COMPARATIVE LAW IN ACTION:
PROMISSORY ESTOPPEL, THE CIVIL LAW,
AND THE MIXED JURISDICTION

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"Touching estoppels, which is
an excellent and curious kind of learning. . . ."1

I. PROMISSORY ESTOPPEL IN A MIXED JURISDICTION

Promissory estoppel, a quintessential creature of the common law, is
ordinarily thought to be unknown to the civil law. Arising at first through a
surreptitious undercurrent of American case law, promissory estoppel was
eventually rationalized in the Restatement of Contracts (Restatement)2 as a
necessary adjunct to the bargain theory of consideration. The civil law, with its
flexible notion of causa or cause, is free from the constraints of the consideration
doctrine. The civil law should not need promissory estoppel. At least initially,
the common law and the civil law would appear as disparate in this area as
anywhere, and comparative lawyers would be confined to observations about two
systems that never meet.

The introduction of promissory estoppel into the Louisiana Civil Code,
however, allows a glimpse of what happens when the civil law and common law

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1. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF
ENGLAND, OR, A COMMENTARIE UPON LITTLETON § 667, at 352a (University Microfilms

2. See RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).
meet. The contracts scholar can see how promissory estoppel works within a different legal system, and the comparatist can watch how the two great legal systems, common law and civil law, interact when they are juxtaposed into a single jurisdiction. For these reasons, mixed jurisdictions have long attracted intense attention. They "offer the comparatist a rare chance to observe, as it actually occurs, the interaction of different styles of law."3

This article studies two related questions. The first and most immediate one centers around promissory estoppel, its divorce from consideration and the common law, and its introduction to cause and the civil law. This study allows us to observe comparative law in action. Although "law in action" is often associated with assessing the impact of law on human and corporate behavior, the phrase is adapted here to describe the impact of two legal systems on one another, within a relatively confined domain.4 A narrow focus will allow the attack on the primary sources to have greater intensity, and perhaps greater penetration.5


The survival of Romanistic law in Louisiana and Quebec is of the greatest interest to comparative lawyers.... Louisiana and Quebec offer the comparatist a rare chance to observe, as it actually occurs, the interaction of different styles of law, and it is therefore natural that both places should have flourishing and world-famous centres of comparative legal studies....

...[T]he legal systems of Louisiana and Quebec offer the comparatist fascinating models of a symbiosis of Civil Law and Common Law, and show that a political unit may comprise states of different legal traditions, even when those legal traditions are as different as those of Rome and Westminster.

Id. at 119, 122; see also SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmermann & Daniel Visser eds., 1996). German readers may also be interested in Joachim Zekoll, Zwischen den Welten: Das Privatrecht von Louisiana als europäisch-amerikanische Misrechtordnung, in AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHE PRIVATRECHT: IMPRESSIONEN AUS DER NEUEN WELT 11 (1995). Thanks are due to Professor Zimmermann for calling it to my attention.

4 The use of the phrase "law in action," currently associated with the perspective of the University of Wisconsin Law School, might surprise those who have pioneered the approach, but that turnabout seems fair enough. See 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION at v (1995) ("we may have interpreted these articles in ways which might surprise their authors").

5 On the benefits and dangers of a narrow focus, see generally LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY at vii (1965) (in studying "the relationship between legal development and economic, political, and social forces..."] the emphasis on Wisconsin poses the danger of falling into
This extraordinary chance to track the interaction of civil law and common law leads to the second, broader question: We owe this unusual opportunity to the mixed nature of Louisiana law, which incorporates elements of both civil law and common law. From studying promissory estoppel in this unaccustomed context, what can we learn about the nature of a mixed jurisdiction? Although such questions rarely allow definite answers, the study of promissory estoppel in Louisiana does uncover some clues about legal development in a mixed jurisdiction. The introduction of the doctrine teaches valuable lessons about jurisdictions where comparative law is part of everyday life.

A. Methods and Focuses

For our inquiry to proceed smoothly, the area for investigation needs to be delineated clearly. This inquiry focuses on promissory estoppel as a general basis for a claim or defense. Certainly many specific legal rules are undergirded by the principle that reasonable and foreseeable detrimental reliance should be protected. For example, the civil law has recognized since Roman times that a principal may be liable for the acts of an agent whose power has been revoked if the principal has not given notice of the revocation. This rule could easily be viewed as a specific application of the detrimental reliance principle. The rule protects someone who, in reliance on the agent’s erstwhile authority, contracts with the agent without learning of the revocation. For present purposes, though, the existence of such “situation-specific” provisions is only tangential interest. That they exist is no longer newsworthy. Indeed, their presence is not altogether surprising since reliance is so often connected with notions of basic justice, and

parochialism or triviality, but bears the promise of increasing knowledge of the legal and social order through attacking primary sources intensively and thoroughly”).


Louisiana and the civil law have protected reliance in various ways for a long time. What Louisiana did not have until recently, however, was a broadly generalized and well-recognized theory.

A word about terminology is in order. The phrases *promissory estoppel* and *detrimental reliance* are often used interchangeably, and this article does not attempt to draw any significant distinction between them. *Promissory estoppel* is preferred here, especially when describing the concept as it is known at common law. Occasionally, *detrimental reliance* is used, particularly in the section reviewing Louisiana case law, when the court uses the terminology. One reason that *promissory estoppel* is preferred here is that the reliance basis of the theory will later be called into question.

Promissory estoppel in Louisiana law before 1985 has already received ample space in law reviews and will only be summarized here. In 1985, the legal landscape changed because promissory estoppel became effective as an aboveboard theory of liability. The legislation is reflected in article 1667 of the Civil Code. Earlier studies have not examined in detail the history of the 1985 legislation. That examination is undertaken in this paper. Part of this paper is also devoted to studying cases decided after codal recognition; earlier articles were unable to undertake that task. Cases implicating theoretical questions, such as whether promissory estoppel is contractual or delictual, are discussed. We also observe that promissory estoppel typically appears in particular classes of cases, and we take note of what functions the doctrine performs. Put more simply, this paper asks what jobs promissory estoppel is expected to do in a mixed jurisdiction. Those jobs are compared with the jobs promissory estoppel

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German civil law as a matter of "elementary fairness," see John P. Dawson, Gifts and Promises: Continental and American Law Compared 189 (1980).


11. See generally Herman, supra note 6; see also Christian Larroumet, Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law, 60 Tul. L. Rev. 1209 (1986); Saul Litvinoff, Still Another Look at Cause, 48 La. L. Rev. 3, 18-28 (1987); Mattar, supra note 7; Jon C. Adcock, Comment, Detrimental Reliance, The 1984 Revision of the Louisiana Civil Code's Articles on Obligations—A Student Symposium, 45 La. L. Rev. 753 (1985); Frederick H. Sutherland, Comment, Promissory Estoppel and Louisiana, 31 La. L. Rev. 84 (1970); G. Miller Hyde, Comment, Estoppel in the Law of Quebec (With References to the Louisiana Civil Code), 5 Tul. L. Rev. 615 (1931). The latest of these articles could only find one case decided under the new rule. See Mattar, supra note 7, at 139.

12. Thinking of promissory estoppel in terms of the jobs it does is grounded in Llewellyn's conception of law-jobs. His theory is vastly broader since it looks to the jobs
performs in a pure common law jurisdiction. The use of promissory estoppel in a mixed jurisdiction is then placed within the context of the wider American growth of promissory estoppel, and the rate and stage of doctrinal development in a mixed jurisdiction are assessed.

These two lines of inquiry, legislation and jurisprudence, will engage most of our attention. The third possible source of law in a civil-law jurisdiction, the doctrinal views of writers in the universities, will be treated in conjunction with the examination of jurisprudence and legislation. Before turning to those sources of law, though, a shared starting point must be established.

B. Orthodoxy and Heresy: Basic Doctrine and Working Assumptions

1. Common Law

Different jurisdictions, and different scholars, define promissory estoppel differently. Our working definition is that a promise is binding when the promise induces reasonable and foreseeable detrimental reliance. This formulation captures the core of the current codal definition in Louisiana, and it focuses on the doctrine as explained by courts generally. For purposes of


14. Probably the most influential articulation is RESTATMENT (FIRST) OF CONTRACTS § 90 (1932). The Second Restatement expands and liberalizes:

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

RESTATMENT (SECOND) OF CONTRACTS § 90(1) (1981). Action or forbearance is not required to enforce charitable subscriptions or marriage settlements under the Restatement. See id. § 90(2). Although § 90 does not explicitly require that the reliance be reasonable, courts have had no difficulty so holding. See, e.g., State Bank v. Curry, 500 N.W.2d 104, 107 (Mich. 1993) ("the reliance interest protected by § 90 is reasonable reliance"); Alden v. Presley, 637 S.W.2d 862, 865 (Tenn. 1982).

defining a starting point, we shall assume that promissory estoppel at least
purports to base liability on a promise that is coupled with the type of detrimental
reliance that would not satisfy the bargain theory of consideration. In other
words, the common law will first inquire whether a promise can be enforced as a
contract supported by consideration. Only if some defect would prevent such a
holding will a court turn to promissory estoppel, a second-best alternative. Its
secondary status is linked to its remedy: reliance damages. Why would someone
use promissory estoppel and get reliance damages when an ordinary breach of
contract action will yield higher expectancy damages? Some have also suggested
that courts subordinate promissory estoppel to avoid collapsing the doctrine of
consideration altogether.\textsuperscript{16} This much is black letter law—that is, what law
students figure they have to know for their exams.\textsuperscript{17}

To understand orthodox promissory estoppel, we need a firm grasp of
the strictures imposed by the bargain theory. To count as consideration under the
bargain theory, the item exchanged has to be bargained for, or sought, in return
for the promise in question.\textsuperscript{18} An example: Seller says, "I offer to sell you this
watch for $200," and Buyer accepts. To satisfy the bargain theory, the
promisee's reliance must be induced by the promise and must also be the motive
for the promise.\textsuperscript{19} If in our example, Buyer pays $200, it will be a detriment
that was both (1) induced by the promise to deliver the watch and (2) that was the
motive for the promise to deliver the watch. The equivalent may be said for
Seller. Sometimes, however, promisees are induced by a promise to change their
position to their detriment, but that detriment was not the motive for the promise.
Suppose a mother tells her son, "I will give you Blackacre; I'm not using it, and I
want you to have it," and the son builds a house on Blackacre and moves his
family there. His change of position was induced by her promise, but it was not
the motive for her promise. The motive for the promise was simply to make a

\textsuperscript{16} See Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94

\textsuperscript{17} See Jay M. Feinman, The Last Promissory Estoppel Article, 61 Fordham L.
Rev. 303, 309 (1992) ("[T]his is the] doctrinal hierarchy that I have always taught my
students: Look first for the contract that meets traditional requirements; if and only if it is
not available, look for a section 90 cause of action").

\textsuperscript{18} Put more precisely:

Consideration requires that a performance or return promise be 'bargained
for' in exchange for a promise; this means that the promisor must manifest
an intention to induce the performance or return promise and be induced
by it, and that the promisee must manifest an intention to induce the
making of the promise and to be induced by it.

\textsuperscript{19} See A.W.B. Simpson, A History of the Common Law of Contract: The
gift. The bargain theory is not satisfied, and, in that sense, no consideration supports the promise. At least in American states other than Louisiana, if the mother's promise is enforced, promissory estoppel is likely to be the basis for liability.

Such cases form one of the reasons promissory estoppel emerged in American courts. With the decline of the seal, the common law largely lost formality as a method of turning a naked promise into an enforceable contract. Promissory estoppel was born partly because the common law had come to lack any way to enforce a gift promise. At first courts enforced gift promises without invoking promissory estoppel, as it did not yet exist. Instead, the courts strained to find consideration even though there was none under traditional bargain theory, or they applied "equitable estoppel" (which is ordinarily limited to representations of fact) to promises of future intent. Eventually, this undercurrent of cases became recognized in section 90 of the Restatement. With this history, courts often limited promissory estoppel to gratuitous promises, especially when the doctrine was first gaining acceptance.

Understanding the history of promissory estoppel also requires an appreciation of a basic, though often ignored, distinction. Careful lawyers now distinguish equitable estoppel, sometimes called "estoppel in pais," from promissory estoppel. Equitable estoppel arises when the party being estopped makes a representation of fact, and this doctrine was well established by the

20. Cf. Greiner v. Greiner, 293 P. 759 (Kan. 1930). Similar cases are generalized in Herman, supra note 6, at 711.

21. Exceptions still exist, but they are few and limited. For example, U.C.C. § 2-205 and RESTATMENT (SECOND) OF CONTRACTS § 87 recognize option contracts that lack consideration if certain formal requirements are met (primarily, a signed writing). On the status of sealed contracts without consideration, see id. ch. 4, topic 3, introductory note and statutory note. For a modern case allowing a seal to substitute for consideration, see Wagner v. Lectrocor Corp., 348 N.E.2d 451 (Mass. App. Ct. 1976).

22. "[A] man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of 'promissory estoppel' is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise." James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.).

23. Compare, for example, the majority and dissenting opinions in Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927).


25. See 4 AMERICAN LAW INSTITUTE PROCEEDINGS app. at 106 (1926) [hereinafter ALI PROCEEDINGS] (describing charitable subscription cases: "[T]he is simply a misuse of words to say that there is any bargain here"); see also infra note 235 and accompanying text.

26. See Baird, 64 F.2d at 344.

27. See infra Part III.A.1.
nineteenth century. A representation of past or present fact (e.g., "I have $10,000 in my bank account") is either true or not. A promise, on the other hand, relates to the future (e.g., "I will pay you $10,000 next month"). In the early promissory estoppel cases, however, some courts simply applied equitable estoppel when the party being estopped had made a promise of future performance instead of a representation of past or present fact. Williston insisted on more precise analysis, and he called the newly forming doctrine "promissory estoppel." Eventually the courts also came to distinguish the doctrines.

Although certainly abbreviated and possibly oversimplified, the foregoing is all orthodoxy. Promissory estoppel has continued to grow, however, and scholarship on the subject has exploded. While heretical to some, new or newly discovered aspects of promissory estoppel are undeniable. Because promissory estoppel served as a consideration substitute in gratuitous promises, courts often awarded expectancy, not reliance. This point is often overlooked (black letter law, as usual, is misleading), but Williston had figured it out even before section 90 was promulgated. Moreover, promissory estoppel now

28. See John Norton Pomeroy, Treatise on Equity Jurisprudence §§ 804-805 (2d ed. 1892) ("There must be conduct—acts, language, or silence—amounting to a representation or concealment of material facts."). For a discussion of equitable estoppel in Louisiana, see Palmer, supra note 8, at 54-61.

29. See Coke, supra note 1, §§ 666-667 (discussing early forms of "estoppel," which occurs when "a man's owne Act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth").


31. See, e.g., Rickett v. Scolthorn, 77 N.W.365, 367 (enforcing promissory note, despite lack of consideration, because of equitable estoppel or estoppel in pais) (citing 2 Pomeroy, supra note 28, § 804). Such cases do not generally mention that earlier courts had held reliance on a promise to be insufficient to support an estoppel. The earlier cases reasoned that promises look to the necessarily uncertain future instead of to the known present or past. For a case explaining that equitable estoppel is limited to representations of past or present facts, see, for example, Prescott v. Jones, 41 A. 352, 353 (N.H. 1898), which also collects a number of authorities. These cases are premised on the idea that if a promise, as opposed to a representation, were to be enforced, it would have to be enforced as a matter of contract, and it would therefore require consideration.


33. See Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 167 (Mo. Ct. App. 1959) (quoting 1 Williston, supra note 32, § 139); see also Mattar, supra note 7, at 76 n.10 (collecting cases).


35. "Now, there are a lot of things which I have cited in my Commentaries where the court enforces a promise and does not go on the theory of restoring the status quo. In
sometimes substitutes not only for missing consideration, but for the contract itself. If the parties have not yet reached agreement, or if a promise is indefinite, no contract exists in the usual sense.\textsuperscript{36} Many states, however, will allow an action in promissory estoppel even though something aside from consideration is missing—even the agreement itself.\textsuperscript{37} And now there is little question that promissory estoppel applies in situations involving bargains or bargaining. The days when promissory estoppel was generally thought to be limited to gratuitous promises are over.\textsuperscript{38}

2. Civil Law

The central tenet of the civil law in this regard is that promissory estoppel does not exist.\textsuperscript{39} Other devices, such as the German doctrine of \textit{culpa in contrahendo}, sometimes lead to similar results.\textsuperscript{40} Translated as “fault in

the case I put of Johnny building a house on Blackacre, he gets Blackacre, he does not get what he has spent on the house; he gets Blackacre, whether it is worth four or five times as much as the house.”\textsuperscript{39} See \textit{Restatement (Second) of Contracts} § 17(1) (1981) (in general, a contract requires mutual assent—i.e., agreement—and consideration), and §33 (to form a contract, offer must be reasonably certain).

36. \textit{See Restatement (Second) of Contracts} § 17(1) (1981) (in general, a contract requires mutual assent—i.e., agreement—and consideration), and §33 (to form a contract, offer must be reasonably certain).

37. \textit{See Holmes, supra} note 34, at 286 (in 1996 all but about 16 jurisdictions had reached this stage of development).


39. \textit{See Mattar, supra} note 7, at 73-74 (“in the civil law [there is] no counterpart to the doctrine of promissory estoppel”).

40. \textit{See id.} at 108-16, discussing the doctrine and collecting authorities. Tied as it sometimes is to \textit{BÜRGERLICHES GESETZBUCH} [hereinafter BGB] article 242 and \textit{Treu und Glauben} or good faith, see \textit{Dawson, supra} note 9, at 189; \textit{see also} Simon Whittaker & Reinhard Zimmermann, \textit{Good Faith in European Contract Law—A Survey} 7 (forthcoming), \textit{culpa in contrahendo} may come to enjoy greater currency throughout Europe as various international law projects move forward. That end game is still distant, however. \textit{See generally} UNIDROIT, \textit{PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS} art. 1.7 (1994); \textit{PRINCIPLES OF EUROPEAN CONTRACT LAW} art. 1.106 (Ole Lando & Hugh Beale eds., 1995); \textit{TOWARDS A EUROPEAN CIVIL CODE} v (A.S. Hartkamp et
contracting,” some have argued that the main difference between *culpa in contrahendo* and promissory estoppel is the requirement of fault under the former.\(^1\) This supposed difference, of course, will depend on how *fault* is defined. Promissory estoppel is already framed in terms of reasonable and foreseeable reliance, and *fault* could be defined in similar terms. Under the German conception, persons may be liable if they knew or should have known that the object of the contract is impossible,\(^2\) if they rescind the contract because of their own error,\(^3\) or if they enter into a contract prohibited by statute.\(^4\) At the very least, the “knew or should have known” formulation is quite close to the standard applied in promissory estoppel, and one court applying Louisiana law has said that *culpa in contrahendo* is “the civilian equivalent of the common law concept of promissory estoppel.”\(^5\)

On a more general level, the relative flexibility of the doctrine of cause, compared to the stringencies of bargained-for consideration, perhaps lessens the need for promissory estoppel in the civil law. An offer that states that it will remain open for a particular time is perfectly supported by cause and will be enforced according to its terms under the civil-law theory; this avoids the problem of needing consideration for an option contract at common law. The importance of this difference in the context of subcontractor bids—an everyday job for promissory estoppel—has been explained elsewhere.\(^6\) Whether the contours of cause suggest that promissory estoppel is not needed in a pure civil-law jurisdiction is beyond the scope of this paper, but it is worth noting that one

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2. See BGB, art. 307.
3. See *id.* art. 122. This concept has now been introduced in *La. Civ. Code Ann.* art. 1952 (West 1987).
4. See BGB art. 309. For a brief introduction to *culpa in contrahendo* in the civil law, see REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 244-45 (1990).
French scholar has as good as said so. 47 To the extent that problems arise, despite the flexibility of cause, various contractual and delictual remedies are available. 48 The command of the Code civil that contracts be performed in good faith 49 has been read broadly and extended to precontractual negotiations. 50 Taken together with the vast scope of the delictual articles 51 (and associated doctrines, such as abuse of rights), French law is well equipped without promissory estoppel.

This summary of possible equivalents should also mention the Roman slogan that one is not allowed to go against his own act, or venire contra factum proprium non valet. The maxim, which generally has been confined to situations of equitable estoppel (i.e., based on representations of fact), has not been frequently associated with promissory estoppel. 52 Possible traces of promissory liability for reliance damages have been discovered in the Roman sources, however, and lately venire contra factum proprium has often been mentioned in scholarly writing, 53 as well as during the drafting of article 1967 itself. 54

All of the doctrines discussed so far have appeared in Louisiana jurisprudence. Before article 1967 became effective in 1985, the state looked much like a civil-law jurisdiction might be expected to look; in short, it was complicated. 55 Promissory estoppel did not officially exist, as the Louisiana Supreme Court explicitly rejected it in Ducote v. Oden in the 1950s. 56 This decision garnered praise from scholarship that was oriented toward the civil law. 57 Civil-law devices for doing promissory estoppel jobs, especially culpa in contrahendo, were touted in the law reviews. Few cases accepted the invitation proffered by the academic writers, however. Before article 1967 went into effect, the cases mentioning culpa in contrahendo could be counted on one hand, and no court had based a decision on the doctrine. 58 Even fewer cases mentioned venire contra factum proprium, and only one or two courts had based a decision

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47. See René David, English Law and French Law: A Comparison in Substance 106 (1980) (promissory estoppel "would not serve any useful end, and it is consequently unknown to French law").
48. See Larroumet, supra note 11, at 1225.
49. See Code Civil [C. Civ.] art. 1134.3 (Fr.).
50. See F. Terré et al., Droit civil, Les obligations 320 (5th ed. 1993).
51. See C. Civ. arts. 1382-1383.
52. See Dawson, supra note 9, at 188-89. Roman and German sources on venire contra factum proprium are further discussed infra note 100.
53. See Herman, supra note 6, at 714; see also Mattar, supra note 7, at 74-86; Adcock, supra note 11, at 755.
54. See infra note 100 and accompanying text.
55. For the elegant and classic discussion of the civil law in this regard, see generally Dawson, supra note 9.
56. See Ducote v. Oden, 59 So. 2d 130 (La. 1952).
58. See Mattar, supra note 7, at 110 & n.134.
on the idea.\textsuperscript{59} Still, careful research could and did unearth cases that could be read to apply promissory estoppel or similar doctrines.

This situation is not surprising; it is not unlike either the American or the European experience. As was argued over thirty years ago, courts across the United States have been silently applying concepts akin to \textit{culpa in contrahendo}.\textsuperscript{60} Promissory estoppel itself started out as a silent, nameless doctrine. Continental jurisdictions found their own methods of doing promissory estoppel jobs, often strainng as heroically as their American counterparts to find onerosity; in doing so, they are only a half-step removed from bargain.\textsuperscript{61} In sum, pre-1985 Louisiana fit well with the jurisdictions that have not recognized promissory estoppel as an aboveboard theory, but that cannot help but protect detrimental reliance in some kinds of cases.

The foregoing is only a summary, but we need someplace to start, and we cannot lose too much time before moving on to the main task: discovering what codification says about promissory estoppel in a mixed jurisdiction. As others have observed, "Louisiana belongs neither entirely to the Civil Law nor yet to the Common Law."\textsuperscript{62} The introduction of promissory estoppel into the Louisiana Civil Code underscores the truth of this statement.

\section*{II. CODIFICATION}

It is noteworthy that this article contains a section on codification. Promissory estoppel originated in this country when courts struggled to find a

\textsuperscript{59} See id. at 80-86.


\textsuperscript{61} See Dawson, supra note 9, at 86-90 (describing French creativity in finding an oneros component to donations). The civil law, in addition to enforcing most informal promises of exchanges, also enforces some informal "onerous donations." For a further explanation of oneros donations and their enforceability despite the lack of formalities, see infra note 233 and accompanying text.

\textsuperscript{62} Zweigert & Kötz, supra note 3, at 121.
means to hold charitable subscriptions binding.\textsuperscript{63} From these cases, the theory of promissory estoppel was generalized.\textsuperscript{64} In short, promissory estoppel arose by common law, and it has been adopted by common law in virtually all of the states. The courts have done the lawmaking. Only one jurisdiction, aside from Louisiana, has adopted promissory estoppel by legislation.\textsuperscript{65} Louisiana's use of legislation, and its insistence on a legislative mandate,\textsuperscript{66} is perhaps a testament to the persistence of the civil law in the state, since modern civil law is so strongly associated with legislation and codification.\textsuperscript{67} Legislation can provide the civil law with the authoritative text it craves.\textsuperscript{68} Even so, the use of the Code to adopt promissory estoppel also shows how legislation cannot help but derogate from the defining criterion of the civil law: Roman sources.\textsuperscript{69}

In this look at legislative history, article 1967 must obviously receive star treatment. Following the key parts of the drafting and debate will illustrate how a jurisdiction with a civil-law heritage adopts a doctrine associated primarily with, if not invented by, surrounding common law jurisdictions. It will also highlight the interplay between cause, consideration, and promissory estoppel. More generally, we will see the lengths to which a mixed jurisdiction will go to keep up a civilian appearance while importing a common law doctrine.

\begin{quote}
\textsuperscript{63} But see Holmes, supra note 34, at 272-76 (promissory estoppel concept implicit in ideas of consideration before bargain usurped all in America).

\textsuperscript{64} See Dawson, supra note 9, at 188.

\textsuperscript{65} As of Professor Holmes's 1996 study, the only state other than Louisiana to adopt promissory estoppel by statute was Georgia, which did so in 1981. See GA. CODE ANN. § 13-3-44 (1982) (formerly GA. CODE ANN. § 20-302.2); see also Holmes, supra note 34, at 263, 265-66, 367. The Georgia courts, however, have remained curiously resistant to the doctrine. See id. at 368-69.

\textsuperscript{66} Protestations to the contrary notwithstanding, the Louisiana Supreme Court has ruled, twice and emphatically, that promissory estoppel was not recognized in Louisiana before the effective date of new article 1967. See Morris v. Friedman, 663 So. 2d 19, 26 (La. 1995); see also Ducote v. Oden, 59 So. 2d 130 (La. 1952).

\textsuperscript{67} See F.H. Lawson, A COMMON LAWYER LOOKS AT THE CIVIL LAW 47 (1953).

\textsuperscript{68} See Stein, supra note 13, at 247 ("The civil law attorney, by contrast [to the common law attorney], is only really at home with written law, that is law formulated in an authoritative text which he can subject to the techniques of interpretation.").

\textsuperscript{69} See Lawson, supra note 67, at 47; see also Pierre Legrand, Civil Law Codification in Quebec: A Case of Decivilianization, 1 Zeitschrift für Europäisches Privatrecht 574 (1993).
\end{quote}
A. The Stormy Relationship Between Cause and Promissory Estoppel

1. How Promissory Estoppel and Consideration Drove the Redefinition of Cause

The Louisiana State Law Institute (the Institute), which is responsible for drafting the revisions of the Civil Code, generously searched its files for this article. The earliest relevant draft located by the Institute was prepared for a meeting in April 1979. The draft says:

Art. 2. Cause defined

Cause is the reason that makes an obligation enforceable.

Such cause need not be anything given to the obligor by the obligee.

One party's reasonable reliance on a promise by the other may be valid cause for an obligation of the other if the latter knew or should have known that his promise could induce the former party to rely on it to his detriment.

Source: C.C. Art. 1824, 1896; Restatement 2d; Contracts § 90.

Section 90 of the Second Restatement of Contracts (Second Restatement) is set out beneath the draft article, along with articles 1824 and 1896 of the Code of 1870. An official comment states:

(c) Under this article a promise becomes an enforceable obligation when it has been made in a manner that induced the other party to rely on it to his detriment. That conclusion is consistent with the basic principles contained in Civil Code Articles 1791 and 2315. The rule of Ducote v. Oden is thus abandoned.

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70. I very much appreciate the efforts of William Crawford and James Carter of the Institute. They kindly sent me the materials relating to the drafting and consideration of what would eventually become LA. CIV. CODE ANN. art. 1967 (West 1987).


73. Apr. 1979 Draft, supra note 71, at 2 (citation omitted for Ducote, 59 So. 2d 130 (La. 1952)).
In his reporter's notes, Professor Saúl Litvinoff explains the genesis of the draft. He would have preferred to omit a definition of *cause*, but the Council of the Institute instructed the reporter to draft an article that would make it quite clear that "cause" is not "consideration" in the common law sense, and, further, to introduce a concept analogous to "detrimental reliance" or "promissory estoppel." To achieve such purpose it became necessary to preserve a definition of "cause," to which is appended the negation of "consideration."^{74}

The April 1979 Draft is rife with material for students of promissory estoppel and the mixed jurisdiction. To begin, the reason that *cause* is defined is to distinguish it from its common law competitor.^{75} The reporter manages to accomplish this goal "without condescending to use the problematic word," that is, "consideration."^{76} Next, part of the reason *cause* is defined as "the reason that makes an obligation enforceable"^{77} rather than as the "motive" for making the contract^{78} is to reconcile cause with promissory estoppel. Acerbically, Professor Litvinoff writes, "the reporter was instructed to make detrimental reliance compatible with cause. The reporter has done so in compliance with the Council's wishes."^{79} The forces driving the definition of *cause*, the most civilian of notions, are consideration and promissory estoppel. The irony could not be more acute.

Lest his caustic wit be taken for disapproval, the reporter adds his civilian imprimatur. "The reporter strongly adheres to the Council's decision of incorporating promissory estoppel into the new articles on obligations."^{80} This endorsement is delicate, however, because it has to combine several opposing, if not contradictory, ideas. The Louisiana Supreme Court had unequivocally rejected the doctrine of promissory estoppel in *Ducote v. Oden*,^{81} and the rule of

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74. Id. at 3.
75. This paper is hardly the place for an exposition of cause and consideration, or even for a summary of the leading literature, but a reader unfamiliar with the related functions of cause and consideration could start with Arthur T. von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009 (1959).
76. Id. at 2.
77. Id. at 2.
78. Article 1896 of the Code of 1870 had provided in part that "Ibly the cause of the contract, in this section, is meant the consideration or motive for making it." La. Civ. CODE ANN. art. 1896 (1870) (West comp. ed. 1972) (repealed 1985).
79. Id. at 7.
80. Id. at 7.
that case had to be eliminated. If the text of the article does not make the legislative overruling of the case clear, that task is easily accomplished in the comment.

In addition, as a matter of advocacy, the 1952 Ducote holding had to be subtly disparaged, and it was. The reporter notes that a century ago, the Louisiana Supreme Court employed an analysis that smacks of promissory estoppel. The defendant in Choppin v. Labranche, after promising to leave the remains of plaintiff’s ancestor alone, tried to remove the remains from a tomb. The court enjoined removal, holding that “the principle of estoppel, so often applied, in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted.”

82. Given its nineteenth-century vintage, when promissory estoppel was not well established even in the common law, the opinion could not be much clearer. The defendant’s statement was obviously a promise—a serious statement relating to the speaker’s future conduct—rather than a representation of fact, which would have fit within the older doctrine of equitable estoppel.

In case the clarity and strength of Choppin were missed, the April 1979 Draft lists other instances, both before and after Ducote, in which Louisiana courts used promissory estoppel—albeit without always recognizing its use. Southern Discount Co. v. Williams is another strong case though. It forthrightly uses civil- and common-law terms: “Even assuming for argument’s sake that plaintiff’s promise of time [i.e., extra time to file an answer in court] was without cause or consideration, plaintiff is estopped to repudiate that promise because defendant relied on it to her detriment.”

83. Again, the case involved a genuine promise rather than a factual representation. The ensuing examples involve an


83. See Grant Gilmore, The Death of Contract 88 (1974) (“promissory estoppel’ cases, like the quasi-contract cases, began to appear in the reports shortly after the turn of the century”).

84. Sometimes when reading these cases, I cannot help but think of M. Jourdain’s exclamation upon discovering that he had unconsciously been speaking prose for more than forty years. See Jean-Baptiste Poquelin (Molière), Le Bourgeois Gentilhomme, act 2, scene 4, 163-64 (Yves Hucher ed., Librairie Larousse 1989) (1670) (“Par ma foi! il y a plus de quarante ans que je dis de la prose sans que j’en susse rien”). Not being overly conscious of the process is not necessarily bad, of course, as Justice Holmes pointed out a century ago; it may be the best way to reform the law. Oliver Wendell Holmes, Jr., The Common Law 64 (Mark De Wolfe Howe ed. 1963) (1881).

employer's offer of a benefit plan, a pipeline company's promise of payment, and several pre-policy acceptances by insurers. Of course, the Louisiana Supreme Court did not decide any of these cases after Ducote; one was decided by the court in 1951, the year before Ducote, and the remainder were issued by lower courts. Still, the draft makes the point that promissory estoppel would not be entirely new to Louisiana law, and thus the import from the common law ought to be more palatable.

Nevertheless, a nod had to be given to civilian notions. The official comment cites two articles of the Code of 1870 as precedent. Certainly there were "situation-specific" articles that might be invoked to illustrate the proposition that detrimental reliance had been recognized in the Code before; one of the cited articles seems to be such an example. These arguments are relatively weak, however. It would be incredible if the old Code did not contain some provisions that recognized that reasonable reliance ought to be protected in certain circumstances. Instead of resting the argument at this point, the draft takes a more expansive line by focusing on the general tort theory contained in the other cited article.

"It is clear that the civilian armory contains other weapons to shoot at the same target," the reporter writes. Culpa in contrahendo and "the binding force of a unilateral declaration of will" receive brief mention, but delictual or quasi-delictual liability receive primary emphasis in the April 1979 Draft. This tie with delict is of interest because of the long association of promissory estoppel and tort in common law scholarship. This issue receives further

86. See Robinson v. Standard Oil Co., 180 So. 237 (La. Ct. App. 1st Cir. 1938). Promises of pensions have often been treated as promissory estoppel cases. For a leading decision, see Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959).
89. The April 1979 Draft, supra note 71, at 2, cites articles 1791 and 2315 of the Code of 1870. The official comment in the enacted version of article 1967 continues to cite the same article numbers. The reference to article 1791, however, is not clear and perhaps article 1793 was intended. Cf. La. Civ. Code Ann. arts. 1791, 1793 (1870) (West comp. ed. 1972) (repealed 1985).
90. Palmer, supra note 8, at 55.
91. See supra note 89.
92. See Apr. 1979 Draft, supra note 71, at 2 (citing article 2315).
93. Id. at 6.
94. The doctrine of cause, as Professor Herman has observed, "exaggerate[s] the importance of individual will." Herman, supra note 6, at 717-18.
95. See Apr. 1979 Draft, supra note 71, at 7.
attention below.\textsuperscript{96} The reporter's intellectual integrity is highlighted by his acknowledgment of the delictual character of promissory estoppel, which undermines his case and even suggests that promissory estoppel should not appear in the contracts articles at all. He admits candidly that the delictual or quasi-delictual remedies justify excluding these situations from the "realm of cause."\textsuperscript{97} This doctrinal nicety, however, would not survive the meetings of the Council. The Code now puts promissory estoppel not just in the realm of cause, but in the defining article. The mixing of the civil law and the common law could not be better encapsulated.

The April 1979 Draft concludes with the reporter's endorsement of promissory estoppel. Despite his attempts at explaining why the introduction of promissory estoppel would overrule Ducote but not be new, the reporter in the end has to acknowledge that the doctrine of article 1967 "reflects a new way of thinking."\textsuperscript{98} Civilian methods for doing promissory estoppel jobs often require manipulation, and the reporter observes that "promissory estoppel ... facilitates the achievement of fair solutions without engaging circuitous reasoning."\textsuperscript{99} Finally, the coup de grâce: Promissory estoppel was not invented by the common law. The Romans thought of it first. "Adopting promissory estoppel, then, simply amounts to going back to original sources of Louisiana law."\textsuperscript{100}

\begin{thebibliography}{9999}
\bibitem{96} See infra Part III.A.3.
\bibitem{97} Apr. 1979 Draft, \textit{supra} note 71, at 6.
\bibitem{98} \textit{Id.} at 7.
\bibitem{99} \textit{Id.}
\bibitem{100} \textit{Id.} ("It is worthwhile to mention that, after all, neither estoppel in pais nor promissory estoppel are common law inventions. The notion of estoppel descends directly from the Roman \textit{venire contra factum proprium.}") (citing \textsc{Jose Puig Brutau}, \textsc{Estudios de Derecho Comparado} 97 (1951). \textit{Compare} supra note 52 and accompanying text (\textit{venire contra factum proprium} generally viewed as fact based, like equitable estoppel, not promissory estoppel).

Despite frequent invocation these days, the Roman antecedents of this doctrine are not much examined once a Roman origin is asserted. The draft does not cite any Roman sources, and only one Roman provision has been mentioned in any writings relating to Louisiana, as far as I have found. It is not a very strong example of promissory estoppel, since the money in question had already been paid. In other words, the issue was not whether to enforce or protect reliance on an executory promise; the question posed was whether the person who gave the money (the "promisor" in \textit{Restatement} terms) could get it back. \textit{See} Dig. 12.4.5.pr. (Ulpian, Disputationum 2); \textit{cf.} Herman, \textit{supra} note 6, at 714-15. That situation is quite different from basing liability on an informal, probably unwritten, promise that has not been performed.

Through Dawson, \textit{supra} note 9, at 189, to Erwin Riezler, \textit{Venire Contra Factum Proprium} 32-38 (1912) (in German), three other texts surfaced. The strongest is one from Ulpian, Dig. 4.3.34 (Ad Sabinum 42), which for an ancient source bears an astonishing resemblance to Ducote v. Oden. "Where you have allowed me to take stone from your land or dig for clay or sand and I have incurred expense on this account and then you do not allow me to remove anything, no action other than that for fraud will lie."

This argument veritably shouts to the student of mixed jurisdictions. A certain amount of rivalry between the two great legal systems of the world might be expected. A jurisdiction with a civil-law heritage, surrounded by common law states and subjected to federal institutions that do not know the civil law, might wish to insulate itself from these “foreign” influences. Still better, though, is to take away the foreign claim and declare intellectual ownership by ancient right. Particularly a state that had seen its civil-law tradition wane—and a state that hoped to reverse the trend—might labor to certify the pedigree of a doctrine that appears to come from the American common law.

(The translation is from the Alan Watson edition of 1985.) The “expense” appears to be a monetary outlay (“sumptum”), and these facts would fit well within American promissory estoppel doctrine. Another example is a case from Pomponius in which you permitted me to sow your land but do not allow me to remove the crop, contrary to your promise. See Digg. 19.5.16.1 (Ad Sabinum 22). I am permitted an action for fraud. The final example, though undergirded by principles of reliance, is unconvincing as evidence of a Roman recognition of anything approaching promissory estoppel. See Digg. 17.1.15 (Paul, Ad Sabinum 2) (agent who buys farm for principal before learning of principal’s countermand is protected); G. Instr. 3.160. More specific examples may be found in Matthias Schwaibold, Brocardica at 43 (1985) (under Neminem debere venire contra factum suum et si non valeat quod fecit). For a modern German study of venire contra factum proprium, see Reinhard Singer, Das Verbot Widerspruchlichen Verhaltens (1993), about which Professor Zimmermann has informed me.

Although Digg. 4.3.34 and Digg. 19.5.16.1 are tantalizing, then, there seems to be no Roman text imposing general liability, see supra text accompanying notes 6-7, for an unenforceable promise just because the promisee relied. As Professor Stein has pointed out to me, “There are various reasons for this. Gratuitous stipulatory promises were easy to make. The doctrine of innominate contracts meant that in any exchange of promises, however informal, once one party had performed, the other was bound by actio præscriptis verbis.” Letter from Peter G. Stein, Emeritus Regius Professor of Civil Law, Queens’ College, Cambridge, to David V. Snyder, author (Apr. 18, 1998) (on file with author) (punctuation altered from original). Professor Stein has suggested that the origin of the phrase venire contra factum proprium “must be sought in the medieval ius commune, and the application to executory promises is later.” Id. (quoting Bartolus’s Commentaria ad, Digg. 12.6.2 (“non potest quis venire contra factum suum ad sui commodum etiam ex persona alterius”)).

101. See Lawson, supra note 67, at 50 (“There may indeed be another reason for codifying one’s civil law: if one fears the encroachment of a neighboring system and wishes to resist it.”).

102. On the Great Debate about whether Louisiana employs the civil law, the common law, or something else, see generally A.N. Yiannopoulos, Louisiana Civil Law: A Lost Cause?, 54 Tul. L. Rev. 830 (1980).
2. Attack

These carefully constructed arguments soon reached the not wholly sympathetic eyes of the Council of the Institute. When the reporter explained his conception of cause at a June 1979 meeting, Smith objected. Long opposed to common law infiltration in this area, Smith said the draft was leading away from the civil-law notion of cause and toward a common-law notion of consideration. Jack Caldwell also objected to the new definition of cause, arguing that "cause is the reason a person makes his promise and that other rules of law will determine if the promise will be enforced." This formulation represents the concept stated in the old Code. The recasting of the definition from the motive for the promise to the criterion of enforceability was necessitated by the reporter's assignment to distinguish consideration and to adopt promissory estoppel. His solution, as Smith's remarks foretell, would not last.

The new definition, after all, was a radical departure. Formerly, cause was used to classify agreements and thus determine their enforceability. For instance, an illicit agreement to lease a house for immoral purposes would not lack cause, but the agreement would not be enforceable. A cause would exist, but it would be illegal, and of course agreements with an illegal cause are not enforceable. Explaining the older concept as it is embodied in French law, Professor Litvinoff noted, "The obligation requires not only a cause according to article 1131 of the French Civil Code, but that this cause be lawful." Under the new conception, however, "cause is the reason that makes an obligation enforceable." A contract would be enforceable if it were supported by cause, but if it were not supported by cause, it would not be enforceable. The lease of

103. The meeting discussed proposals contained in a document slightly later than the April 1979 draft, but the provisions defining cause and recognizing promissory estoppel did not change. For ease of narration, the text will continue to refer to the April 1979 Draft. Nevertheless, to keep the record straight: the document actually used at the June meeting is Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Book III, Obligations Revision at 1 (June 2, 1977) [hereinafter June 1979 Draft]; see also Louisiana State Law Institute, Meeting of the Council [hereinafter June 1979 Meeting]. Both of these materials were made available to the author by the Institute.


105. See June 1979 Meeting, supra note 103, at 1.

106. Id. The quotation comes from the minutes, which do not purport to quote Mr. Caldwell.


108. See, e.g., Campbell v. Gullo, 78 So. 124 (La. 1918).


premises for immoral purposes would lack cause, and thus the analysis would change.

More than a technical change is at work. Although the minutes do not reflect whether Smith explained how the new definition moved away from cause and toward consideration, this example may suggest Smith's thinking. Certainly the April 1979 Draft mentions the bargain theory of consideration only to distinguish it. Yet consideration has been the primary criterion of enforceability of unsealed promises since sixteenth-century common law. Consideration then simply meant "that which is required for an informal promise to be enforced." While an exchange might be good consideration,111 only later would it come to be required.112 Additionally, even since the bargain theory became established in this country, one might still say that consideration is the criterion of enforceability. In that way, the April 1979 Draft uses cause just as the common law ordinarily uses consideration: as the primary factor that determines whether a promise will be enforced.113 On Smith's view, the threatened conflation of civil law and common law was unacceptable.

William Crawford followed Mr. Caldwell's objection with a motion to amend the definition of cause.114 After adopting but then reconsidering Professor Crawford's motion, the Council settled on a provision reviving the old Code: "cause is the reason why a party obligates himself."115 The only substantive change from the old Code is the substitution of reason for motive.116 This formulation would stick; it is now the first sentence of article 1967.117 Smith's concern was satisfied. However, this formulation could no longer include promissory estoppel.

In fact, most cases addressing issues of detrimental reliance quote only the second paragraph of 1967, omitting entirely the first-sentence definition of cause. Even Professor Litvinoff cannot convincingly tie the second paragraph of article 1967 to the first one. He admits that "the question may be raised whether

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112. For brief recitations of the history of consideration, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 386-88, 399-400 (3d ed. 1990) and E. ALLAN FARNSWORTH, CONTRACTS § 1.6 (2d ed. 1990).
113. Using the existence of cause as the primary criterion of enforceability should not be inferred from the text to be necessarily inconsistent with Continental conceptions of cause. Inconsistency with the Continent was not Smith's objection. Rather, he objected to coincidence with consideration.
114. See June 1979 Meeting, supra note 103, at 1-2; see also June 1979 Draft, supra note 103, at 78.
detrimental reliance is a true cause for an obligation."118 Indeed, the question has been raised.119 "The answer," he says, "is that, though the promisee's detrimental reliance is certainly not a motive of the promisor, it is, however, a reason why he should be bound."120 This answer relates detrimental reliance only to the rejected first-sentence definition of cause, not the adopted one. Cause, in the Louisiana conception, is the "reason why a party obligates himself."121 It is not "the reason that makes an obligation enforceable."122 From here on, promissory estoppel would have to be analytically distinguished from the first-sentence definition of cause.

That in itself is noteworthy for one studying the introduction of promissory estoppel into the civil-law framework of a mixed jurisdiction. The survey hints at issues to come, including whether the civil law would recognize a conventional obligation without a cause, and whether promissory estoppel, by legislative fiat, would be defined to be cause. Whatever the solution, the marriage of cause to promissory estoppel was off to a bumpy start.

3. The Separate Peace with Promissory Estoppel

Promissory estoppel would not escape unscathed from the causal battle123 for which it was partly to blame. Almost as soon as the definition of cause was settled, the Council debated whether promissory estoppel should be recognized at all. The minutes reflect that "the reporter finally requested that the issue should be recommitted," and the Council agreed to let the reporter and his committee try again.124 The theoretical task proved much more difficult because the drafters resisted separating cause and detrimental reliance conceptually.

In the next available draft, from July 1979, the definition of cause is split from the provision on promissory estoppel, which appears in the following article.125 In the new draft, the provision for promissory estoppel is remade: "A party's reasonable reliance on a promise by another may be regarded as the cause

118. Litvinoff, supra note 11, at 28.
119. See Mattar, supra note 7, at 145-46; see also Herman, supra note 6, at 720, cited in Litvinoff, supra note 11, at 28 n.145.
120. Litvinoff, supra note 11, at 28 (emphasis added).
123. "Battle" may be too strong a word given the lengthy Continental wars over cause. For a capsule of the monumental debate, see Litvinoff, supra note 11, at 15-16 n.84.
125. See Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Book III, Obligations Revision, Cause, at 8 (July 13, 1979) ("7-13-9" typed in lower right corner of cover page) (made available to the author by the Institute) [hereinafter July 1979 Draft].
of an obligation of the other when the latter, though not intending to bind himself, knew or should have known that his promise could induce the former party to rely on it to his detriment.”\(^{126}\) Apparently recognizing the confusing double-takes of the new provision, the reporter notes that promissory estoppel is separated from cause at the instruction of the Council. “That task is not easy,”\(^{127}\) he writes. “Unless the idea is introduced that some obligations may be valid without a cause—which would destroy the basic principle—the only solution seems to say that reliance may be regarded as cause under certain circumstances.”\(^{128}\) The reporter, in short, had to do what he was told, and he provided for an obligation to arise because of a promisee’s detrimental reliance. But if an obligation were to be recognized, there had to be a cause. Otherwise, \textit{delenda est causa}.\(^{129}\)

The September Council meeting was less concerned about tying detrimental reliance to cause. Led again by Denson Smith, several councilors thought that promissory estoppel should not be combined with cause. Late Friday afternoon, they argued that promissory estoppel should be an exception to the requirement that cause support every binding obligation.\(^{130}\) The minutes suggest that the Council decided to move forward despite these objections.\(^{131}\)

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\(^{126}\) \textit{Id.}

\(^{127}\) \textit{Id.}

\(^{128}\) \textit{Id.} (emphasis in original).

\(^{129}\) \textit{Cf.} Marcus Porcius Cato the Elder, who said “\textit{delenda est Carthago},” or “Carthage must be destroyed,” as reported in \textit{Florus, Epitome Rerum Romanorum} 2.15.4 (= 1.31.4, at 136 in Loeb) (Edward Seymour Forster ed., 1984) (“\textit{delendam esse Carthaginem}”); 4 \textit{Pliny the Elder, The Natural History} [\textit{Historia Naturalis}] 15.74, at 338 (Horace Rackham ed., 1945) (“\textit{Carthaginem delendam}”).

\(^{130}\) \textit{See} Louisiana State Law Institute, Meeting of the Council, at 6 (Sept. 21-22, 1979) (made available to the author by the Institute) (Saúl Litvinoff, Reporter) [hereinafter Sept. 1979 Meeting]. The provisions the Council was gathered to review are contained in Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Obligations Revision, Cause (Sept. 10, 1979) (Prepared for Meeting of the Council Sept. 21-22, 1979, New Orleans) (Saúl Litvinoff, Reporter) (made available to the author by the Institute) [hereinafter Sept. 1979 Draft]. The text of the promissory estoppel article is the same as in the July 1979 Draft.

\(^{131}\) The minutes are a bit confusing here. They say, “Despite these objections, an amended draft of Alternate Draft articles 1 and 6 on page 4 was adopted.” Sept. 1979 Meeting, \textit{supra} note 130, at 6. Apparently the provision then adopted was this one:

\begin{itemize}
  \item \textbf{Arts. 1 and 6.} No obligation without cause; detrimental reliance
  \item An obligation cannot exist without a lawful cause.
  \item Nevertheless, an obligation may come into existence because of a party’s reasonable reliance on a promise by another when the latter, though not intending to bind himself, knew or should have known that his promise could induce the former party to rely on it to his detriment.
\end{itemize}

\textit{Id.} at 11.
However, early Saturday morning the issue was raised again. Jack Caldwell, Denson Smith, and Cary de Bessonet urged that promissory estoppeel be moved out of the contracts section of the Code and put in quasi-delicts.\(^{132}\) If only Grant Gilmore were there to see it!\(^{133}\) But those objections would not quite carry the day. Detrimental reliance would be an exception to the cause requirement, but it would not be transported into the realm of delict. Its exceptional nature would be signaled in the text: After the definition of cause, the article would use "nevertheless" to introduce detrimental reliance.\(^{134}\) A new provision was agreed on,\(^{135}\) but another objection was then voiced by George Pugh. The reporter again suggested that further discussion be postponed so that other materials could be reviewed.\(^{136}\) This paramount theoretical issue would require further study. Significantly, though, the problem is one of theory and is presented and debated as such. Neither the impact of policy nor the implication for cases was discussed. The jurists remain committed to the theoretical coherence expected of the civil law.

More than three years would pass before these provisions would reach the Council again. A draft from February 1983,\(^{137}\) prepared for the last Council meeting dealing with promissory estoppeel, reflects significant discussion in the interim.\(^{138}\) During that time, two further issues arose: (1) whether promissory

132. See id. at 7.

133. The adoption of promissory estoppeel in RESTATEMENT (FIRST) OF CONTRACTS § 90 was one of the reasons that Grant Gilmore famously pronounced "The Death of Contract." See generally GILMORE, supra note 83; see also infra note 274 (Macaulay et al. were executioners).

134. See Sept. 1979 Meeting, supra note 130, at 7.

135. The Council at that point adopted this provision, which appears incomplete:

Art. 2. and 6. Cause defined; detrimental reliance

Nevertheless, an obligation may come into existence because of a party's reasonable reliance on a promise by another when the latter knew or should have known that his promise could induce the former party to rely on it to his detriment. Reliance on a promise may not be deemed reasonable if the promise was made without required formalities.

Id. Presumably, a definition of cause should appear in the sentence before the "Nevertheless." Incidentally, the September 1979 Meeting is the earliest version of article 1967 I have seen that precludes recovery when the defect is an absence of formalities; see also Adcock, supra note 11, at 765. The issue may have been raised as early as April 1979, however. See infra note 139.


137. See Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Book III, Obligations Revision, article 2 of Cause (Feb. 18, 1983) (made available to the author by the Institute) (Saul Litvinoff, Reporter) [hereinafter Feb. 1983 Draft].

138. Unfortunately I do not have access to any documents reflecting the interim discussions, if any such documents exist.
estoppel could be used to enforce a promise that is otherwise unenforceable for want of formality, and (2) whether the article should recognize the discretion of the court to limit the remedy.\textsuperscript{139} In short, the answers were no and yes.

With respect to the first issue, the concern about undermining formal requirements seems to relate to gifts, and to donations inter vivos in particular.\textsuperscript{140} This specific worry highlights part of the difference between a mixed jurisdiction and an ordinary common law state. Given the historical link between promissory estoppel and gratuitous promises,\textsuperscript{141} one might argue that precluding gratuitous promises from the reach of article 1967 would be an anomaly, if not a travesty.\textsuperscript{142} One might view the situation differently, however. That promissory estoppel has been introduced into a jurisdiction that retains methods of enforcing gratuitous promises is an example of real mixture, and of new kinds of blends. Louisiana presents a very different environment for promissory estoppel than the jurisdictions in which the doctrine evolved, for they had generally lost the seal as a method for making gift promises enforceable. Given the disparate legal backgrounds, and especially the existence of an alternative method of making enforceable gratuitous promises, an exception for gratuitous transfers might be seen as perfectly appropriate. In essence, the differing civil-law rules may justify adapting a common law import before using it. However it is viewed, the exception for gratuitous promises is an example of how the variegated framework of a mixed jurisdiction leads to unusual doctrinal decisions and innovative legal rules.

The question of reliance in the absence of formalities raises another point. One way such issues still arise in common law jurisdictions is under contracts subject to the statute of frauds, and one of the earliest ways that courts came to employ promissory estoppel was in that context.\textsuperscript{143} Interestingly, the

\begin{thebibliography}{99}
\bibitem{139} Feb. 1983 Draft, supra note 137. According to this document, concern about undermining formal requirements surfaced at the April 1979 Meeting. \textit{See id. at 1. But see supra} note 133.
\bibitem{140} Feb. 1983 Draft, supra note 137, at 1, notes the intent that “reliance on a donation promised without proper form will not be protected. Otherwise, it was thought, an exception would be created to the strict rule of C.C. Art. 1536 (1870).” That article requires a duly notarized and doubly witnessed document for certain donations inter vivos. \textit{See L.A. Civ. Code Ann. art. 1536 (West 1987). Donations mortis causa were not ignored, as the February 1983 Draft also includes L.A. Civ. Code Ann. art. 1570 (West 1987) (repealed eff. July 1, 1999) (‘No disposition mortis causa shall henceforth be made otherwise than by last will or testament.’)}.
\bibitem{141} \textit{See supra} Part I.B.1.
\bibitem{142} Aside from the historical argument, one might add that excluding gratuitous obligations from promissory estoppel is an “illogical exception,” given that obligations with no cause can be enforceable by promissory estoppel but obligations with gratuitous cause cannot. \textit{See Adcock, supra} note 11, at 765; \textit{see also infra} note 224 and accompanying text (discussing formal requirements that apply to many gratuitous obligations but that do not apply to many onerous obligations).
\bibitem{143} \textit{See Holmes, supra} note 34, at 277-78.
\end{thebibliography}
available legislative documents do not evince much concern about the issue. The only clue is in a change of wording. Until the meeting in February 1983, the exception for formalities was stated generally: "Reliance on a promise made without required formalities is not reasonable." This language would seem to preclude applying promissory estoppel to promises caught by a statute of frauds. Only in an alternative version does the draft hint at limiting its application to gratuitous promises, and even then the reference is bracketed. But there is no further discussion, and the matter would not arise until the Council met to vote.

Before we reach that final meeting, let us note the issue of reliance damages. The drafts expressly acknowledge the debt to section 90 of the Second Restatement, but they obviously did not follow it verbatim. The proposal to acknowledge explicitly the power of courts to limit recovery was an invitation to follow section 90 even more closely. When the Council met and made the last decisions, this invitation would be accepted.

As it survives in the minutes, the April 1983 meeting is a bit of a letdown. A couple of paragraphs record the discussion about limiting damages to reliance in appropriate cases, as well as the decision to make that point in the text of the article. In the debate on excepting ineffective informal gifts, some objected to the exception because they wanted to preserve a line of cases upholding informal promises to remember the plaintiff in a will. The reporter assured everyone that those cases involved onerous contracts and therefore would not be affected by the exception. Still, there was a dilemma. "The

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145. For one of the most prominent Louisiana examples of a statute of frauds, see LA. CIV. CODE ANN. art. 1839 (West 1987); see also Amos J. Oelking III, Note, Morris v. Friedman: Detrimental Reliance and Statutory Writing Requirements, 57 LA. L. REV. 1375, 1379-380 (1997) (collecting nine Louisiana statutes of frauds).
146. "Reliance on an informal promise to execute a formal [gratuitous] contract is not reasonable." Feb. 1983 Draft, supra note 137, at 3 (bracketed material in original).
147. For a quotation of § 90, see RESTATEMENT (SECOND) OF CONTRACTS (1981), supra note 14.
148. There was no doubt that the proposal referred to the Restatement, which was invoked and explained. See Feb. 1983 Draft, supra note 137, at 2.
149. See Louisiana State Law Institute, Meeting of the Council, at 6 (Feb. 18-19, 1983) (made available to me by the Institute) [hereinafter Feb. 1983 Meeting]. The point is reinforced in LA. CIV. CODE ANN. art. 1967 cmt. (e) (West 1987).
150. See Feb. 1983 Meeting, supra note 149, at 6. Such cases would continue to come up after the revision, and they are mentioned infra Part III.B.1. The pre-revision cases are discussed more in Feb. 1983 Draft, supra note 137, at 1-2 (construing Succession of Gesselly, 44 So. 2d 838 (La. 1950); Succession of Joublan, 5 So. 2d 762 (La. 1941); Succession of Oliver, 165 So. 318 (La. 1936); Succession of Palmer, 68 So. 405 (La. 1915); Succession of McNamara, 18 So. 908 (La. 1896); Succession of Napoli, 286 So. 2d 392 (La. Ct. App. 4th Cir. 1973)). The analysis is preserved in LA. CIV. CODE ANN. art. 1967 cmt. (f) (West 1987); see also infra notes 224-233 and accompanying text.
Council wanted to retain the principle that a donation not in proper form was invalid, but also wanted to clarify when detrimental reliance could be used as a means of recovery.\footnote{151}

Alas, we are only told of a “debate,” and then in short order a number of decisions and a final version of the article. It now reads,

\textbf{Art. 2. Cause defined; detrimental reliance}

Cause is the reason why a party obligates himself.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.\footnote{152}

What happened to the “nevertheless” at the beginning of the second paragraph? Was there a grand discourse on recognizing contracts without cause for the first time? Was it determined that detrimental reliance is cause, notwithstanding the definition in the first sentence? Did the Council decide that promissory estoppel is a delictual or quasi-delictual theory after all?

The minutes do not say, and the theoretical conundrum could not be resolved.\footnote{153} The comments are not illuminating in this respect. The\textit{ exposé des motifs} that accompanies the obligations revision is cryptic, stating that article 1967 changes the law in two ways: (1) by defining cause as a “reason” rather than a “motive,” and (2) by “introduc[ing] detrimental reliance as an additional ground for enforceability.”\footnote{154} If we emphasize that detrimental reliance is an “additional ground for enforceability,”\footnote{155} the conclusion might well be that detrimental reliance is indeed an exception to the requirement that every contract have a cause. That conclusion cannot be right, however, for the preceding article continues to state that “an obligation cannot exist without a lawful cause.”\footnote{156} Furthermore, the reporter assures us in his scholarly writings that the basic idea

\footnote{151} Feb. 1983 Meeting,\textit{ supra} note 149, at 6.

\footnote{152} \textit{Id.} at 6-7.

\footnote{153} The deletion of “nevertheless” is part of a series of seemingly minor wording changes. It does not even receive a whole sentence in the minutes. \textit{See id.} at 6; \textit{see also} Mattar,\textit{ supra} note 7, at 143-47 (revision inconclusive about how detrimental reliance fits with cause, contract, and obligation).


\footnote{155} \textit{Id.} (emphasis added.)

\footnote{156} \textit{Id.} art. 1966.
of cause has been retained in the revision. Nevertheless, some observers visiting from arguably purer civil-law jurisdictions have expressed skepticism. The theoretical problem, though, could not hold up promissory estoppel forever. The Council stuck to the earlier definition of cause in the first sentence and made its separate peace with promissory estoppel in the second. The two concepts would remain in tension. The rest would be for the legislature, the courts, and the scholars.

B. Afterword

The legislature did not waste any time on theoretical niceties. The text of article 1967 now reads just as it did at the conclusion of the February 1983 meeting. Once the Council had adopted it, the article was placed with the rest of the obligations revision into a bill that was enacted in 1984. Promissory estoppel became effective in Louisiana, at least as a statutory matter, on the first day of 1985.

The most prominent players in the drafting of article 1967 are not legislators but members of the Council and members of the committee charged with revising the obligations articles. Persons attending Council meetings are recorded in the minutes and the makeup of the committees charged with the obligations revision is noted in the beginning of the statute books. Prominent members of the bench, bar, and professorate are listed. In short, the key players look much like a Louisiana version of the ALI, founded about fifteen years before the Louisiana State Law Institute. The ALI was most influential in the spread of promissory estoppel in the first place.


158. See the works of Professor Christian Larroumet of the Université de Droit, d'Économie et de Sciences Sociales in Paris, supra note 11, at 1223-225 (stating that “comparison between promissory estoppel and cause is not acceptable” and observing that civil law devices for doing promissory estoppel jobs are not necessarily contractual), and Professor Mohamed Mattar of Alexandria University in Egypt, supra note 7, at 145-46 (“detrimental reliance does not fall within the definition of cause”).


160. See 1984 LA. ACTS 331, § 1.

161. See June 1979 Meeting, supra note 103, at 1; see also Sept. 1979 Meeting, supra note 130, at 1; Feb. 1983 Meeting, supra note 149, at 1.

162. See 7-8 LA. CIV. CODE ANN. XLII (West 1987).

163. The American Law Institute was founded in 1923 under the leadership of the Elihu Root. The Restatement (First) of Contracts (1932) was its first restatement of the law. Contract Law: Selected Source Materials I (Steven J. Burton & Melvin A. Eisenberg eds., 4th ed. 1998). The Louisiana State Law Institute was established by 1938 by LA. ACTS 166 as a product of the Great Debate. See Yiannopoulos, supra note 102.
Perhaps one other observation will strike students of comparative law: Professors appear to have dominated the debate over promissory estoppel. In addition to Professor Litvinoff, Professors Crawford, de Bessonet, Pugh, and Smith took part; Mr. Caldwell, sometime President and Chairman of the Institute, is the only practicing lawyer whose participation is noted in the minutes. A reader cannot help but be impressed by the deep learning and intellectual passion of the participants. Given that one of the defining characteristics of a civil-law system is the prominence of academic writers in lawmaking, these facts seem noteworthy. Moreover, the influence of the jurists is not confined to court decisions; they are a crucial part of the legislative process. On the other hand, the Louisiana experience does not seem much different in this respect from the more general American one. True, the debate on promissory estoppel before the ALI included a number of prominent practitioners and judges. Still, the late Professor Williston of Harvard and the late Professor Corbin of Yale are remembered as the protagonists in that story.

III. ARTICLE 1967 IN THE COURTS

The need to devote a major part of this paper to the life of a Civil Code article in the courts is itself a testament to the different kinds of lawmaking at work in a mixed jurisdiction. The hypothetically pure civilian jurisdiction would theoretically have its code, or atavistically, its Roman texts, and this fairy-tale jurisdiction also would have its scholars. Court cases would be an administrative affair, with little role for precedent and the induction and experience of the common law. The deductive logic of academic law would reign supreme. Such a jurisdiction exists only as a construct, however. In reality, library shelves bow under case reports from civil-law jurisdictions. Louisiana is hardly an exception, and article 1967 cannot be understood as law without studying how it is treated by the courts.

The cases that have addressed promissory estoppel issues might be divided into two classes: those forced to decide theoretical questions, such as whether a cause of action sounds in contract or tort, and those faced with fact patterns associated with promissory estoppel. Both classes of cases are of interest, the theoretical ones for obvious reasons, and the others because they illustrate how promissory estoppel is becoming law in a mixed jurisdiction. The latter group of cases also indicates the stage of doctrinal development.

165. See generally Stein, supra note 13.
166. See ALI PROCEEDINGS, supra note 25, at 85-114.
167. See GILMORE, supra note 83, at 62-64; see also, e.g., Perillo, supra note 32, at 769 n.40.
168. See Stein, supra note 13, at 241-42.
Promissory estoppel has evolved through demonstrably different phases, and the evolutionary stage in which Louisiana finds itself is significant both to the student of promissory estoppel and to the student of mixed jurisdictions. Questions of theory will be addressed first.

A. Drawing Theoretical Lines

Courts, usually disdainful of theory, are sometimes pushed to decide the most troublesome theoretical issues. While scholars can equivocate about "borderlands" between tort and contract, concrete cases require courts to decide definitely. On the other hand, the courts occasionally blur the theoretical lines. Before addressing the line drawing cases, we need to consider the cases that have not appreciated the distinction between promissory estoppel and equitable estoppel.

1. Confusion About Onerous Contracts, Promissory Estoppel, and Equitable Estoppel

As explained in more detail above, promissory estoppel and equitable estoppel are not the same. Equitable estoppel is concerned with representations of fact, while promissory estoppel is founded on a promise about the future. The Louisiana Supreme Court seems to appreciate this distinction fully. In at least two cases, it has carefully treated promissory estoppel and equitable estoppel theories separately. The high court has not effectively taught this lesson to everyone, however, and some parts of its opinions may obscure the distinction between the doctrines. In one prominent case, for instance, the court says that before article 1967 went into effect, claims based on a "change in position due to allegedly 'reasonable' reliance on factual representations made by another were framed in terms of either 'detrimental reliance' . . ., 'equitable estoppel,' or 'promissory estoppel." The court is speaking of previous cases, and its characterization is accurate as a historical matter. Claims so labeled were made. But lumping everything together has not aided other courts in understanding the doctrinal difference.

Of particular interest in this regard is *North Central Utilities, Inc. v. Walker Community Water System,* which seems to view equitable estoppel, contract, and promissory estoppel as one. The Second Circuit holds that if a

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statement is not an offer sufficient to form a contract (if accepted), the statement cannot support a detrimental reliance claim either.\textsuperscript{172} Even more interesting is an early case from the First Circuit which suggests that plaintiffs cannot justifiably rely on a promise that lacks "cause":

\begin{quote}
[T]he obligor must show the promise to forbear [collection on a loan] was made for a lawful cause. No cause for such a promise has been shown in the present case. In view of this fact and the fact [that] no specific agreement was made, there was no basis for plaintiffs to rely upon the alleged statements as a promise by the Bank to forbear.\textsuperscript{173}
\end{quote}

In a more recent case, the Fourth Circuit was also inclined to limit detrimental reliance to contractual relationships, refusing to use the doctrine in favor of a plaintiff who lacked privity of contract.\textsuperscript{174}

These cases are important because they show an incipient stage in the development of promissory estoppel doctrine. Courts hesitated at first to move away from pre-established contract doctrine. As will become apparent below, the courts did not wait long before moving rapidly to more advanced stages of development. Before we can assess doctrinal development, however, we need to examine some more problematic cases.

Aside from the early conflation of contract and promissory estoppel, the more persistent problem has been the confusion of promissory estoppel with equitable estoppel. The Second Circuit in \textit{North Central Utilities} appears to say that a detrimental reliance claim is the same as an equitable estoppel claim.\textsuperscript{175} The confusion between promissory estoppel and equitable estoppel is common, and this case is only one example among many. One way to see the doctrinal line effaced is when promissory estoppel or detrimental reliance under article 1967 is defined according to elements announced in an equitable estoppel case.

\textsuperscript{172} See \textit{id.} at 1329 (if "invitation to receive bids is not an offer, plaintiff cannot maintain an action which contends he was damaged by relying on defendant's 'invitation').


\textsuperscript{174} Barrie v. V.P. Exterminators, Inc., 614 So. 2d 295, 296 (La. Ct. App. 4th Cir.) (home buyers who relied on defendant's no-terminate certification, which was issued pursuant to contract with seller, have no "contractual cause of action based upon detrimental reliance because this extends only to contracting parties, but not to third parties"), rev'd, 625 So. 2d 1007 (La. 1993) (finding delictual cause of action).

\textsuperscript{175} The opinion is not entirely clear, and the distinctions between the different theories may have been implicit in the thinking of the court, but the lines were not so clearly drawn as to indicate these distinctions. See \textit{North Cent. Util.}, 506 So. 2d at 1328 ("theory of detrimental reliance or equitable estoppel"), 1329 ("detrimental reliance (or equitable estoppel)").
Instead of referring to a “promise,” as article 1967 does, the court will require “a representation by conduct or word.”\textsuperscript{176} Sometimes, courts blur the distinction even more. The Third Circuit, for instance, has stated outright that article 1967 codifies equitable estoppel.\textsuperscript{177}

Admittedly, a litigator might argue in good faith that article 1967 does codify the doctrine of equitable estoppel. The argument might begin by characterizing some of the old estoppel cases, which ostensibly require a “representation,” as really promissory in nature. In fact, many of the earliest promissory estoppel cases in other jurisdictions purport to be equitable estoppel cases, with the courts stretching a promise into a factual representation in order to find for a deserving party.\textsuperscript{178} These arguments would be hard to press now,


As if the doctrinal confusion were not enough, a typographical error has muddied the waters further. Most of the cases just cited rely on either Wilkinson or Bailey, both decided by the Louisiana Supreme Court. Bailey actually quotes Wilkinson, so they are largely the same, but Bailey mistakenly refers to “[a] representation by conduct or work” rather than “word,” as the court had said in Wilkinson. Several courts have been misled by Bailey. See, e.g., Simmons v. SOWELA Technical Inst., 470 So. 2d 913, 922 (La. Ct. App. 3d Cir. 1985), and further problems are likely since the supreme court repeated the mistake in Morris v. Friedman, 663 So. 2d 19, 25 (La. 1995).

\textsuperscript{177} See Kibbe, 604 So. 2d at 1370. The confusion, of course, can work in both directions: sometimes a court will have to rule about a representation of fact and will erroneously treat it as a promissory estoppel case. This mistake may have been part of what led the Fourth Circuit to err in Barrie, 614 So. 2d at 296, rev’d, 625 So. 2d 1007. Zoning Bd. v. Tangipahoa Ass’n for Retarded Citizens, 510 So. 2d 751, 754-55 (La. Ct. App. 1st Cir. 1987), is also probably best considered a factual case, as the estoppel claim seems to be based on an alleged representation of compliance with zoning regulations. For a case that more clearly involves a representation of fact (“the loan is sufficient to satisfy the contract”) and that appropriately applies equitable estoppel elements outside the article 1967 promissory context, see A.F. Blair Co. v. Hayden, 533 So. 2d 1022, 1023 (La. Ct. App. 1st Cir. 1988).

\textsuperscript{178} See Holmes, supra note 34, 277 (“courts characterized promises as representations of fact for the application of equitable estoppel”).
however, since the Louisiana Supreme Court has reiterated that estoppel claims prior to article 1967 "properly apply only as to representations of fact."179 With luck, this statement by the high court will help dissipate the confusion between promissory and equitable estoppel.

Still, the litigator might argue, the Civil Code does not define "promise" to exclude a representation of fact. A company, without offense to English usage, might be said to "promise" that it has $10,000 in its bank account. Such a broad construction of "promise" in the promissory estoppel context, however, would be abnormal. Courts certainly obfuscated the difference between promise and representation before promissory estoppel was widely accepted, and the difference between a promise and a representation might be hard to discern in some cases. But the Second Restatement explicitly defines a promise in terms of the future,180 and the historical limit on equitable estoppel was that the statement or conduct on which the claim was based could not look to the future. Otherwise, courts thought, the law of contract (and particularly of consideration) would be acceptably undermined.181

Additionally, understanding the difference between promissory and equitable estoppel is important for other reasons. First, facts can be checked. Equitable estoppel is disfavored because a party often should have determined the "true facts" for itself.182 Further, the moral and policy implications of holding someone to a representation of fact are different from holding someone to a promise about the future. Stating untruthfully, "We have $10,000 in our bank account," is far different from saying, "We will have $10,000 to pay you in six months," even if the latter statement eventually proves untrue also. Finally, the distinction matters because equitable estoppel was recognized as an aboveboard, if disfavored, doctrine in Louisiana well before article 1967 went into effect. Promissory estoppel, on the other hand, had been explicitly rejected by the Louisiana Supreme Court.183 For purposes of retroactivity, the doctrinal distinction might mean the difference between winning and losing the case. We turn now to that issue.

179. Morris v. Friedman, 663 So. 2d at 25 (citing State v. Mitchell, 337 So. 2d 1186, 1188 (La. 1976)).
180. See Restatement (Second) of Contracts § 2(1) (1981) ("promise is a manifestation of intention to act or refrain from acting in a specified way").
181. See supra note 31 and accompanying text (discussing traditional equitable estoppel cases).
183. See Ducote v. Oden, 59 So. 2d 130 (La. 1952).
2. Is Promissory Estoppel New?

Despite bright signs that the recognition of promissory estoppel in article 1967 changed the law, controversy persisted about whether promissory estoppel was really new to Louisiana. True, the Louisiana Supreme Court had said in Ducote v. Oden that promissory estoppel is “unknown” to Louisiana law and inapplicable under the binding provisions of the Civil Code.184 And true, comment (d) to article 1967 unequivocally states that the Ducote holding “that promissory estoppel is not recognized in Louisiana” is “overruled.”185 Still, several courts opined that the detrimental reliance theory codified in article 1967 was not new to Louisiana law.

Some of these statements are grounded on a conflation of promissory estoppel and equitable estoppel. That misperception partly explains the unwillingness of the court in Breaux v. Schlumberger Offshore Services186 to believe comment (d). In Breaux, a representative of Schlumberger approached Breaux about leasing office space. The men reached an agreement but the Schlumberger representative said the home office would have to approve any lease. During the delay, the previously booming oil market busted, and the local real estate market consequently plummeted. Refusing to enter the lease with Breaux, Schlumberger made a more advantageous lease with someone else. Breaux claimed detrimental reliance.187

Although the operative facts occurred before the effective date of article 1967, the court declines to decide whether the new article is retroactive. In the face of comment (d), the court says, “Although purporting to be new, this article did nothing more than codify existing practice. . . . Louisiana courts have long recognized a cause of action for detrimental reliance. . . .”188 The court recognizes that the detrimental reliance protected by article 1967 sounds a promissory estoppel theory, but the court says that the Bailey case is an example. Bailey, however, clearly labels the doctrine it applies as “equitable estoppel,” and it denies relief because the plaintiff could have and should have checked the “true facts.” Nor was there a promise in Bailey on which promissory estoppel liability could have been based.189 Given the Louisiana Supreme Court precedent and the background of article 1967 itself, the federal Fifth Circuit holding in Breaux is a bit surprising. The court does cite scholarly literature,190 and perhaps this opinion could be seen as evidence of academic writers’ unusually

184. Id. at 132.
186. See Breaux v. Schlumberger Offshore Servs., 817 F.2d 1226 (5th Cir. 1988) (for prior and subsequent history of the case see footnote 176).
187. See id.
188. Id. at 1229.
190. See Breaux, 817 F.2d at 1229 (citing Herman, supra note 6, at 715).
authoritative role in a civil-law regime. The court, however, relies on a range of authorities, and it cites the lower court opinion in *Simmons v. SOWELA Technical Institute* for the proposition that promissory estoppel is delictual.

The broad-based delictual theory, especially when tied to particular civil-law doctrines, is of particular interest in the study of a mixed jurisdiction. *Simmons* also involved facts arising before article 1967 became effective, and the case was not decided under the article. In pinning detrimental reliance to delict or quasi-delict, the court surveys a number of similar doctrines—promissory estoppel, equitable estoppel, detrimental reliance (which the court suggests is the same as the first two), and negligent misrepresentation—that would sound perfectly familiar to a common law lawyer. Other cases, when deciding whether article 1967 changes the law, prefer to resort to more obvious civil law counterparts that received attention in scholarly literature and jurisprudence. For example, in justifying its holding that “detrimental reliance was codified in 1985, but it is not actually new,” the intermediate court in *Morris v. People’s Bank* linked the doctrine to *culpa in contrahendo*. Thus, the Louisiana courts seem to use both the common and civil law when finding precedents for article 1967.

The majority opinion in *Breaux* did not last; the *Morris* litigation eventually brought it down. From the start, Judge Garwood had dissented cogently in *Breaux*, and the Fifth Circuit stayed its mandate and certified the case to the Louisiana Supreme Court. Curiously, the Court refused certification, and the *Breaux* majority opinion stood a while longer.

Soon enough, though, the supreme court enunciated its disagreement with the holding in *Breaux* that article 1967 is not really new.

In *Morris v. Friedman*, the Louisiana Supreme Court repeated its holding in *Ducote* that promissory estoppel was not recognized in Louisiana before article 1967. As in *Breaux*, the facts giving rise to *Morris v. Friedman*

\footnote{191: See id. (citing *Simmons*, 470 So. 2d at 922); see also Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 Tul. L. Rev. 457, 533 (1994) (*Breaux* recognizes a cause of action in tort for detrimental reliance, but that action will be relatively unimportant given article 1967).}

\footnote{192: See *Simmons*, 470 So. 2d at 922-23.}


\footnote{194: For the subsequent history of *Breaux*, see supra note 176.}

\footnote{195: Notably, not all federal cases had been so sanguine that promissory estoppel was “an accepted and vital part of the jurisprudence of Louisiana,” *Breaux*, 817 F.2d at 1229 (citing *Simmons*, 470 So. 2d at 922), before article 1967 was effective. See *Wicker v. First Fin. Savs. & Loan Ass’n*, 665 F. Supp. 1210, 1215 (M.D. La. 1987) (because of “uncertainty of Louisiana law in this area” and because effect of art. 1967 “far from clear,” federal jurisdiction refused).}

\footnote{196: See *Morris v. Friedman*, 663 So. 2d 19, 26 (La. 1995).}

\footnote{197: See *Breaux*, 817 F.2d at 1228.
occurred before the effective date of the obligations revision. After noting the familiar rule that changes in substantive law are not applied retroactively, the court quoted the statements in the article 1967 comments which state that the article changes the law. The court concluded that at least the detrimental reliance part of the article would not be applied retroactively. The court then analyzed the case under equitable estoppel, emphasizing that a representation of fact is required. The quotation of the comments does not omit the point that Ducote was overruled, but lest the point be missed or disbelieved again, the court reiterated as its last point, “Finally, prior to the enactment of La. C.C. art. 1967, the common law theory of promissory estoppel had been expressly rejected by this Court. There is, therefore, no need to discuss the merits of [plaintiff’s] claim under such a theory.”

The supreme court did not ignore all the bookish labor on detrimental reliance in the civil law, but the court gave it short shrift. “[M]uch has been written in law review articles about the Roman law maxim venire contra propium [sic] factum (no one can contradict his own act) and the German legal theory of culpa in contrahendo (fault in contracting),” the court acknowledged. Yet the court refused to give these doctrines, or the academic writers, any weight. Only a handful of actual cases had “even mentioned” these ideas, and only one had been so bold as to base recovery on such a theory.

The court shows no doubts about the authority of its own holding in Ducote or the authority of case law in Louisiana. The opinion also shows where academic writings belong in the hierarchy: below case law. Implicitly, the court is also answering the question that Professor Herman posed when article 1967 was being drafted: He wondered whether in Ducote “the Louisiana Supreme Court would have been equally hostile to the plaintiff’s claim [of promissory estoppel] if he had invoked the venerable Roman maxim, venire contra propium factum, instead of the Restatement of Contracts section 90.” Sometimes, even a Roman pedigree is not enough, at least in a mixed jurisdiction.

The perspective of the supreme court in Morris v. Friedman differs markedly from that of the jurists prominent in drafting article 1967, as well as from the Fifth Circuit majority in Breaux. The scholars concluded that promissory estoppel would not really be new to Louisiana even though article 1967 would overrule Ducote. They also argued that civil-law doctrines would

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198. See Morris v. Friedman, 663 So. 2d at 21, 22 n.4. See generally Oelking, supra note 145.
199. See Morris v. Friedman, 663 So. 2d at 23.
200. See id. at 25.
201. Id. at 26 (citation omitted).
202. See id. at 24 n.8. Whether the court is aware of the wording of the opinion in Hebert v. McGuire, 447 So. 2d 64, 65 (La. Ct. App. 4th Cir. 1984), is not apparent from the opinion, but the existence of one more case—and an extraordinarily short one—is unlikely to make much difference.
203. Herman, supra note 6, at 717.
lead to equivalent results. *Breaux*, relying on some of this scholarship, agreed. The supreme court, however, looking at the same scholarship and the same case law, did not. The decision in *Morris v. Friedman*, then, emphasizes not only the relationship of scholarship and case law, but also the paramount authority of the legislature and the Civil Code. The court held that the law indeed had been different before 1985. Legislation—an amendment to the Civil Code—was necessary to change the law. At the same time that the court underlines the common law concept of *stare decisis* by reaffirming *Ducote* for pre-1985 cases, the court also reinforces the tenet of the modern civil law that the code and the legislature must remain supreme. Thus, the tension inherent in the mixed jurisdiction may be detected not just in the disagreement between the jurists and the court, but in the *Morris* decision itself.

3. Is Promissory Estoppel Contractual or Delictual?

Because of the astonishing breadth of Civil Code article 2315 (which is the same as the counterpart tort provision in the *Code Napoléon*), delictual liability is always a good candidate for tackling new or problematic jobs. This general tort article plays a dual role with respect to promissory estoppel. It is a codal hook on which to hang various theories of recovery that lack any explicit authorization in the Code. As mentioned in the previous section, *Simmons* hung a number of common law theories on article 2315. Moreover, the article also justifies the new legislation; as comment (d) to article 1967 says, protecting detrimental reliance on a promise is “consistent with the basic principles” of article 2315. Describing article 2315 as delictual presents little theoretical difficulty, since civil law still treats delicts and contracts together under the single rubric “obligations”; the revision of the obligations articles has reinforced this conceptual unity. Different limitations periods for contract and delict actions, however, force the practical separation of the theories, as will become apparent shortly.

For a common lawyer looking at Louisiana law, the choice of delict as a justification, or explanation, for including promissory estoppel in the Code is significant. The common law once knew a similar unity (or at least a failure to separate). The division of tort from contract, although its timing is debatable, was complete in common law jurisdictions by the late nineteenth century. At that point, promissory estoppel was not yet recognized forthrightly in the *First

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204. “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” *L.A. CIV. CODE ANN.* art. 2315 (West 1987); *see CODE NAPOLÉON* art. 1382 (1804).

205. *L.A. CIV. CODE ANN.* art. 1967 cmt. (d) (West 1987) (citing *id.* art. 2315 (1870)).


207. *See GILMORE, supra* note 83, at 140 n.228.
Restatement,²⁰⁸ although cases had begun to appear that would later be seen as promissory estoppel cases. The advent of promissory estoppel, in fact, was interpreted by some as an insidious glue that would rejoin the fields of tort and contract, or at least disturb the border between them.

The reporter for the obligations revision noted this parallel between common law development and explanation on the one hand, and the adoption and justification of the doctrine in Louisiana on the other hand. This interplay between tort and contract, and between the common law and Louisiana, was not new. As long ago as 1926, a Louisiana lawyer at the ALI debate on whether to adopt promissory estoppel noted that “it might be difficult to put the case on the one or the other side of the line of demarcation between a duty imposed by the party and a duty imposed by the law.”²⁰⁹ But that was no reason not to put promissory estoppel into the First Restatement. In both systems, promissory estoppel would be placed physically with the contractual provisions, but it could also rest conceptually in tort.²¹⁰

This theoretical truce on both fronts could not hold on a practical level, at least not in Louisiana. The catalyst for decision was the difference in the limitation or prescription periods for the two different theories. Simmons was the first case to face the issue, and it holds detrimental reliance to be delictual.²¹¹ The court does not appear to be deciding the point under article 1967, however. The case had arisen before the effective date of the new article, and the opinion takes time to review various causes of action relating to detrimental reliance, none with any reference to article 1967.²¹² Breaux followed Simmons in finding a cause of action in tort, but Breaux specifically linked promissory estoppel to

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²⁰⁸ See Restatement (First) of Contracts § 90 (1932).
²⁰⁹ Alien Proceedings, supra note 25, at 111, 113-14 (statement of O.H. Burns regarding then-§ 88 (later § 90), heartily endorsing recognition in the Restatement of Contracts of promissory estoppel).
²¹⁰ See Gilmore, supra note 83, at 87 (“Speaking descriptively [of the First Restatement definitions of consideration and promissory estoppel, §§ 75 and 90], we might say that what is happening is that ‘contract’ is being reabsorbed into the mainstream of ‘tort.’”). The April 1979 Draft, supra note 71, at 6, after noting that La. Civ. Code Ann. art. 2315 can “account at civil law for the situations covered by promissory estoppel at common law,” quotes Orvill C. Snyder, Promissory Estoppel as Tort, 35 Iowa L. Rev. 28, 45 (1949); see also Herman, supra note 6, at 713 n.20. For an article that assesses in light of more modern scholarship the relation of promissory estoppel to contract and tort, see generally Randy E. Barnett & Mary E. Becker, Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443 (1987).
²¹² The court cites article 1967 only with a see generally signal, and only for the point that reliance on a gratuitous promise given without requisite formalities is unreasonable. See id. at 922-23.
delictual liability under article 2315. Both Breaux and Simmons, however, seem to be decided without noticing the distinction between promissory and equitable estoppel, and arguably neither holding applies to article 1967.

Eventually the question had to come up squarely, and it did in Stokes v. Georgia-Pacific Corp. The fact pattern is typical, much like Ducote v. Oden: In reliance on a promise of a long-term contract, plaintiff bought expensive equipment. The defendant terminated the contract well before the plaintiff could recoup his investment. The federal Fifth Circuit rejected the defendant's limitations defense, holding a claim under article 1967 subject to the ten-year liberative prescription for personal actions in general rather than the one-year period applicable to delictual actions. The court did not spend much time on the issue, probably because the defendant had fatally undermined its argument in its briefing. Still, the court observed that article 1967 appears under the rubric "Conventional Obligations or Contracts," and the "eminent scholar who directed the drafting of the new articles expressly places detrimental reliance in the contract realm." This holding is becoming further established as it continues to be followed.

Notably the professor-as-jurist appears here in a dual role, as doctrinal writer and legislative drafter. With the prominent role of academics in the Institute, the role of the jurist is enhanced—at least as long as the Institute has de facto control over the legislation. The jurist retains the role of writing about the law in scholarly publications and gains the privilege of writing legislative history as well. Even with respect to a common law doctrine, invented by the courts and restated by the ALI, the jurist who is familiar with the peculiarities of a particular mixed jurisdiction can exert a pronounced influence. A skeptic, though, doubtful of real differences between the common and civil law, might query whether the high position of the jurist in Louisiana differs from other jurisdictions. Is

213. See Breaux v. Schlumberger Offshore Servs., 817 F.2d 1226, 1229 (5th Cir. 1988) (for prior and subsequent history see footnote 176); see also Galligan, supra note 191, at 533.
215. See Stokes, 894 F.2d at 770 (citing LA. CIV. CODE ANN. art. 3499 (West 1984)).
216. See LA. CIV. CODE ANN. art. 3492 (West 1987).
217. In one of its briefs, defendant itself argued that an action under article 1967 sounds in contract. See Stokes, 894 F.2d at 770.
218. Id. (citing Litvinoff, supra note 11, at 27-28). Breaux is not discussed.
Professor Litvinoff more authoritative in Louisiana than Corbin in Connecticut? Corbin, after all, was largely responsible for section 90.

The question is unanswerable, although one might speculate that the peculiar blend of law in a mixed jurisdiction would require scholarship that pays attention to that jurisdiction in particular. Corbin is likely just as influential in California as Connecticut, but less authoritative in Louisiana. Given its unusual double heritage, Louisiana will need to rely more on local scholarship and less on national scholarship. Because of these inevitabilities, a mixed jurisdiction may find itself more insular, and more insulated from trends in either system. In this respect, it may be relatively slow or conservative in its legal development for a time, although it may be able to proceed more rapidly or efficiently once it decides to take a definite step, like adopting a particular doctrine. These matters are of some importance, and they will recur in the final part of this paper.

B. Promissory Estoppel Jobs

Promissory estoppel has often been enlisted for particular kinds of jobs. It can simplify the legal analysis and serve the ends of justice in fact patterns where the traditional common law of contract sometimes fails. With its bargain theory of consideration, the common law has either led to unfortunate results, or more often, strained the law to unshapely forms so that the right party would receive a fair recovery. Academic writers frequently have argued that the civil law is free of the constraint of consideration and thus does not need promissory estoppel. To the extent that contract cannot deal adequately with the fact pattern,

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220. The alliterative choice of residences by the good professors is not my fault.
221. See Gilmore, supra note 83, at 60-65.
222. I had hoped, in this section about drawing theoretical lines, to discuss the appropriate remedy under article 1967. The cases so far are inconclusive, however, and they are especially difficult to generalize because of the discretionary nature of the remedy. For instance, Autin's Cajun Joint Venture v. Kroger Co., 637 So. 2d 538, 540-41 (La. Ct. App. 1st Cir. 1994), appears to leave the question of reliance versus expectancy to the jury, which seemed to award reliance only. Typically, exactly what the jury was doing was unclear. In another case, the plaintiff only asked for reliance damages and lost on the merits anyway. See Illinios Cent. Gulf R.R. v. R.R. Land, 988 F.2d 1397, 1407 n.25 (5th Cir. 1993) (affirming under clear error standard a finding that no representation had been made, so no detrimental reliance claim could lie). Breaux, on the other hand, refused to limit recovery to out-of-pocket expenses. See Breaux v. Schlumberger Offshore Servs., 817 F.2d 1226, 1232 (5th Cir. 1988) (for prior and subsequent history see footnote 176). Stokes seems to allow expectancy (referring to the length and terms of the contract), even though plaintiff had sued for both breach of contract and detrimental reliance but went to trial only on the latter theory. Again, however, the measure of damages was in the hands of the jury, and its deliberations are opaque. See Stokes, 894 F.2d at 770.
delictual theories work fine. Given this background in the doctrinal writings, it is interesting to find promissory estoppel doing pretty much the same jobs in Louisiana as it always does. We will start the examination of the different fact situations, however, with a notable exception.

1. Family Promises and Gifts

In the traditional view, familial and charitable promises, and their lack of bargained-for consideration, explain the advent of promissory estoppel. Seeing litigation over such promises in a list of promissory estoppel jobs is hardly exceptional. Its appearance here is notable for another reason, though. Traditionalists may see a quirk in the introduction of promissory estoppel into a jurisdiction that still allows gratuitous promises to be made binding through the use of formalities. The quirk becomes more intriguing when we observe that the law does not protect reliance on a gratuitous promise made without the requisite formalities. This legislative constriction on the reach of promissory estoppel has not prevented litigation over informal promises of gifts but it has prevented recovery on a promissory estoppel theory, at least so far. The category of family promises and gifts is thus exceptional from the perspective of the common law, where such fact patterns are standard jobs for promissory estoppel.

Interestingly, the classic fact scenarios continue to receive attention from the Louisiana appellate courts. In one familiar pattern, defendant offers to give plaintiff land. Plaintiff may or may not be expected to do much, and usually any duties are left vague, as plaintiff and defendant are somehow related. Families, in other words, are taking care of each other, and promising to take care of each other. The problems come when the family falls to fighting, or when the promisor dies with the promise unfulfilled. The fact pattern is practically proverbial. Sometimes the Louisiana adaptation works just fine in these classic situations. A court could deny recovery to unsympathetic plaintiffs, as when ungrateful, bankrupt children lived on the wife’s parents’ land before a falling out with the parents. In that case, the court easily held that the parents’

223. See Larroumet, supra note 11, at 1225 (discussing French devices for doing promissory estoppel jobs); Mattar, supra note 7 (each section explains how civil law approaches each promissory estoppel job); Sutherland, supra note 11, at 85; Apr. 1979 Draft, supra note 71, at 6-7. Some of these doctrines are reviewed briefly supra Part I.B.2.

224. See La. CIV. CODE ANN. art. 1967 (West 1987); Litvinoff, supra note 11, at 24 ("as a paradox, more promises are enforceable when promissory estoppel substitutes for consideration at common law than under the wider and more flexible theory of cause at civil law").

225. See Herman, supra note 6, at 711 (translating the many cases into an A and B paradigm); see also Feb. 1983 Draft, supra note 137, at 1-2.

promised gift of land required a notarized and witnessed writing, and any reliance without the formality was unreasonable.\textsuperscript{227} Another case so holds in a variation of the classic pattern, where the defendant's decedent promised to remember the plaintiff in her will but died without having done so.\textsuperscript{228}

Other cases present more appealing plaintiffs, and the courts must find other ways of allowing them compensation. This inevitability can result in strain on the courts, and it can raise questions about the Louisiana adaptation of promissory estoppel. Sometimes, a court can find a theory of recovery under the Civil Code itself, such as allowing compensation to possessors who have improved land that turns out not to be theirs.\textsuperscript{229} At other times, the court can find an onerous contract—and, in fact, an "exchange," and probably a bargain\textsuperscript{230}—thus permitting recovery under article 1967, despite the lack of formalities.\textsuperscript{231} Sometimes, the courts must strain to compensate the plaintiffs, recognizing that finding a unilateral,\textsuperscript{232} gratuitous contract will defeat the plaintiff's claim. In another typical promissory estoppel fact pattern, where a corporate officer had been promised stock in recognition of his service to the company, the court took pains to assume a remunerative donation (with the value of the gift not exceeding by half the value of services). That way, the transaction could be treated as an onerous sale.\textsuperscript{233} Admittedly, the strain was less arduous in this case than in a common law jurisdiction, which must find a true bargain rather than a remunerative donation. The struggle is apparent nonetheless.

If such cases were to multiply, an underground group of cases could lead to case-based, common law promissory estoppel in Louisiana. After all, that is how promissory estoppel is said to have started in the rest of the country. Courts found consideration where there was no bargain, upholding various gift promises and charitable subscriptions. The bargain theory of consideration to be

\textsuperscript{227} See id.
\textsuperscript{228} See Kibbe v. Lege, 604 So. 2d 1366, 1368 (La. Ct. App. 3d Cir. 1992).
\textsuperscript{229} See Andrus v. Andrus, 634 So. 2d 1254, 1258-59 (La. Ct. App. 3d Cir. 1994).
\textsuperscript{230} See LA. CIV. CODE ANN. art. 1909 ("A contract is onerous when each of the parties obtains an advantage in exchange for his obligation.") & cmt. (c) (West 1987); cf. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (defining "bargain" in terms of "exchange").
\textsuperscript{232} Here unilateral is used in its sense under the civil law; it has nothing to do with a unilateral contract as conceived by the common law. See generally LA. CIV. CODE ANN. art. 1907 (West 1987).
\textsuperscript{233} See Baldwin v. Gibbens, 635 So. 2d 1317, 1318 (La. Ct. App. 4th Cir. 1994) (on exception of no cause of action); see also LA. CIV. CODE ANN. arts. 1525-1526 (West 1987) ("the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services."). For a counterpart decided under common law promissory estoppel, see Feinberg v. Fetzer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959) (promise of a pension), which is one of the leading American cases.
adopted in the First Restatement\textsuperscript{234} could not explain these cases, so the drafters had to recognize in section 90 what had been an underground group of cases.\textsuperscript{235} Similar pressures have been felt in Louisiana for more than a century, just as long as in most other American states.\textsuperscript{236} As noted above, such cases have been used to show that article 1967 is not entirely new. While the civil law will recognize a contract with a gratuitous cause, and will not be tripped by the lack of consideration, such contracts are often enforceable only with specified formalities. These formalities have a habit of getting left out.\textsuperscript{237} Accordingly, like sister courts in other states, Louisiana courts sometimes feel pressure to torture an apparent gift into an onerous transaction.\textsuperscript{238} In this respect, they will be positioned just like other courts were before the recognition of promissory estoppel.

2. Contractor Bids

At least a couple of cases have arisen already in this familiar context; one deserves careful attention because it implicates so many issues relating to the civil law and the role of promissory estoppel.\textsuperscript{239} Percy J. Matherne Contractor, Inc. \textit{v.} Grinnell Fire Protection Systems Co.\textsuperscript{240} looks typical at first. A general contractor, Matherne, solicited bids from subcontractors for fire sprinklers.\textsuperscript{241} The bid specifications were complicated by four last-minute addenda from the owner, the Saint James Parish School Board.\textsuperscript{242} The defendant subcontractor, Grinnell, submitted a bid of $79,500; the only other sprinkler bid was $218,094.\textsuperscript{243} The disparity quickly prompted Matherne to call Grinnell to make sure the $79,500 figure included the four addenda. Grinnell said that it did. As

\textsuperscript{234} See \textit{Restatement (First) of Contracts} § 75 (1932).

\textsuperscript{235} See \textit{Gilmore}, supra note 83, at 56, 62-64. Part of this story has become legendary, perhaps, \textit{cf. id.} at 128 n.135, but there is little doubt that in its early life promissory estoppel consisted of cases finding consideration when there was no bargain.

\textsuperscript{236} See, \textit{e.g.}, Choppin \textit{v.} Labranche, 20 So. 681 (La. 1896).

\textsuperscript{237} See \textit{Dawson}, supra note 9, \textit{passim}; \textit{Matter}, supra note 7, at 96-99.

\textsuperscript{238} See \textit{generally Adcock}, supra note 11, at 765-66, 770.

\textsuperscript{239} Another case in the contractor vein is \textit{North Cent. Utilis. Inc. \textit{v.} Walker Community Water Sys.}, 506 So. 2d 1325, 1329 (La. Ct. App. 2d Cir. 1987), discussed \textit{supra} note 171 and accompanying text; see also \textit{Menzie Tile Co. \textit{v.} Professional Ctr.}, 594 So. 2d 410, 414 (La. Ct. App. 1st Cir. 1991) (detrimental reliance on statement that lender would pay subcontractors).


\textsuperscript{241} See \textit{id.} at 819.

\textsuperscript{242} See \textit{id.}

\textsuperscript{243} See \textit{id.}
the deadline was minutes away, Matherne immediately submitted its bid to the school board. Matherne’s bid was irrevocable for thirty days.

For most lawyers, the rest might seem predictable, but the case includes two nice wrinkles. First, although Matherne’s bid was lowest, it was still beyond the school board budget. After the bidding, Matherne and the Saint James Parish School Board negotiated a number of changes to reduce costs; some changes apparently affected the sprinkler system. Second, the school board and Matherne did not reach agreement until a few days after the thirty-day period of irrevocability expired. These unusual facts allowed Grinnell several arguments of particular interest here.

Grinnell asserted that the parties never reached an agreement, or in common law terms, that a failure of mutual assent prevented formation of a contract. The court rejected this argument, allowing Matherne to recover on a “quasi-contract” based on detrimental reliance. The court reasoned that no enforceable contract need exist under this theory. This proposition seems unremarkable at first; if there were an enforceable contract, a detrimental reliance theory of recovery would be unnecessary. The authority cited for this uncontroversial proposition is Morris v. People’s Bank & Trust Co. That case holds that an enforceable contract is unnecessary to recover in detrimental reliance when the agreements are arguably illegal under the banking laws and

244. See id. at 819-20.
245. See id. at 820.
246. See id. at 824. The court seems willing to assume that there were “substantially different plans and specifications” with respect to Grinnell.
248. See LA. CIV. CODE ANN. art. 1906 (West 1987).
249. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (in general, “the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration”).
250. As the term “quasi-contract” is often associated at common law with unjust enrichment and a recovery measured by the restitution interest, the use of the term to describe an action based on detrimental reliance seems worth noting. See generally FARNSWORTH, supra note 112, § 2.20. The usage favored by Judge Vance in Matherne was perhaps more codally oriented, as under the Civil Code “all acts, from which there results an obligation without any agreement, . . . form quasi-contracts.” LA. CIV. CODE ANN. art. 2294 (1870) (West comp. ed. 1972) (repealed 1996); see Oliver v. Central Bank, 658 So. 2d 1316, 1322 (La. Ct. App. 2d Cir. 1995).
251. See Matherne, 915 F. Supp. at 824.
unenforceable under the statute of frauds.\textsuperscript{253} In the \textit{Morris} cases, however, there appears to be little question that the parties had actually reached agreement, unlike in \textit{Matherne}.\textsuperscript{254}

Nevertheless, \textit{Matherne} allows the general contractor to recover the difference between the subcontractor's bid and the cost the general contractor incurring to get someone else to do the work. The court says that the recovery would be "the same whether based on breach of contract or detrimental reliance."\textsuperscript{255} This measure of recovery is remarkable. If Matherne and Grinnell had never reached an agreement, which is what the court seems to acknowledge,\textsuperscript{256} determining the expectancy would be impossible if expectancy is defined as putting the plaintiff in the position it would have been in had the defendant's promise been kept.\textsuperscript{257} If Matherne had asked for Rolexes, Grinnell had promised Timexes, and Matherne covered by buying Rolexes elsewhere, the difference between the bid and the cost of cover will not reflect expectancy as it is usually understood. Perhaps in recognition of this problem, the court says that the "real interest plaintiff seeks to protect is its reliance interest."\textsuperscript{258} Reliance is

\textsuperscript{253} See companion case to \textit{Morris I}, \textit{Morris v. People's Bank \\& Trust Co.}, 580 So. 2d 1037 (La. Ct. App. 3d Cir. 1991) [hereinafter \textit{Morris II}]. The principle that an action in detrimental reliance does not require the existence of a contract has also been recognized by the federal Fifth Circuit, which also relied on the \textit{Morris} cases. See Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1069 (5th Cir. 1993). As mentioned above, another case involving Morris was subsequently reversed. \textit{Morris v. Friedman}, 663 So. 2d 19 (La. 1995), rev'g 642 So. 2d 225 (La. Ct. App. 3d Cir. 1994). See supra notes 196-203 and accompanying text.

\textsuperscript{254} See \textit{Morris I}, 580 So. 2d at1031-32; see also \textit{Morris II}, 580 So. 2d at 1042 (referring to the arrangement as an "oral contract"). The penultimate paragraph of \textit{Morris II} could be read to suggest that the parties had not reached a contract, but in light of its earlier references to an "oral contract," the court probably meant something else. Judge Higginbotham also seems to see the obstacle in \textit{Morris II} to be the statute of frauds rather than any lack of agreement. See \textit{Newport}, 6 F.3d at 1069 (construing \textit{Morris} cases). The statute of frauds, of course, prevents enforcement of a contract; the statute does not say that there is no contract. See \textit{LA. REV. STAT. ANN.} \textsection{} 10:8-319 (West 1993) (repealed 1996); see also \textit{U.C.C.} \textsection{} 2-201 cmt. 4 (1994) (explaining why a contract might be unenforceable but still legally significant).

\textsuperscript{255} \textit{Matherne}, 915 F. Supp. at 824; see also \textit{Hillman}, supra note 35, at 601 n.92, 610.

\textsuperscript{256} In context, the statement that "it is not necessary for the Court to address Grinnell's argument that no contract was confected between the parties" refers to differences between the earlier and later plans and specifications, and would thus suggest the court realizes that the parties may not have reached an agreement. See \textit{Matherne}, 915 F. Supp. at 824.

\textsuperscript{257} Cf. \textit{Farnsworth}, supra note 112, \textsection{} 2.1.

\textsuperscript{258} \textit{Matherne}, 915 F. Supp. at 824. For another case that seems to duck a similar issue, see \textit{Stokes v. Georgia-Pacific Corp.}, 894 F.2d 764, 770 (5th Cir. 1990) (seeming to permit a jury award taking expectancy into account, even though the contract was never proved, and its length and terms were unknown).
much easier to measure when the agreement is uncertain, since it does not require determining what has been promised or agreed, and common law courts have used it in similar situations.\textsuperscript{259} Still, the court’s logic is easy to follow: Since Matherne is allowed a recovery that takes into account the cost of obtaining a substitute performance, the recovery appears to be measured by expectancy; since Matherne would be out of pocket by that amount, the recovery appears to be measured by reliance.

Aside from the damages question, the possible lack of agreement between Matherne and Grinnell is emphasized here for two reasons. \textit{First}, the \textit{Matherne} holding puts Louisiana law in line with some of the jurisdictions that have advanced pretty far along the evolutionary path of promissory estoppel. Recognized for a long time as a substitute for consideration, the proposition that promissory estoppel is a substitute for agreement has taken considerable doctrinal development. All or virtually all American jurisdictions recognize promissory estoppel based on section 90; as of spring 1996, only about twenty had arrived at the relatively advanced stage of development evident in \textit{Matherne}.\textsuperscript{260} Louisiana, possibly because it entered the fray after much doctrinal evolution had occurred elsewhere, has arrived at this point within ten years of recognizing promissory estoppel at all. Despite the recent vintage of article 1967, the court could take advantage of a highly developed common law of promissory estoppel. Noting that Texas and Louisiana law are “functional[ly] equivalent” in this area, the court easily could follow two Fifth Circuit cases decided under Texas law.\textsuperscript{261} One of those cases has received national and even international attention, since it exemplifies the expansion of promissory estoppel to a realm where contract formation is not dispositive.\textsuperscript{262}

\textit{Second}, the lack of agreement raises the question that will occur to many comparatists: Would \textit{culpa in contrahendo} have worked? Probably. Although not stated explicitly, the opinion veritably vibrates with intimations that Grinnell did not act reasonably—that it was at fault. In the end all would depend on the precise definition of \textit{culpa}, but it likely would be found in this case. The civil-law doctrine could have handled this problem. \textit{Culpa in contrahendo}, however, is still an obscure doctrine in the United States, and as a mixed jurisdiction, Louisiana has taken the opportunity to adopt the familiar and simple

\textsuperscript{259} See, e.g., Hoffman v. Red Owl Stores, 133 N.W.2d 267, 276-77 (Wis. 1965) (refusing to award lost profits because plaintiff sued in promissory estoppel rather than breach of contract).

\textsuperscript{260} See Holmes, supra note 34, at 289.


promissory estoppel doctrine from the common law. The Matherne court declined to “strain [ ] to fit the parties’ negotiations into the contours of a contract,” and the court did so based on straightforward codification, without resort to academic writings of less certain authority.

The final wrinkle on the facts of Matherne is the delay for renegotiation, which was caused by the earlier budget overrun. That fact raised the possibility that Matherne might revoke its bid for the prime contract. Rarely do subcontractor bid cases raise this problem; ordinarily, the owner accepts the general contractor’s bid, thus forming a contract. Revoking a bid with impunity, therefore, is not generally a possibility for the general contractor. In this case, however, it might have been. This fact is of interest because it could mean that a civilian device for protecting general contractors might not have worked. The civil law allows for an irrevocable offer—an option contract under the common law—without regard to consideration. As long as they are properly interpreted, subcontractors’ bids may be deemed irrevocable for long enough to protect the relying general contractor, without any need to resort to promissory estoppel. Indeed, these situations often highlight the difference between consideration and cause. The irrevocable offer theory would not have worked in this case, however, if the subcontractor revoked its bid after the period of irrevocability expired. But that problem is present with promissory estoppel too: The subcontractor can argue that reliance beyond the usual time was unreasonable and unforeseeable. Either way, the court had to deal with such arguments, and it did, saying laconically that revocation by Matherne when the Parish School Board wanted to negotiate might have “exposed” Matherne to some unspecified “legal action.” Even on these unusual facts, the civil law and common law would have come out the same, for the same reasons.

3. On the Cusp of Contract

Contractor cases generally involve a promise, and often an offer, but not a contract between the general contractor and the subcontractor. Many other cases also involve negotiations that have not ripened into an agreement, although intermediate promises have been made and relied on. These are jobs for promissory estoppel in many jurisdictions. As the doctrine of promissory estoppel has matured, it has come to be used in more situations, including those

263. Matherne, 915 F. Supp. at 824.
264. Cf. Palmer, supra note 8, at 56 (“Anglo-American doctrine [of equitable estoppel] was advantaged [over venire contra factum proprium] by accessible authorities setting forth distilled elements”).
265. See Mattar, supra note 7, at 137.
266. Matherne, 915 F. Supp. at 825. Might the court have been thinking about culpa in contrahendo, or some American equivalent? See generally Kessler & Fine, supra note 60. No basis for promissory estoppel is evident from the opinion.
that are closer to a completed, bargained-for contract. Sometimes a court may have trouble deciding whether the parties have reached an agreement. For example, the significance of particular facts may be unclear, or equally credible witnesses may tell different stories. In such cases promissory estoppel may allow the case to be resolved without deciding the hardest issues. Parties and courts have frequently invoked article 1967 in this broad range of situations, and not just in the subcontractor context. As Professor Herman predicted, lending arrangements have been especially fertile territory.

There is not much here for the student of promissory estoppel, the civil law, and the mixed jurisdiction. Recovery is often denied in this category of cases, and there is no indication in the facts of the Louisiana cases that culpa in contrahendo would have led to a different result. It does show that Louisiana has progressed into and beyond the middle-range evolution of the promissory estoppel doctrine. (As noted above, the exceptional legislation in Louisiana caused the state to skip the first stage of development, in which the courts focus the doctrine on gratuitous promises.) Professor Henderson noted as long ago

267. *See* Carter v. Huber & Heard, Inc., 657 So. 2d 409, 412 (La. Ct. App. 3d Cir. 1995) (no promise or reasonable reliance where manager moved to defendant’s locale after negotiations started but before final contract signed); Garner v. Hoffman, 638 So. 2d 324, 344-46 (La. Ct. App. 4th Cir. 1994) (court disbelieved that promise or agreement had been made, and reliance would have been unreasonable given lack of documentation and magnitude of transaction); South Cent. Bell Tel. Co. v. Rouse Co., 590 So. 2d 801, 804-06 (La. Ct. App. 4th Cir. 1991) (contract claim made at trial level but abandoned on appeal; detrimental reliance claim lost on appeal because defendant never actually promised to pay).

268. *See* Herman, *supra* note 6, at 732-34.

269. *See* Schell v. N.K. Enters., 688 So. 2d 68 (La. Ct. App. 1st Cir. 1997) (lender did not show that it detrimentally relied on defendants’ lease to the borrower); Academy Mortgage Co. v. Barker, Boudreaux, Lamy & Foley, 673 So. 2d 1209, 1212 (La. Ct. App. 4th Cir. 1996) (statement by defendant attorney that he would abide by client’s instruction to pay plaintiff lender out of proceeds of personal injury judgment held not a promise, and perhaps not relied on because of no reasonable basis for reliance); Lakeside Nat’l Bank v. Vinson Bros., 607 So. 2d 1009, 1011 (La. Ct. App. 3d Cir. 1992) (no reliance on alleged promise to forbear collection); Boes v. Elmwood Fed. Savs. & Loan Ass’n, 595 So. 2d 1189, 1190, 1194 (La. Ct. App. 5th Cir. 1992) (lender allegedly said it would obtain fire insurance, but plaintiff borrower knew no insurance had been obtained and would be unreasonable in relying; perhaps an equitable rather than promissory estoppel case); Menzie Tile Co., Inc. v. Professional Ctr., 594 So. 2d 410, 414, 416 (La. Ct. App. 1st Cir. 1991) (partly factual and partly promissory assertions about paying subcontractors from loan funds; detrimental reliance recovery against lender upheld); Scott v. Reed, 524 So. 2d 756, 759 (La. Ct. App. 3d Cir. 1988) (no reliance by lender on seller’s alleged promise not to foreclose vendor’s lien); Busby v. Parish Nat’l Bank, 464 So. 2d 374, 377-78 (La. Ct. App. 1st Cir. 1985) (no justifiable reliance on lender’s alleged promises to “help” or to forbear collection).


as the 1960s that the common law had reached the stage in which promissory estoppel would often be put to use in the context of bargains or bargaining, and Louisiana already has plenty of litigation in this category. Not much doubt had existed, though, even when article 1967 was new. Since the gratuitous realm was legislatively forbidden, promissory estoppel in Louisiana would largely apply in the context of onerous transactions, at least as an aboveboard matter.

4. Past the Cusp: Completed Bargains

Many of the cases cited in the preceding section are difficult to classify as involving completed bargains. Other cases involve situations where the parties had indeed reached a bargain. Sometimes an impediment undermines its legal effect, necessitating the use of promissory estoppel, but sometimes promissory estoppel is simply used to fortify a holding first made on a straight contractual theory. This fact raises the same question for the mixed law of Louisiana as for the pure common law. With promissory estoppel, who needs old-fashioned contract law? Or put in starker terms, generally attributed to Gilmore but laid by him at another's door, "Contract, like God, is dead." The common law has reached a consensus that the death pronouncement was rather an overstatement, and the civil law should not feel too threatened. But given their gravity, such statements deserve attention.

One group of cases involves bargains that were completed but that fail to satisfy the writing requirement of a statute of frauds. Professor Holmes views the use of promissory estoppel to avoid contract defenses, like the statute of frauds, as a particularly early application of the doctrine, and this specific job receives explicit recognition in the Second Restatement. Courts applying

272. See Henderson, supra note 38.

273. See Litvinoff, supra note 11, at 23 ("It must not be believed that detrimental reliance is grounds for enforcement only in situations where a contract would be gratuitous if there is a contract at all. Reliance may perform its efficient auxiliary function where the contract at stake is a business, that is onerous, contract.").

274. Gilmore, supra note 83, at 3. Gilmore designated Professor Stewart Macaulay the Lord High Executioner, assisted by others in the Wisconsin School. See id. at 105 n.1.


276. See Holmes, supra note 34, at 277.

277. See Restatement (Second) of Contracts § 139 (1981).
article 1967, however, have not expressed enthusiasm. The federal Fifth Circuit
intimated skepticism but avoided a square holding because plaintiff had not
shown any damages that were not speculative.\textsuperscript{278} Some of the \textit{Morris} litigation
suggested that article 1967 might be used to avoid the effects of the statute of
frauds,\textsuperscript{279} but in a related and more recent case, the supreme court put a damper
on the notion. Although it did not apply article 1967, the court found "no logical
distinction between the courts' absolute unwillingness to enforce a gratuitous
promise not made in the required form and the enforcement of an onerous
promise not made in the required form."\textsuperscript{280}

In this regard Louisiana has declined to use promissory estoppel in
a traditional way, but Louisiana is far from alone.\textsuperscript{281} Perhaps the continued role of
formalities in the civilian aspect of Louisiana law makes derogation from formal
requirements more serious, and perhaps the mixed nature of Louisiana law can
help explain the attitude of Louisiana courts. Another way the civil law may be
shaping judicial thought patterns is in the unstated—and perhaps unconscious—
rejection of consideration in \textit{Morris}. Surely a common law court could easily
find a "logical distinction" between an onerous transaction and a gratuitous one
where both lacked formalities. The common law has long accepted that
consideration can fulfill, at least in some degree, some of the same functions as
formalities.\textsuperscript{282} That the Louisiana Supreme Court would ignore this common law
distinction is remarkable for a common lawyer looking to Louisiana. Perhaps it
is reassuring to the advocates of the civil law in Louisiana. On the other hand,
the statute of frauds implicated by all of these cases is one from the Uniform
Commercial Code.\textsuperscript{283} Still, the requirement of form seems relatively safe in

\begin{itemize}
\item \textsuperscript{278} \textit{See} Levinson v. Charbonnet, 977 F.2d 930, 932 (5th Cir. 1992).
\item \textsuperscript{279} \textit{See} \textit{Morris II}, 580 So. 2d 1037, 1043 (La. Ct. App. 3d Cir. 1991) (suggesting
detrimental reliance claim survives statute of frauds defense). Another hopeful case for a
party seeking to avoid the statute of frauds is \textit{Baldwin v. Gibbens}, 635 So. 2d 1317, 1318-
19 (La. Ct. App. 4th Cir. 1994) (stock agreement), which would allow "estoppel" of an
undesignated type—but which would be promissory—to avoid a statute of frauds defense.
\textit{Baldwin}, however, is premised partly on the holding that expectancy damages (i.e., the
market value of stock, as opposed to specific performance) would not fall afoul the statute
of frauds even in a breach of contract action. One might question whether the holding
will be followed.
\item \textsuperscript{280} \textit{Morris v. Friedman}, 663 So. 2d at 25.
\item \textsuperscript{281} \textit{See} Hillman, \textit{supra} note 35, at 599; Holmes, \textit{supra} note 34, at 278-79.
\item \textsuperscript{282} \textit{See}, for example, the famous statement of O. W. Holmes, \textit{supra} note 84, at
215 ("Consideration is a form as much as a seal."). \textit{See generally} Lon L. Fuller,
\textit{Consideration and Form}, 41 \textit{COLUM. L. REV.} 799 (1941).
\item \textsuperscript{283} \textit{See} \textit{LA. REV. STAT. ANN.} \textsection 10:8-319(a) (West 1993). This provision is the
same as U.C.C. \textsection 8-319. Both the Louisiana and U.C.C. provisions have been abolished
by the 1994 revision of Article 8 of the U.C.C. \textit{See} 1995 \textit{LA. ACTS} 884 (codified at
\end{itemize}
Louisiana, and the longstanding contract defense of the statute of frauds appears to be alive and well.

Leaving aside the cases involving defective contracts, of usual and unusual varieties, a number of promissory estoppel cases could have been decided in traditional contract terms alone. Courts sometimes state holdings as a matter of contract, and then restate them as a matter of promissory estoppel. Also intriguing are a couple of cases that allow recovery under article 1967 when the party could not have brought a contract claim because the party had failed to perform his end of the bargain. All of these cases suggest that Louisiana may use promissory estoppel not only when there is a defective contract, and not only when there is no contract, but also when there is a perfect contract. Contract, a determined executioner might argue, is becoming irrelevant. Even the most

284. But see Oelking, supra note 145, at 1390 (emphasizing that Morris v. Friedman does not apply article 1967 and advocating a different result under the new article).

285. Cf. Act for the Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3 (Eng. 1677). It has been amended over the centuries; a summary is given in Restatement (Second) of Contracts statutory note (1981).

286. An unusual example is Law v. City of Eunice, 626 So. 2d 575, 577-78 (La. Ct. App. 3d Cir. 1993) (criminal defendant’s bargain with police officer because a plea bargain does not create a conventional obligation, court hesitates on contract action but suggests detriment reliance).

287. See Tabco Exploration, Inc. v. Tadlock Pipe & Equip., Inc., 617 So. 2d 606, 610 (La. Ct. App. 3d Cir. 1993) (court finds partner liable under partnership agreement and under detrimental reliance theory, which does not differ from contract theory); Autin’s Cajun Joint Venture v. Kroger Co., 637 So. 2d 538 (La. Ct. App. 1st Cir. 1994). Inasmuch as both sides were performing in Autin’s, the bargain appeared complete. See id. at 539-40. The situation is probably best viewed as casus omisssus; neither side contemplated that the Cajun mayonnaise manufactured by defendant for plaintiff would go bad so fast. See id. at 540. The case went to the jury on both contract and detrimental reliance theories, and the jury found detrimental reliance but limited recovery to what the defendant had already paid, which was apparently reliance damages. See id. 543-44.

Two other cases might also have stated their detrimental reliance holdings in terms of contract, although the characterization is less clear because the detrimental reliance claims were relatively unimportant. See Bernofsky v. Tulane Univ. Med. Sch., 962 F. Supp. 895 (E.D. La. 1997) (scattergun complaint stating numerous theories, mainly for employment discrimination), aff’d mem. (5th Cir. Jan. 8, 1998); Clark v. America’s Favorite Chicken Co., 916 F. Supp. 586 (E.D. La. 1996) (franchisee litigation involving bankruptcy).


290. This stage of promissory estoppel development is discussed extensively in Farber & Matheson, supra note 262.
ardent executioner might not find fault with these particular cases, given their
equities, but might be quick to wield the hatchet and dispatch the field of
contract.

Contract is not dead yet, though, any more in Louisiana, as a mixed
jurisdiction, than in the common law. In addition to the cases involving the
statute of frauds, other cases have also shown great restraint, carefully holding
contract law immune from attack by detrimental reliance or other quasi-
contractual theories. The Louisiana Supreme Court, after a start in the other
direction and despite countervailing equities, refused to allow promissory
estoppel to derogate from an express contractual term.291 The federal Fifth
Circuit has expressed similar sentiments, although its holding is less clear since it
is based on several grounds.292 Louisiana, in these respects, appears much like
other jurisdictions that have advanced far along the evolutionary path of
promissory estoppel: some cases might spark concern about the continued health
of contract law, but other cases seem as determined to keep the field of contract
vigorous.

Finally, the completed-bargain cases must include a couple of cases
involving error as a vice of consent,293 or put in common law terms, mistake.294
These cases show the power of promissory estoppel and its interaction with the
civil law, and they suggest that the civil law of contract remains vulnerable to
promissory estoppel. Although both cases concluded that the parties’ consent
had been vitiated by error, they allowed recovery to the plaintiffs under article
1967, using reliance as the measure of damages.295 The courts overlooked,
however, a specific Code article on point. article 1952 provides for determining
liability for damages in cases involving possible rescission for error. The
generality of article 1967, and the power of promissory estoppel, allow it to
usurp a job assigned to a more specific article.296 It is not hard to see the threat to
the Code-based civil-law method from the overarching import from the common
law.

In the error cases, the threat was realized even with judges who are
sensitive to the civil-law tradition. In cases of error, of course, *culpa in

291. *See Edwards v. Conforto*, 636 So. 2d 901, 907 (La. 1994) (majority op. on
reh’g).

292. *See Omnitech Int’l v. Clorox Co.*, 11 F.3d 1316, 1333 (5th Cir. 1994)
(refusing to allow detrimental reliance claim to derogate from express contract term in
context of integrated agreement where only reliance was performance of a contractually
assumed duty).

293. *See LA. CIV. CODE ANN. arts. 1948-1949 (West 1987).*

ch. 6.*

Cir. 1988).

296. I am grateful to Vernon Palmer for bringing this point to my attention.
contrahendo jumps to mind, and the BGB includes an article addressed specifically to these issues.\textsuperscript{297} A civil-law judge or scholar might ask whether culpa in contrahendo would work just as well. In one case, at least, the answer is a resounding “Yes.” The court notes that culpa in contrahendo has long been championed by academic writers. In finding article 1967 applicable, the court says that the German doctrine “finds codification through ‘detrimental reliance.’”\textsuperscript{298} Thus, the court holds that article 1967, based on section 90 of the Second Restatement,\textsuperscript{299} is culpa in contrahendo. That holding is a fitting way to complete the review of the jurisprudence in a mixed jurisdiction. Whether seen as common law promissory estoppel or civil law culpa in contrahendo, the Louisiana detrimental reliance doctrine is likely to provoke fears for some time to come that it is so broad-ranging as to be dangerous.

IV. MUSINGS ON PROMISSORY ESTOPPEL, THE CIVIL LAW, AND THE MIXED JURISDICTION

A. Theory and Practice: Is Promissory Estoppel Any Different When Attached to a Civil-Law Framework?

The distinction between Louisiana and other states is intriguing for comparatists. Not everywhere do courts equate promissory estoppel with culpa in contrahendo, a doctrine familiar in America only to scholars. In few places would legislative drafters identify promissory estoppel with venire contra factum proprium, a doctrine advanced because of its validating association with Roman law. These facts show not only the double perspective of the mixed jurisdiction but also demonstrate how a mixed jurisdiction can attempt to claim an apparent import as a native asset. Plus, the interplay of cause and promissory estoppel during the drafting of article 1967 is fascinating to study. The student of the mixed jurisdiction can observe comparative law in action, watching a doctrine that was conceived as a substitute for consideration be introduced into a jurisdiction that uses cause instead of consideration.

Still, while these unusual theoretical intricacies are instructive, we are left with the question of whether promissory estoppel is really any different when it is grafted onto a classical civil code. After all, the relation between consideration and promissory estoppel was no less problematic for the drafters of the First Restatement. Moreover, the difficult theoretical splice of cause and promissory estoppel has not had any impact on the application of the doctrine to concrete cases, even those that face conceptual questions like the distinction between delict and contract. The theoretical problem is real and provocative and

\textsuperscript{297} See BGB art. 122; supra notes 40-44 and accompanying text.
\textsuperscript{298} Keithley, 535 So. 2d at 507 n.2.
\textsuperscript{299} See supra notes 71-72 and accompanying text.
fully engaged the jurist-drafters. But the problem seems confined to the realm of theory. Certainly the theoretical framework to which promissory estoppel has been added differs markedly between Louisiana and other American states, but courts have no difficulty holding that article 1967 is just like promissory estoppel everywhere else in the country. 300

From this general conclusion that promissory estoppel is the same in Louisiana as elsewhere, one exception must be marked: the exclusion of many gratuitous promises from the reach of the doctrine. This exceptional rule might be linked to the unusual double heritage of Louisiana; it appears connected to the continuing ability of the civil law to enforce gratuitous promises through formalities. A review of cases decided before and after 1985, however, raises the question whether the distinction will remain salient. On some facts, courts have continued to find alternative devices to enforce family promises and apparent gifts, without the requisite formalities. Some cases might hearten advocates of the civil law, for some rely on codal principles that have a distinct civilian flair. A prominent example is the treatment of a remunerative donation as an onerous transaction if the donation is not overly generous. 301 Others reading these cases, though, may see a drift toward the same old undercurrent of cases that contorted gifts into bargains, or at least into onerous transactions. Similar cases were decided when promissory estoppel was not an aboveboard basis for liability and, in this sense, Louisiana has not moved from the orthodoxy of the 1950s. Given the broad range of cases in which promissory estoppel is applied, however, this exceptional quirk in Louisiana law is limited to a relatively confined area.

B. Assessing Doctrinal Evolution

If Louisiana law is not substantially different, one might still wonder whether its development has tracked the doctrinal evolution in other jurisdictions. In particular, if cause is much broader and more flexible than consideration, has promissory estoppel been used for fewer jobs in a mixed jurisdiction than in a common law jurisdiction? One might also ask if the conceptual breadth of cause has slowed the growth of promissory estoppel. The answers to these questions are perhaps a testament to the potency of promissory estoppel, and perhaps bear witness to another peculiarity of a mixed jurisdiction.

Arguably, the growth of promissory estoppel has been even more rapid in Louisiana than elsewhere. In 1987, two years after article 1967 became


301. See LA. CIV. CODE ANN. arts. 1525-1526 (West 1987).
effective, the Second Circuit seemed to be at an early stage of doctrinal development, holding that an invitation for bids could not support a detrimental reliance claim unless it could be construed as an offer. This conflation of contract and promissory estoppel notions, especially focused on the consent stage of contract formation, coincides with relatively early notions in common law jurisdictions. The common law progressed well beyond that stage in cases like *Hoffman v. Red Owl Stores*; although the parties never reached a definite agreement in *Hoffman*, the court allowed recovery in promissory estoppel.\(^{302}\) Louisiana courts arrived at that stage quickly, certainly by the 1995 *Matherne* case.\(^{303}\) Jurisprudence also shows that promissory estoppel, as applied in Louisiana, does the usual wide range of jobs, with the possibility of occasional, minor exceptions. One common law scholar who has surveyed all American jurisdictions places Louisiana with a dozen other jurisdictions in the most advanced stage of doctrinal development, even beyond the stage represented by *Hoffman*.\(^{304}\) This rapid doctrinal growth may indicate a peculiar supercapacity available to a mixed jurisdiction. Interestingly, another mixed jurisdiction, Puerto Rico, also appears in the most advanced group.\(^{305}\)

Even assuming that such a supercapacity for rapid growth exists, some might consider it dearly bought. We can only speculate, but the most likely explanation for rapid growth is that nearby jurisdictions developed the doctrine while Louisiana resisted an explicit common law infiltration. When Louisiana eventually decided to adopt promissory estoppel, the doctrine was no longer the stripping it had been earlier in the twentieth century. Louisiana courts could be expected to use the mature and broad-ranging doctrine that had developed in the meantime, and they have.

In evaluating the pace of doctrinal development, one eye ought to be cast toward the next step. The introduction to this paper summarizes orthodoxy, and even widely accepted heresy, about promissory estoppel. That theme resurfaces here. Promissory estoppel in Louisiana is now legislatively tied to reliance. The introduction of the doctrine into the Code was largely justified, it was argued, by similar principles protecting detrimental reliance in Louisiana and several civil-law countries. The link between promissory estoppel and detrimental reliance is orthodoxy, both in Louisiana and the common law. Meanwhile, the common law literature has continued to burgeon. Provocative articles have suggested that common law promissory estoppel is independent of detrimental reliance.\(^{306}\) Louisiana does not appear to have arrived at such a point.

\(^{302}\) *See* Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965).

\(^{303}\) *See* Matherne, 915 F. Supp. at 824 (where not clear whether parties ever reached agreement, court used detrimental reliance rather than straining to find a contract).

\(^{304}\) *See* Holmes, *supra* note 34, at 294 n.75.

\(^{305}\) *See* id.

\(^{306}\) The most prominent articles in this vein are probably Farber & Matheson, *supra* note 262, and Yorio & Thel, *supra* note 35. Although these articles at one point
however. Alternatively, some scholarship suggests that common law courts have soured on promissory estoppel, and that reliance requirements have been heightened so that promissory estoppel claims are generally unsuccessful. Some Louisiana cases, especially in the commercial context, might be so read, but no clear trend has yet emerged. In a few more years, the status of promissory estoppel in Louisiana might be reviewed in light of further evolution in the common law. At that time, the nature of Louisiana as a mixed jurisdiction might also be revisited with, as always, an eye to comparative legal development.

C. Conclusions on the Nature of a Mixed Jurisdiction

With promissory estoppel, two opposing forces are at work in the mixed jurisdiction. One is the ability and willingness to reach to another system for new and efficient ways of handling recurring legal problems. Choppin v. Labranche, which used estoppel to enforce a promise in the nineteenth century, is an example. The opposing force is the predilection to resist innovations that are perceived as foreign. Ducote v. Oden is an example of this tendency. Although Choppin shows a seemingly unconscious meeting of the civil law and the common law, in Ducote the court was quite aware of the interplay, or what we have called "comparative law in action." The consciousness of the decisionmakers, however, should not be given too much weight from these two examples; awareness does not necessarily equal resistance. The introduction of promissory estoppel into the Civil Code is surely an instance of reaching to another system for an efficient solution, and the redactors were more than conscious that comparative law had sprung to life. They were passionate, but they did not allow their passion to prevent a solution that would add to the mixture of Louisiana law.

These competing tendencies—to reach for the new and to resist the foreign—allow doctrines to mature outside the mixed jurisdiction before being accepted into the law of the state. The delay in adopting new doctrine may be appeared to have led to a "new consensus" on promissory estoppel, Randy E. Barnett, The Death of Reliance, 46 J. LEGAL Educ. 518, 522 (1996), more recently these contentions have been undermined. See Sidney W. DeLong, The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch 22, 1997 Wis. L. Rev. 943; Hillman, supra note 35.

307. See generally DeLong, supra note 306; Hillman, supra note 35, at 596. The articles of Professors DeLong and Hillman were published when I had already completed much of the work on this paper. Although I have tried to revise the paper to take account of their views, I fear that I have not been able to give their works the weight they deserve.

308. See Apr. 1979 Draft, supra note 71, at 7; Litvinoff, supra note 11, at 22-23.


310. See Herman, supra note 6, at 717 (construing Smith, supra note 57, at 241).

extended by the heightened status of legislation in the civil law, as legal innovation has to await legislative impetus. These musings, of course, must contain an element of speculation. Still, some might argue that this effect is stifling, resulting in a slow, outdated law that lacks the newest innovations. Such a view is not necessary however. An alternative view might see the same result as healthy, leading to more durable and better engineered legal tools. Both perspectives are persuasive. Although they are opposed, they are not contradictory. Such is the tension inherent in a mixed jurisdiction.