

**LINCOLN MEMORIAL UNIVERSITY  
LAW REVIEW  
BLOG – “OFF THE RECORD”**

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VOLUME 9

FALL 2021

ISSUE 1

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**#MeToo Meets Estoppel: How Bill Cosby’s  
Conviction Got Tossed by Court’s Application  
of Equitable Doctrine**

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“I plead the Fifth.” We’ve all jokingly uttered this phrase. We have laughed at the *Chappell’s Show* skit featuring Dave Chappell’s character “Tron Carter” escaping the courtroom with a shout of “I PLEAD THE FIFTH!”<sup>3</sup> But what does it mean? And what are the implications for a defendant

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<sup>3</sup> Comedy Central, *Chappell’s Show – Tron Carter’s “Law & Order” – Uncensored*, YOUTUBE (Mar. 1, 2018), <https://www.youtube.com/watch?v=HeOVbeh2yr0>.

when a governmental office negotiates immunity from prosecution in exchange for incriminating testimony?

Recently, Bill Cosby walked from a Pennsylvania prison a free man to the shock and chagrin of many. The trial centered on allegations made by one woman, Andrea Constand, who accused Cosby of assault in 2004.<sup>4</sup> In 2005, Ms. Constand approached the Montgomery County prosecutor about Cosby's advancements toward her at various times between 2002 and 2004.<sup>5</sup> Evaluating the case, District Attorney Bruce Castor determined that the inconsistencies, lack of corroboration, and diminished reliability of the evidence would make the case difficult to win.<sup>6</sup> Instead, Castor suggested that a positive outcome for Ms. Constand may lie in a civil judgment. "[A]s the sovereign," he offered Cosby, in exchange for his testimony in a civil trial, immunity from prosecution.<sup>7</sup>

The agreement was memorialized not in a traditional proffer letter but a press release, signed by D.A. Castor.<sup>8</sup> The civil trial settled for \$3.38 million and remained under seal until 2015.<sup>9</sup> Before the settlement, Cosby admitted in four separate depositions that he obtained Quaaludes to use on women with whom he wanted to have sex.<sup>10</sup>

Although Castor remained true to his promise in the press release and declined to charge Cosby, his successor, D.A. Risa Ferman, reopened the investigation in 2015, upon the unsealing of the civil trial records.<sup>11</sup> After the new D.A. brought charges against Cosby, Cosby moved for habeas corpus relief seeking dismissal of the criminal charges based on D.A. Castor's agreement not to prosecute.<sup>12</sup>

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<sup>4</sup> Commonwealth v. Cosby, 2021 Pa. LEXIS 2761, \*1 (Penn. 2021).

<sup>5</sup> *Id.* at \*3-6.

<sup>6</sup> *Id.* at \*13-14.

<sup>7</sup> *Id.* at \*15.

<sup>8</sup> *Id.* at \*17-21, \*29.

<sup>9</sup> *Id.* at \*24.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*25.

<sup>12</sup> *Id.* at \*31.

The trial court denied the motion, finding no agreement and failure to follow strict statutory requirements, creating “an incomplete and unauthorized contemplation of transactional immunity.”<sup>13</sup>

The criminal trial began in April of 2018 after “a number” of women (60)<sup>14</sup> accused Cosby of drugging and sexually assaulting them.<sup>15</sup> The trial resulted in a conviction on three counts of aggravated incident assault, with the court imposing a sentence of three to 10 years.<sup>16</sup> On appeal of his conviction, the Superior Court of Pennsylvania explicitly held that “Cosby failed to cite sufficient authority to establish that a prosecution may be barred under a promissory estoppel theory.”<sup>17</sup>

In June 2021, the state’s high court reversed the decision and ruled that Cosby was wrongly convicted of the assault charges. The Pennsylvania Supreme Court held that using Cosby’s testimony from a civil trial to convict him in a later criminal proceeding violated his Fifth Amendment rights.<sup>18</sup> A prosecutor promised not to pursue a criminal case and Cosby relied on that promise – to his detriment.

If this all seems like a first-year Contracts class – a proffer of immunity, a dispute about whether a statement in the newspaper constitutes a written agreement, a purported acceptance, and detrimental reliance – you are right. If you are surprised, perhaps you should not be. Traditional principles of contract law govern many areas of criminal law, including plea agreements and, more recently, proffers of immunity.<sup>19</sup>

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<sup>13</sup> *Id.* at \*50.

<sup>14</sup> Sydney Ember and Matt Stevens, ‘Overwhelmed and Devastated’: Cosby’s Accusers on Decision to Free Him, N.Y. TIMES (June 30, 2021), available at <https://www.nytimes.com/2021/06/30/arts/television/cosby-accusers-react.html>.

<sup>15</sup> Cosby, 2021 Pa. LEXIS at \*56.

<sup>16</sup> *Id.* at \*69.

<sup>17</sup> *Id.* at \*77.

<sup>18</sup> *Id.* at \*129-30.

<sup>19</sup> United States v. Robinson, 924 F.2d 612, 613 (6th Cir. 1991).

Thus, an offer of immunity functions much like any other offer in the law of contracts. A person who relies on an offer, and in doing so gives up the valuable privilege against self-incrimination, may successfully use the equitable doctrine of promissory estoppel in a criminal proceeding to prevent the statement's use. But how? And why?

The "how" begins with the Fifth Amendment to the United States Constitution, which protects an individual against self-incrimination.<sup>20</sup> In other words, the privilege gives an individual the right to refuse to answer any questions or make any statements that could be used in a criminal proceeding to help establish that the person committed a crime.<sup>21</sup> A person may exercise the privilege in many settings including criminal cases, civil cases, administrative hearings, and investigations.<sup>22</sup> The privilege may be invoked whenever a person has a reasonable fear that providing truthful testimony might incriminate him in a future criminal proceeding.<sup>23</sup> The court determines whether the privilege is justified, given the situation.<sup>24</sup>

Sometimes, however, a prosecutor wants to compel an individual to testify or provide a potentially incriminating statement.<sup>25</sup> Perhaps there is another, more culpable person to prosecute, or, like Bill Cosby's case<sup>26</sup>, an accompanying civil action offers a meaningful outcome to the victim. In the face of the Fifth Amendment privilege against self-incrimination, prosecutors, and district attorneys have a powerful tool to obtain desired statements that may implicate criminal activity: immunity. Proffers of immunity, at the federal level, almost always reduced to a letter, are common practice to obtain useful

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<sup>20</sup> U.S. CONST. amend. V.

<sup>21</sup> *Braswell v. United States*, 487 U.S. 99, 109 (1988).

<sup>22</sup> *United States v. Balsys*, 524 U.S. 666, 672 (1998).

<sup>23</sup> *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

<sup>24</sup> *United States v. Redhead*, 194 F. App'x 234, 236 (5th Cir. 2006) (citing *Hoffman v. United States*, 341, U.S. 479, 486-87 (1951)).

<sup>25</sup> *United States v. Pelletier*, 898 F.2d 297, 301 (2d Cir. 1990).

<sup>26</sup> *Cosby*, 2021 Pa. LEXIS at \*14.

statements that are potentially incriminating.<sup>27</sup> Proffers of immunity protect the individual from criminal prosecution but can be used against a witness in other settings.<sup>28</sup> They can be used in proceedings to consider revocations of licenses to practice professions or to convict in the “court of public opinion.”<sup>29</sup> To be sure, the risks and rewards of immunity are several—for both promisor and promisee. The promisor is giving up the ability to use the statement in a prosecution—and sometimes is giving up the right to prosecute entirely. The promisee is waiving a constitutional right—the right against self-incrimination—in exchange for a lighter sentence, probation, or even liability in a civil case.

There are multiple forms of immunity, and each comes with its own “reward.”<sup>30</sup> The government may offer transactional immunity or derivative use-immunity. Derivative use immunity covers the same ground as the Fifth Amendment, preventing a prosecutor from using the immunized statement directly against an individual witness or using information indirectly ascertained from said statement against the witness.<sup>31</sup>

Transactional immunity, sometimes called blanket immunity, exceeds the confines of the Fifth Amendment, and grants complete immunity for any transactions revealed in the testimony, even if the government finds independent evidence that the witness committed the crime.<sup>32</sup> Transactional immunity is only available to state proceedings—the federal statute 18 U.S.C. § 6002 makes no provision for transactional immunity. Transactional immunity is the most expansive, and most

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<sup>27</sup> *Kastigar*, 406 U.S. at 447.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *McKissic v. Birkett*, 200 F. App'x 463, 466 (6th Cir. 2006).

<sup>31</sup> *Kastigar*, 406 U.S. at 453.

<sup>32</sup> *See, e.g., United States v. Fitch*, 964 F.2d 571, 575-76 (6th Cir. 1992) (“Transactional immunity is full immunity from prosecution for any offense to which the testimony relates,” and it “prohibits the government from prosecuting the defendant at any time with respect to incriminating matters that the witness disclosed.”).

valuable, form of immunity for those who may incriminate themselves with testimony in another proceeding. A prosecutor is proposing an agreement. In exchange for truthful (but self-incriminating) testimony, the defendant will not be prosecuted, no matter what other evidence may be discovered.

Of course, the promise may have conditions precedent or conditions of performance. An individual must promise to give not just testimony but *truthful* testimony in the exchange.<sup>33</sup> Failure to perform can cause a breach, leading to many consequences including the use of statements against the offending person's interests.<sup>34</sup> Still, due process demands a full performance by a promisee should result in the full performance by the promisor also—immunity, in the manner contemplated in the agreement.<sup>35</sup>

To say the least, any offer of immunity, whether transactional or derivative-use, requires careful consideration. A promisee must rely on the promisor, and in that reliance he or she must give up one of the most important privileges provided in the United States Constitution—the privilege against self-incrimination. In this way, it is a binding contract, pledging a promise to perform in exchange for something of value.<sup>36</sup>

So where does promissory estoppel play in?

“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”<sup>37</sup>

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<sup>33</sup>*Fitch*, 964 F.2d at 574 (describing the terms of an immunity agreement governing the determination of whether a breach occurred).

<sup>34</sup> *Id.*

<sup>35</sup> *Fitch*, 964 F.2d at 576.

<sup>36</sup> *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986).

<sup>37</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

Anyone who has ever read a Restatement then inevitably asks himself or herself: "So, what did that mean?" This article shall strive to answer the question.

At the risk of oversimplification, promissory estoppel has three elements: (1) a promise that the promisor reasonably expects to induce action or inaction, (2) actual action or inaction by the person to whom the promise was made, and (3) that injustice can *only* be avoided by enforcement of the promise. Let us take the elements, often dubbed foreseeability, detrimentality, and avoidability, in turn.

The first element requires that the person making the promise, the promisor, have been able to reasonably foresee the reliance on his promise by the person to whom the promise was made, the promisee. The promisor is affected only by the reliance that he does or should foresee.<sup>38</sup> Second is the requirement that the promisee have *actually* relied on the promise made in the first element to his own detriment. If the promisee relies on the promise made, be it through action or inaction, and the failure to carry through on the promise would harm the relying party, then the only question left is on the satisfaction of the third element. If the detrimental reliance of the promisee can be mitigated through another means, promissory estoppel is unnecessary and unavailable to him; yet, if injustice can be avoided only by enforcing the promise against its maker, courts employ the equitable doctrine of promissory estoppel.

As then-Judge Cardozo put it in 1927, the doctrine of promissory estoppel "survives as one of the distinctive features of our legal system" by allowing courts to enforce the public policy that for the promisor to abandon his word is a "breach[] of faith towards the public."<sup>39</sup> More recent years have seen a rise in the use of the once-civil-only doctrine used in criminal cases. Informal immunity agreements between a prosecutor and a

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<sup>38</sup> *Id.* cmt. b.

<sup>39</sup> *Allegheny College v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 175 (N.Y. 1927).

defendant are judicially enforceable much as other contracts.<sup>40</sup> The obligations of such agreements are subject to the basic principles of contract law as well as principles of equity described above. Under some circumstances, a promise from a prosecutor may be enforced on equitable grounds rather than contract principles when a defendant detrimentally relies on the government's promise and sacrifices due process guarantees. And that is exactly what happened with Bill Cosby.

While much of the debate surrounding Mr. Cosby's appeal centered on whether then-D.A. Castro and Mr. Cosby reached a formal agreement (as memorialized in a press release), Pennsylvania's highest court found the *post-hoc* attempts to explain the alleged agreement or characterize it largely immaterial.<sup>41</sup> Focusing instead on principles of equity in the contract, the court looked at the elements of promissory estoppel. The court noted the District Attorney's "patent intent to induce Cosby's reliance upon the non-prosecution decision."<sup>42</sup> Indeed, the court found that Cosby's deposition testimony came from his reasonable belief that D.A. Castor's decision not to prosecute him meant that the potential risk of criminal punishment no longer existed<sup>43</sup>. Cosby actually relied, to his detriment, upon the assertion that he would not be prosecuted.<sup>44</sup> The deposition testimony provided Constand's civil attorneys with evidence of past use of drugs to facilitate sexual assaults.<sup>45</sup> This information hindered his ability to defend the suit.<sup>46</sup> That met the first element of a promissory estoppel claim – actual reliance on a promise.

Contract law instructs us the next question we must ask is whether that reliance was reasonably expected by the

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<sup>40</sup> State v. Howington, 907 S.W.2d 403, 405 (Tenn. 1995).

<sup>41</sup> *Cosby*, 2021 Pa. LEXIS at \*104.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*111.

<sup>44</sup> *Id.* at \*112.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

promisor.<sup>47</sup> The Pennsylvania Supreme Court held that it was. The record, the court said, left no doubt that D.A. Castor reasonably expected, and in fact intended Mr. Cosby to waive his Fifth Amendment right. His actions were specifically designed to reach such a result.<sup>48</sup> D.A. Castor expected and indeed hoped that Mr. Cosby would rely on the promise of non-prosecution to secure a favorable outcome in a future civil suit with Ms. Constand as a plaintiff.<sup>49</sup>

Finally, detrimental reliance requires a reasonable reliance by the promisee. The court examined whether Mr. Cosby's waiver of the Fifth Amendment privilege was a reasonable reliance on D.A. Castor's promise of non-prosecution.<sup>50</sup> The court held Mr. Cosby relied on the advice of his counsel in deciding to waive his privilege as well as a promise of a public official.<sup>51</sup> This is a reasonable decision based on all available information and advice.<sup>52</sup> Indeed, Mr. Cosby's reliance must be reasonable because to hold otherwise would mean anyone in a similar position should disbelieve an elected district attorney's public statement and ignore the wisdom of his own counsel.<sup>53</sup> The court found such understanding of the word "reasonableness" untenable.<sup>54</sup> In other words, Mr. Cosby successfully proved each element of a claim of promissory estoppel. The use of his deposition testimony against him at a subsequent criminal trial was improper, and the appropriate remedy was specific performance — adherence to the agreement not to prosecute Mr. Cosby.<sup>55</sup> Mr. Cosby walked free.

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<sup>47</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

<sup>48</sup> *Cosby*, 2021 Pa. LEXIS at \*113.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*113.

<sup>51</sup> *Id.* at \*114.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*115.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*120.

After covering the “how” question, you may still be asking “why?” The answer lies in public policy, and much like promissory estoppel, equity. Acknowledging prosecutors’ tremendous discretion and authority, the Supreme Court recognizes a special weight must be accorded their assurances.<sup>56</sup> Indeed, public policy requires enforcing a prosecutor’s promise reasonably relied upon by a defendant. State and federal prosecutors grow increasingly reliant on proffers of immunity in exchange for testimony to convict a person posing a bigger threat to the public. Due process demands the value of the tool must be balanced against the waiver of a constitutional privilege. The usefulness of immunity agreements—a weapon for prosecutors to secure necessary information—would be neutralized if the promise is perceived as unreliable.<sup>57</sup> Citizens must be able to rely on the promise of a public official; the public justifiably expects to rely on the promise of these individuals when waiving a constitutional privilege.<sup>58</sup> Indeed, the “why” is perhaps the most important part. Prosecutors value immunity agreements, and so do defendants. Just as a prosecutor must rely on performance of the promise, so too must a defendant. Though the result in *Pennsylvania v. Cosby* seems unfathomable, that is, a man accused of sexually assaulting at least 60 women walked free after a jury of his peers found him guilty, the result is rooted in principles of law. Society should, and must, protect the constitutional rights of the people. State prosecutors must use necessary tools, including proffers of immunity, to secure public safety. In turn, we must have faith in the word of state actors and reasonable reliance on those agreements. Due process depends upon it.

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<sup>56</sup> *Santobello v. New York*, 404 U.S. 257 (1971).

<sup>57</sup> *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986) (quoting *Dube v. State*, 275 N.E. 2d 7, 11 (Ind. 1971)).

<sup>58</sup> *Bowers*, 500 N.E.2d at 204.