St. John's Law Review

Volume 89, Spring 2015, Number 1 Article 3

The Justice Element of Promissory Estoppel

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INTRODUCTION

> [U]nlike conventional contract analysis, application of promissory estoppel as expressed in section 90 requires that the issue of injustice be specifically addressed.[1]

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Promissory estoppel[2] has evolved as a mechanism to enforce non-bargained for, relied upon promises. It is considered a secondary rule of enforceable promises and as a narrow and limited substitute for consideration.[3] Promissory estoppel is categorized as a contract, tort, or equitable doctrine and classified, accordingly, as promise-based, assent-based, reliance-based, or equity-based liability.[4]

The law requires that four elements be present in order to invoke the doctrine of promissory estoppel: First, there has to be a clear, definite, and unambiguous promise; second, the promisor must have had reason to expect reliance on the promise; third, the promise must have induced such reliance and a consequent detrimental change of position; and fourth, injustice can be avoided only by enforcement of the promise.[5]

The fourth element, which will be referred to as the justice element, is the subject matter of this Article.[6] The first Part explores the current case law and scholarship in this matter. This Part concludes that justice is considered an insignificant element of promissory estoppel in both contract literature and court opinions, and it links this conclusion to the insignificant role of promissory estoppel in contract law in general. The second Part suggests that justice should play a more prominent and meaningful role in promissory estoppel by adopting a theory of distributive justice. Thus, justice requires not only balancing between the promisee and the promisor, but also that social

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[1] Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1265 (1998).

[2] Section 90 of the Restatement (Second) of Contracts provides:

> 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.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also id.* § 139; *id.* § 139 cmt. a ("This Section is complementary to § 90 . . . .").

[3] Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER, RACE & JUST. 47, 53 (2013).

[4] *Id.* at 56; *see also* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 44 (1997); STEPHEN A. SMITH, CONTRACT THEORY 233 (2004).

[5] E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.19, at 167 (3d ed. 2004); ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.9, at 29 (Joseph M. Perillo ed., rev. ed. 1996) [hereinafter HOLMES, CORBIN ON CONTRACTS].

[6] For justice in contract law, see generally Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U.L.Q. 471 (2005).

considerations and public policy—such as the power dynamics between the parties, their relations, and the allocative implications—should be taken into account. Accordingly, courts should actively promote justice in the formation of contract process rather than minimally preventing injustice by enforcing the promise. This is not only a change in the application of promissory estoppel; a robust justice element will also lead to making promissory estoppel a more meaningful doctrine of contract formation.

Consider *Dickens v. Equifax Services Inc.*[7] as an example. An employee was made an offer to relocate from Phoenix to Denver.[8] His supervisor promised that he would be promoted if he moved, that he would be a manager, that he would receive annual pay increases and annual bonuses, that the amount of his bonus would compensate for the loss of his wife's income, and that he would continue to have a career with the company until age sixty-five.[9] In reliance on this promise, the employee gave up his job in Phoenix and sold his home.[10] His wife quit her job, and they moved to Denver.[11] Subsequently, he was terminated on his fifty-fifth birthday.[12] The court dismissed his promissory estoppel claim, concluding that the supervisor's statements were not sufficiently definite to be legally enforceable promises for purposes of establishing promissory estoppel.[13] These statements were little more than vague assurances or unsupported predictions, and thus the employee's reliance on these statements was unreasonable.[14] The court did not consider whether enforcing the promise was warranted to prevent injustice.

This decision is problematic since it does not protect employees and it allows employers to benefit from an employee's change of position, which is based on the employer's promise, and later deny the promise.[15] In contrast, this Article concludes that such promises should be enforced. This Article proposes that the

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[7] No. 95-1217, 1996 WL 192973 (10th Cir. Apr. 22, 1996).
[8] *Id.* at *1.
[9] *Id.* at *1, *5.
[10] *Id.* at *1.
[11] *Id.* at *5.
[12] *Id.* at *1.
[13] *Id.* at *6.
[14] *Id.*
[15] Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 27 (1999).

court should have considered the power imbalance between the parties and the long-term employment.[16] The court should have taken into account not only the employer's promise and the employee's reliance, but also their relations and the power dynamics between the parties. The court should have used the justice element to promote justice by accepting the employee's promissory estoppel claim. Rather than maintaining the power relations between employees and employers, the courts should police misuse of power and actively promote more egalitarian employment relations. This will not only empower the employees vis-a-vis the employers, but it will also enable employees to enforce the promises made to them.[17] Thus, employees will be able to rely on employers' promises and to benefit from contracts.

The contribution of this Article is threefold. First, it critiques the current case law for ignoring and neglecting the justice element of promissory estoppel. This goes against the specific wording of section 90 of the Restatement (Second) of Contracts and also against promissory estoppel's rationale and purpose. Contrary to this approach, this Article suggests a robust justice element based on a theory of distributive justice.

Second, a more robust justice element will make the doctrine of promissory estoppel more meaningful. This will result in better protecting reliance, furthering trust and cooperation among parties, empowering disadvantaged parties, and making the formation of contract a more flexible and conscience process. Furthermore, this author's previous Article, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, advocated the importance of promissory estoppel[18] and stressed that this doctrine serves to police power imbalances between parties. More generally, it enables underprivileged promisees[19] to enforce promises and to benefit from contracts. Accordingly, it makes contract law more inclusive by enforcing rather than excluding these promises. This Article is a follow-up article dealing with how this can work in practice, meaning how promissory estoppel

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[16] Mr. Dickens was employed by Equifax Services, Inc. for thirty-two years from 1960 until 1993. *Dickens*, 1996 WL 192973, at *1.

[17] Dickens did not base his claim on breach of contract. *Id.*

[18] Gan, *supra* note 3, at 52.

[19] I use the term underprivileged to mean parties lacking in bargaining power, which are often times poor or minority people but not necessarily. For example, employees usually have less bargaining power than employers though the employees may be white, educated, and middle class.

should become a more meaningful doctrine. This Article suggests that a robust justice element will make promissory estoppel a more significant doctrine of contract formation.

Third, this Article suggests a novel rationale for applying distributive justice in contract law. While many scholars negate the arguments against such application, this Article offers a different approach to supporting distributive justice consideration under a contract law doctrine. In her previous article, this author shows how promissory estoppel has a disparate impact on different social groups.[20] That article argues that promissory estoppel is mainly used by underprivileged promisees, such as employees. Since these promisees cannot satisfy the consideration requirement, they cannot claim breach of contract; as such, promissory estoppel is their only way to enforce the promises made to them. Building on this groups-based analysis, this Article argues that promissory estoppel should apply distributive justice considerations. Because promissory estoppel is applied differently by different social groups, this doctrine should address these allocative consequences.

I. JUSTICE—AN INSIGNIFICANT ELEMENT OF PROMISSORY ESTOPPEL

This Part briefly outlines promissory estoppel case law and scholarship on the matter of the justice element. It explores the following questions: What does avoiding injustice "only by enforcment of the promise" mean? How do courts interpret this? What theories of justice do they use? What is the relation between the justice element and the other three elements of the promissory estoppel doctrine? This Part establishes that justice is an insignificant, sometimes even ignored, element of promissory estoppel. This conclusion is related to a more general phenomenon, which is that promissory estoppel is considered an insignificant doctrine of contract formation.

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[20] Gan, *supra* note 3, at 102.

A. Avoiding Injustice

Although this Article uses the term "the justice element," according to section 90 of the Restatement (Second) of Contracts, the aim of promissory estoppel is to avoid injustice. The wording of section 90 seems to minimize the function of the promissory estoppel doctrine. First, enforcing promises under this doctrine should be used only as a last resort. The court will enforce a promise only to avoid injustice; however, if the court can achieve this goal by another means or if no injustice is expected, then the promise should not be enforced. Second, the court is not required to actively promote justice in contract formation, but rather to minimally avoid injustice.[21] Rather than affirmatively and effectively pursuing justice, the courts make do with only preventing injustice. Thus, section 90 inserts only a limited notion of equity and justice into the contracting process.

B. An Ignored Element

The justice element of promissory estoppel has received little attention by judges.[22] While focusing mainly on the promise made by the promisor and on the reliance by the promisee, many opinions neglect the justice element of this doctrine.[23] As a recent empirical study of promissory estoppel cases concluded, "[M]ost judges require the existence of both promise and reliance before allowing a promissory estoppel claim to proceed, although surprisingly few judges speak in terms of 'equity' or 'justice.' "[24] For example, one opinion states:

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[21] Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) ("It is perhaps worth noting that the test is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent an injustice. As has been observed elsewhere, it is easier to recognize an unjust result than a just one, particularly in a morally ambiguous situation.").

[22] FARNSWORTH, *supra* note 5, § 2.19, at 180 ("This vague qualification has been discussed in relatively few cases."); *see* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 312 (5th ed. 2011) ("There is very little discussion of this requirement in the case law.").

[23] ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 220 (3d ed. 2002) ("In most cases, courts ignore this third element in promissory estoppel and focus instead on whether a clear and definite promise was made and whether the promisee reasonable [sic] relied on the promise.").

[24] Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 672 (2010). For a discussion on these findings, see *id.* at 702–04.

> The doctrine of promissory estoppel which will create a cause of action has two fundamental elements which must be proved by the plaintiff. First, there must be proof that there actually was a promise and, second, that the plaintiff relied upon that promise and took action to his detriment.[25]

This court completely ignored the justice element and reduced the doctrine of promissory estoppel to two elements.[26]

Some judges stress that promissory estoppel is an equitable doctrine that gives the courts discretion in its application.[27] However, they do not further discuss how this discretion should be exercised and what theory of justice should be applied. Other judges contend that when the promise and reliance prongs are

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[25] Haveg Corp. v. Guyer, 226 A.2d 231, 236–37 (Del. 1967); *see also* Metro. Convoy Corp. v. Chrysler Corp., 208 A.2d 519, 521 (Del. 1965); Martin-Senour Paints v. Delmarva Venture Corp., No. CIV.A. 86C-JA11, 1988 WL 25376, at *2 (Del. Super. Ct. Mar. 14, 1988).

[26] *See* Cha Plake Holdings, Ltd. v. Chrysler Corp., No. 94C-04-164-JOH, 2002 Del. Super. LEXIS 31, at *133–37 (Del. Super. Ct. Jan. 10, 2002), *aff'd in part, rev'd in part*, Chrysler Corp. v. Chaplake Holdings, Ltd., 822 A.2d 1024 (Del. 2003). The court's instructions to the jury included this element of promissory estoppel: "Plaintiffs were injured by acting or refraining from acting in reliance upon Chrysler's promises." *Id.* at 111. Chrysler argued that the court should have included an additional element according to which "the promise is binding because injustice can only be avoided by its enforcement." *Id.* at 134. The court rejected this argument, holding:

> First, this proffered additional element is not part of an action at law for promissory estoppel. Second, in a dispute not involving an employment situation, the element of preventing injustice is not one that need be proven. . . . What the Supreme Court said in *Quimby* is not that avoiding injustice is an element to be proven but is the policy underpinning for the cause of action for promissory estoppel. For these reasons, the Court did not err by not including this manifest injustice element in its instructions. But, the facts of this case are a good example of the policy behind the cause of action.

Id. at 134, 136–37; *see Chrysler Corp.*, 822 A.2d at 1034 ("The prevention of injustice is the 'fundamental idea' underlying the doctrine of promissory estoppel. Accordingly, the trial judge implicitly found that this element was satisfied, and the court did not err by failing to submit this element of the *Lord* test to the jury." (citation omitted)).

[27] *See, e.g.*, US Ecology, Inc. v. State, 28 Cal. Rptr. 3d 894, 901–02 (Cal. Ct. App. 2005); Scott v. Savers Prop. & Cas. Ins. Co., 663 N.W.2d 715, 729–30 (Wis. 2003) ("When making a policy decision under the third element of the promissory estoppel test—that is, determining whether an injustice can be avoided by enforcing the promise—a court 'must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly.' . . . Permitting the plaintiffs to obtain damages from an immune public official through the back door opened by a claim of promissory estoppel contravenes the government immunity policy of this State set forth . . . and consequently would not serve the ends of justice.").

met, then the justice prong is also satisfied.[28] Thus, the justice element is redundant and is established by a showing of detrimental reliance on a clear and unambiguous promise. Contrary to the specific language of section 90 that requires courts to examine whether enforcement is warranted to prevent injustice, courts rarely consider justice in their holdings.

Scholarly literature has similarly only rarely addressed the justice prong of promissory estoppel. Some scholars categorize promissory estoppel as a promise-based or assent-based liability, while others categorize promissory estoppel as reliance-based liability.[29] Consequently, in spite of this difference of opinion, both schools of thought tend to focus mainly on the promise and on the reliance elements of the doctrine, respectively.[30] Furthermore, even scholars who categorize promissory estoppel as an equitable doctrine do not give a full and adequate analysis of justice.[31] They give only a general theoretical notion of the doctrine's equitable character. For example, Holmes uses terms like good faith, conscience, honesty, and equity rather than justice to stress the equitable nature of promissory estoppel.[32] According to Holmes:

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[28] MURRAY, *supra* note 22 ("The requirement appears conclusory once it is shown that a party justifiably relied on a promise and the promisor reasonably expected such reliance."); *see also* Heffron v. Burlington N. & Santa Fe Ry., No. A11-2039, 2012 Minn. App. Unpub. LEXIS 741, at *18 (Minn. Ct. App. Aug. 6, 2012) ("[T]he district court's findings that appellant made a clear and definite promise and that respondents' reliance was reasonable are not clearly erroneous. We conclude that these findings support the district court's conclusion that the promise must be enforced to prevent injustice."); Chester Creek Techs., Inc. v. Kessler, No. A06-505, 2007 Minn. App. Unpub. LEXIS 6, at *14 (Minn. Ct. App. Jan. 2, 2007) ("Taking as true the jury's determinations that Chester Creek made a clear and definite promise; that Chester Creek intended for Kessler to rely on it; and that Kessler did in fact rely on it, we conclude that the district court did not err when it concluded that enforcement of the promise was necessary to prevent injustice."); Baldwin v. Aurora Health Care, Inc., No. 00-1006, 2001 WI App 75, at *4 (Wis. Ct. App. Feb. 28, 2001) ("Baldwin's termination of her practice was reasonable in light of the jury's finding that a promise was made and Baldwin reasonably relied on it. It was reasonably foreseeable by Aurora that Baldwin would terminate her practice given her clear expression of interest in leaving direct patient care in favor of ADCP work, which the jury found Aurora offered. The injustice factors of *U.S. Oil* are satisfied in this case.").

[29] *See, e.g.*, Gan, *supra* note 3, at 56.

[30] *Id.* at 56, 60.

[31] *Id.* at 62.

[32] Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 515–16 (1996).

> With its equitable underpinnings—good faith, conscience, honesty, and equity—promissory estoppel recognizes the promisee's right to reasonably rely, arising from the reasonable expectations created and foreseeable by the promisor. The promisor's statements and manifestations must objectively evidence a sufficient commitment or assurance on which a reasonable person foreseeably would rely. In such a case, the promisor has a duty to prevent a promisee's detrimental reliance. The remedy for breach is discretionary and personalized, predicated on the principles and standards of good faith, conscience, honesty, and equity. A promisee or third party recovering under promissory estoppel should neither be penalized nor experience a windfall.[33]

Similarly, Charles Knapp observes:

> Section 90 also contains a requirement that the situation be such that "injustice can be avoided only by enforcement of the promise." From the wording of the section, it appears that the reference to injustice is not simply a verbal summation of all the elements that have been listed so far. Rather it is an additional element, distinct from the others. Even if a promise has induced foreseeable, substantial and reasonable reliance, meeting all the specific tests imposed by section 90, the final question must still be answered. Will injustice result from its nonenforcement? To the drafters of section 90, this is an open question—the answer will often be yes, but it can be no.[34]

Thus, though Knapp and other scholars acknowledge that justice is an independent element of promissory estoppel, they fall short of specifying what justice means and what theory of justice should be applied under section 90.

C. Corrective Justice

The few court opinions that have discussed the justice element of promissory estoppel have concluded that justice means corrective justice.[35] In contrast to distributive justice,[36]

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[33] *Id.*

[34] Knapp, *supra* note 1, at 1264 (footnote omitted); *see also* HOLMES, CORBIN ON CONTRACTS, *supra* note 5, § 8.9, at 33.

[35] Holmes, *supra* note 32, at 276 ("Presently, reliance consideration has its own autonomous sphere of influence as an evolving equitable principle for enforcing the right to rely on certain promises and for designing relief to afford corrective justice between parties." (footnote omitted)); *see also id.* at 307–08 (Alaska), at 315 (Arizona), at 318 (Arkansas), at 322, 327, 331, 339 (California), at 343 (Colorado), at 353 (Delaware), at 363 (Florida), at 413 (New Jersey), at 425 (New York), at 433

corrective justice deals only with balancing between the promisor and the promisee[37] and it ignores social aspects of the contract and policy considerations.[38] Under a corrective justice approach, one party has to compensate the other for the damage she caused.[39] Put differently, the promisor was unjustly enriched as a result of the promisee's reliance. In applying this notion of justice, these judges mainly weigh the loss caused to the promisee due to her reliance on the promise but also the promisor's situation.[40] For example, one court explained:

(North Carolina), at 446 (Pennsylvania), at 464 (Texas). James Gordley asserts that cases applying the consideration and promissory estoppel doctrines can be explained by "Aristotelian ideas of commutative justice and liberality." Accordingly, Gordley states:

> [Courts'] decisions do not turn on whether the parties made a bargain or the promisee relied or the offeree assented. They turn on the effect of the transaction on the distribution of wealth between the parties. Promises that enrich the promisee at the promisor's expense are not enforced, unless the promisor intended to enrich him and there is some reason to think the promisor's decision is sensible and will change the distribution of wealth for the better.

James Gordley, *Enforcing Promises*, 83 CALIF. L. REV. 547, 548 (1995).

[36] Distributive justice is discussed further in Part II.C.

[37] Carolyn Edwards, *Promissory Estoppel and the Avoidance of Injustice*, 12 OKLA. CITY U. L. REV. 223, 248–49 (1987) ("Without a doubt, the success which the doctrine of promissory estoppel has enjoyed in the last two decades has provided the foundation and the encouragement for the development of new rules which are designed to achieve fairness between parties to a bargain contract."); *see also* Trans-World Int'l, Inc. v. Smith-Hemion Prods., 972 F. Supp. 1275, 1288 (C.D. Cal. 1997) (considering the behaviors of both parties).

[38] For corrective justice in contract law, see, for example, Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 108–112 (2007). For distributive justice, see, for example, *id.* at 112–16; see also Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 535–47 (1992); Curtis Bridgeman, Note, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 252–60 (2003); Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 103–06 (1991).

[39] *See* Zamir, *supra* note 38, at 108.

[40] Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 SW. L.J. 841, 849 (1990) ("Although the main focus of this open-ended requirement appears to be the harm the promisee would suffer in the event of nonenforcement, consideration of the promisor's position is implicitly part of the process of determining the nature of his promise and the substantiality of the reliance it produced."); *see also* Snyder v. Snyder, 558 A.2d 412, 417 (Md. Ct. Spec. App. 1989) ("One of the most significant factors in determining whether justice demands enforcement of the promise is whether the promisor acted unconscionably."), *cert. denied*, 564 A.2d 1182 (1989).

> Defendant's fifth 'essential element of estoppel' refers to a 'weighing of all the equities.' If by that is meant a mathematical comparison of potential disadvantages to the respective parties depending on whether the promise is or is not enforced, the proposition is unsound. The question is not which party will suffer the greater detriment if the contention of the other prevails. That is not the rule of promissory estoppel—*estoppel that arises when an innocent promisee relies, to his disadvantage, upon a promise intended or reasonably calculated to induce action by him*. In such case equity is first concerned with the plight of the innocent promisee if the promisor be permitted to seek asylum within the protection of the statute of frauds. . . . Vander Wal attempted to measure any threatened damage to plaintiffs' home at 'from fifty to seventy-five per cent of its present value.' But we agree with him 'the damage cannot be evaluated in dollars and cents.' That fact merely fortifies the jurisdiction of equity to restrain this threatened wrong. An injury is said to be irreparable where there exists no certain pecuniary standad [sic] for measuring the damage. We think the record shows that here, in the language of the Restatement, 'injustice can be avoided only by enforcement' of the promise upon which plaintiffs relied. While the threatened injustice to the promisee is equity's first consideration, it is proper to consider the possible harshness to defendant by enforcement of his promise.[41]

In order to have the promise enforced, the promisee has to convince the court that enforcing the promise would prevent her unjust injury. Accordingly:

> The authorities are not in accord on the precise meaning of the injustice requirement. Some courts have ruled that it is sufficient that the reliance be detrimental in the consideration sense; others have insisted that the reliance be injurious to the promisee. Logically, injury is required; without injury there would be no injustice in not enforcing the promise. As Judge Posner has indicated, the doctrine requires that the promisee incur a real cost.[42]

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[41] Miller v. Lawlor, 66 N.W.2d 267, 274 (Iowa 1954) (citations omitted).

[42] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 221 (6th ed. 2009) (footnotes omitted); *see also* Burton v. GMC, No. 1:95-cv-1054-DFH-TAB, 2008 U.S. Dist. LEXIS 62758, at *39 (S.D. Ind. Aug. 15, 2008) (The court's instructions to the jury regarding the elements of promissory estoppel included the following: "that the plaintiff suffered a financial loss because General Motors broke the promise, and an award of damages for breaking the promise is needed to avoid what would otherwise be an injustice."); Indus. Maxifreight Servs., LLC v. Tenneco Auto.

If, however, no such loss or injury can be shown, the promissory estoppel claim is rejected.[43] For example, in one case,

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Operating Co., 182 F. Supp. 2d 630, 636 (W.D. Mich. 2002) ("Michigan courts apply the doctrine of promissory estoppel cautiously, and only where the facts are unquestionable and the wrong to be prevented undoubted."); Kattke v. Indep. Order of Foresters, No. 00-276 ADM/AJB, 2001 U.S. Dist. LEXIS 23232, at *13 (D. Minn. May 22, 2001), *aff'd*, 30 F. App'x. 660 (8th Cir. 2002) ("Especially where the promise alleged is 'at-will' employment, there must be some tangible detriment for a finding of injustice."); Hoffmann v. Boone, 708 F. Supp. 78, 82 (S.D.N.Y. 1989) (holding that the party asserting promissory estoppel as a defense to the statute of frauds must demonstrate unconscionable injury); Laks v. Coast Fed. Sav. & Loan Assn., 131 Cal. Rptr. 836, 839 (Cal. Ct. App. 1976) (The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance."); Kiely v. St. Germain, 670 P.2d 764, 767 (Colo. 1983) ("The doctrine of promissory estoppel encourages fair dealing in business relationships and discourages conduct which unreasonably causes foreseeable economic loss because of action or inaction induced by a specific promise."); CBA Collection Servs. v. Potter, No. 95A-10-023-RRC, 1996 Del. Super. LEXIS 357, at *17 (Del. Super. Ct. Aug. 14, 1996) ("Promissory estoppel which creates a cause of action requires 1) a promise, 2) reliance on that promise, and 3) injury to the party relying on that promise."); Conrad v. Fields, No. A06-1387, 2007 Minn. App. Unpub. LEXIS 744, at *14 (Minn. Ct. App. July 24, 2007) ("Appellant argues that because respondent received a valuable law degree, she did not suffer any real detriment by relying on his promise. But receiving a law degree was the expected and intended consequence of appellant's promise, and the essence of appellant's promise was that respondent would receive the law degree without the debt associated with attending law school. Although respondent benefited from attending law school, the debt that she incurred in reliance on appellant's promise is a detriment to her."); Geisinger v. A & B Farms, Inc., 820 S.W.2d 96, 100 (Mo. Ct. App. 1991) ("Without injury there is no injustice by not enforcing the promise."); Hellenbrand v. Goodman, 2003 WI App 162, at *38 (Wis. Ct. App. 2003) ("Although none of the elements of promissory estoppel expressly require that the broken promise be a cause of harm to the plaintiff, such a requirement is plainly a part of the 'avoidance of injustice' inquiry encompassed by the third element.").

[43] *See, e.g.*, Local 107 Office & Prof'l Emps. Int'l Union v. Offshore Logistics, Inc., 380 F.3d 832, 835 (5th Cir. 2004) (per curiam) ("In this case, the Union did not suffer any harm as a result of Offshore's failure to implement the 2002 pay increases."); Brock & Co. v. Kings Row Assocs., No. 04-cv-2096, 2004 U.S. Dist. LEXIS 26340, at *9 (E.D. Pa. 2004) (rejecting promissory estoppel claim because promisee benefitted from the relationship with promisor); State v. First Nat'l Bank of Ketchikan, 629 P.2d 78, 81 (Alaska 1981) ("Even taken in the light most favorable to the Bank, the evidence introduced at trial leads us to the conclusion that enforcement of the State's promise is not necessary in the interest of justice. Under the circumstances, we must agree with the State's claim that the real cause of the Bank's loss was its misplaced reliance on Jones, not the materiality of the State's promise to the Bank. It is undisputed that had Jones proven to be the trustworthy businessman that the Bank believed he was, the State's failure to perform its promise would have resulted in nothing more than a two-week delay in the closing of its loan to Jones. And it is clear that, as Taylor conceded, a two-week delay was 'no big concern.' Since we are convinced that the Bank's loss was caused by its own

though both the promise element and the reliance element of promissory estoppel were satisfied, the court concluded:

> In generic terms, the promise to appellant was one that a benefit would probably be given and that it would probably be given to appellant. We can find no precedent for application of the doctrine of promissory estoppel to enforce a promise with benefits as uncertain as these, and we conclude that this is not the kind of commitment calling for special judicial action in the name of avoiding injustice.[44]

The Restatement's comments also take the view that, under the justice prong, the court should consider the detriment and the promisee's loss, the promisee's reliance and the unjust enrichment of the promisor, and the promisor's promise.[45] The comment provides:

> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.[46]

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erroneous judgment as to Jones's character rather than by its reliance on the State's promise, we do not believe that justice would be served by requiring the State to bear the loss occasioned when Jones absconded with $30,000 on loan from the Bank."); Kiley v. First Nat'l Bank, 649 A.2d 1145, 1154 (Md. Ct. Spec. App. 1994) ("Given that the Kileys had the benefit of the BFF terms for some five years, justice certainly does not compel application of promissory estoppel."); Filippi v. Filippi, 818 A.2d 608, 627 (R.I. 2003) ("[S]he suffered no detriment. . . . Under these circumstances we refuse to find such detriment that justice requires enforcement of the alleged contract."); Barnes & Robinson Co. v. Onesource Facility Servs., 195 S.W.3d 637, 645 (Tenn. Ct. App. 2006) ("No injustice arises in the refusal to enforce a promise where either the loss induced is negligible or the promisee's reliance is not reasonable.").

[44] Faimon v. Winona State Univ., 540 N.W.2d 879, 884 (Minn. Ct. App. 1995); *see also In re* Babcock & Wilcox Co., Nos. 00-10992, 00-10993, 00-10995, Civ.A.02-0335, 2002 WL 1874836, at *6 (E.D. La. Aug. 13, 2002); Worlds v. Nat'l R.R. Passenger Corp., No. 90-C-0643, 1990 WL 129346, at *5 (N.D. Ill. Aug. 24, 1990).

[45] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981).

[46] *Id.*

Though the Restatement opens the door for policy considerations under the justice requirement, such as the enforcement of bargains and prevention of unjust enrichment, it stops short of introducing distribution aspects and other social issues into the equation.[47] Thus, promissory estoppel aims to provide a remedy to the promisee for her loss or to have the promisor pay the promisee due to the promisor's wrongful enrichment.[48] The only consideration under the justice analysis is the parties' respective situations and conduct, but other societal and distributive considerations are beyond the scope of this doctrine.[49] This approach is not neutral; rather, it has distributive results—it maintains rather than mitigates power dynamics between the parties. In other words, by not intervening, it favors the dominant party.

D. The Remedy

Justice is not only an element of promissory estoppel; it also applies to the remedy.[50] According to section 90 of Restatement (Second) of Contracts, "[t]he remedy granted for breach may be limited as justice requires."[51] The First Restatement did not

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[47] *See id.* § 139(2) ("In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor."); *see also id.* § 139 cmt. b ("Like § 90 this Section states a flexible principle, but the requirement of consideration is more easily displaced than the requirement of a writing. The reliance must be foreseeable by the promisor, and enforcement must be necessary to avoid injustice. Subsection (2) lists some of the relevant factors in applying the latter requirement. Each factor relates either to the extent to which reliance furnishes a compelling substantive basis for relief in addition to the expectations created by the promise or to the extent to which the circumstances satisfy the evidentiary purpose of the Statute and fulfill any cautionary, deterrent and channeling functions it may serve.").

[48] *See, e.g.*, *Faimon*, 540 N.W.2d at 883 ("Numerous considerations enter into a judicial determination of injustice, including the reasonableness of a promisee's reliance and a weighing of public policies in favor of both enforcing bargains and preventing unjust enrichment."); *see also* Panasonic Commc'ns & Sys. v. State Dep't of Admin., Bureau of Purchases, 691 A.2d 190, 196 (Me. 1997).

[49] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b.

[50] *See id.* § 90.

[51] *Id.* For the causation element, see US Ecology, Inc. v. State, 28 Cal. Rptr. 3d 894, 896 (Cal. Ct. App. 2005) ("[A]s in ordinary contract actions, a plaintiff seeking

include this part, which was added in the Second Restatement.[52] This language gives courts discretion to tailor the damages to the specific circumstances in order to achieve a just remedy.[53] But in practice, courts apply their discretion in a limited manner. Court opinions and scholars have interpreted this provision to mean that the usual remedy is expectation damages, meaning full contractual damages. However, in some cases, justice requires that damages be limited to the reliance interest of the promisee.[54] In other words, promissory estoppel generally awards expectation damages similar to breach of contract damages, but because of its equitable nature, it gives the courts discretion to award reliance damages.

The Restatement's comments provide that "relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise."[55] However, courts tend to

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recovery on a promissory estoppel theory must prove that the defendant's breach was a substantial factor in causing the plaintiff's damages.").

[52] For limiting damages as justice requires, see generally W. F. Young, *Half Measures*, 81 COLUM. L. REV. 19, 24–30 (1981).

[53] Holmes, *supra* note 32, at 295–96 ("The remedy for promissory estoppel is discretionary. No rigid or mechanical remedy rule applies. The remedy is not necessarily co-extensive with damages for contract breach, but is equitably molded ad hoc for each case according to the dictates of good faith, conscience, and justice. With their reliance sabers, courts award the full range of remedies based on specific performance, restitution, expectation, reliance, exemplary (seldom), or some other appropriate relief to achieve corrective justice between the parties in the context of their distinct litigation." (footnotes omitted)); HOLMES, CORBIN ON CONTRACTS, *supra* note 5, § 8.8, at 21 ("There is no reason why the courts of the present day should not 'make the remedy fit the crime' and make the amount of a judgment for damages depend upon the special circumstances and the merits of the claims of all existing claimants."); *see also* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 276 (Wis. 1965) ("Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided.").

[54] FARNSWORTH, *supra* note 5, at 180 ("Even if the requirements for enforceability of a promise are met, the Restatement Second states that recovery 'may be limited as justice requires,' language that is generally invoked in limiting recovery to damages based on the reliance interest."); *see also* Baldwin v. Aurora Health Care, Inc., No. 00-1006, 2001 WI App. 75, at *4 (Wis. Ct. App. Feb. 28, 2001) ("The amount of damages 'may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance.' ").

[55] RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981).

award either expectation damages or reliance damages,[56] and they generally do not award other remedies, such as specific performance or restitution.[57] For example, one court stated:

> An equity court possesses some discretionary power to award damages in order to do complete justice. Furthermore, since it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief, and a district court sitting in equity may even devise a remedy which extends or exceeds the terms of a prior agreement between the parties, if it is necessary to make the injured party whole. Since promissory estoppel is an equitable matter, the trial court has broad power in its choice of a remedy.[58]

The opinion then stated that the court has discretion to choose from a broad range of remedies; however, it only debated whether to award the lost profits or the expenditures in reliance on the promise.[59] It did not consider other remedies beyond expectation damages or reliance damages.[60]

It is interesting to note that, with regard to the remedy, the Restatement uses the term "justice" rather than injustice.[61] Despite this linguistic difference, however, the courts use limited discretion with regard to the remedy. Similarly, the courts give a narrow interpretation to, and limitedly use, the doctrine's justice element, as demonstrated above.[62]

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[56] For expectation damages see, for example, Gan, *supra* note 3, at 59. For reliance damages see, for example, Gan, *supra* note 3, at 61.

[57] Walters v. Marathon Oil Co., 642 F.2d 1098, 1100–01 (7th Cir. 1981).

[58] *Id.* at 1100 (citations omitted); *see also* D & G Stout, Inc. v. Bacardi Imps., Inc., 923 F.2d 566, 569 (7th Cir. 1991) (debating whether to award expectation damages or reliance damages); D & G Stout v. Bacardi Imports, 805 F. Supp. 1434, 1451 (N.D. Ind. 1992) (debating whether to award expectation damages or reliance damages); Tynan v. JBVBB, LLC, 743 N.W.2d 730, 734–35 (Wis. Ct. App. 2007) (debating whether to award expectation damages or reliance damages).

[59] *Walters*, 642 F.2d at 1100–01.

[60] *See* Burton v. Gen. Motors Corp., No. 95-CV-1054, 2008 WL 3853329, at *19 (S.D. Ind. Aug. 15, 2008) ("There is no simple answer to the question of what type of damages are appropriate as a remedy for promissory estoppel. The court concludes that under federal common law, the court and/or the jury has the discretion to fashion the remedy needed to avoid injustice based on a promissory estoppel claim, which can include either expectation damages or reliance damages.").

[61] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) ("The remedy granted for breach may be limited as justice requires.").

[62] *See* Part I.B.

E. Why Is Justice Unimportant?

Some contract law scholars have observed that the current trend in contract law is toward a formalist, conservative contract law similar to classical contract law.[63] Reflecting this trend, courts are moving away from a looser, open-textured approach toward a more restrictive approach that emphasizes definitions, categories, and bright-line rule formulations.[64] In addition, courts embrace a more formal, abstract, inflexible, and rule-oriented application of contract law.[65] Courts also rely heavily on freedom of contract and embrace values such as respect for market exchange and disapproval of state intervention.[66] This results in empowering economically dominant parties rather than mitigating power imbalance between the parties.

This trend explains why promissory estoppel is considered by many scholars to be an insignificant doctrine of contract formation.[67] But this trend also explains why the justice prong is

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[63] JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 78–127 (2004). *But see* Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 666–68 (2007); Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 17 (2001); Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 674–78 (2009).

[64] Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995). *See generally* Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 643–44 (2002) ("[T]he traditionally embraced view of an impartial judiciary carefully applying neutral legal principles is itself mythic and illusory. The business of judging, even in the most desiccated breach of contract case, always calls for decisions regarding a party's fit into a legally (i.e., socially) constructed category. In contract law, as in anti-discrimination law, society has determined, and then expressed through legal regulation, under what conditions an injured party deserves a remedy. Yet somehow this judicial undertaking seems less fraught with difficulty in a contract dispute, perhaps because although the rules related to relief are socially/legally constructed, they do not seek to embody extant traits but instead shuffle people in and out of the class entitled to recover for breach of contract according to specific criteria defined by law (e.g., existence of a valid contract, breach, damages)." (footnote omitted)).

[65] Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 879–80 (1999); *see also* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 2 (2004).

[66] Mooney, *supra* note 64, at 1134 ("The most fundamental conception returning to dominate contract law today is 'freedom of contract.' ").

[67] Gan, *supra* note 3, at 65.

considered unimportant. Courts disfavor standards such as justice and adhere to formal and strict contracting rules.[68] Courts are also less inclined to use equitable doctrines to protect underprivileged parties.[69] As a result, courts interpret justice narrowly and limit the application of promissory estoppel.[70]

II. JUSTICE—TOWARD A SIGNIFICANT ELEMENT OF PROMISSORY ESTOPPEL

This Part discusses how courts should interpret and apply the justice element of promissory estoppel. Contrary to the current attitude toward this aspect, justice should be considered a meaningful element and independent of the other elements of promissory estoppel. In addition, courts should actively promote justice in the contracting process by applying a theory of distributive justice that goes beyond considerations of the interests of the parties. In particular, courts should consider the relations between the parties, the power imbalance between the parties, the allocative aspects of the contract, and other public policy considerations under the justice prong. This Part advocates for a change in the way the courts use justice in their opinions. This will result in a profound change in the meaning, application, and function of the promissory estoppel doctrine. Furthermore, it will make promissory estoppel a more robust doctrine, which can serve both to protect the reliance of underprivileged parties and to empower underprivileged parties by providing them with a tool to enforce the promises made to them. This will make the contracting process more flexible, egalitarian, and conscionable, and, more generally, it will make contract law more inclusive and pluralist.

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[68] *Id.* ("[C]ourts move away from a looser, open-textured approach toward a more restrictive approach emphasizing definitions, categories, and bright-line rule formulations." (citing Mooney, *supra* note 64, at 1133–34)).

[69] *Id.* at 79–80 ("However, underprivileged promisees remain at a disadvantage, since they often cannot adhere to contract law formalities and form legally binding contracts.").

[70] *See* Part I.B.

A. From Avoiding Injustice to Promoting Justice

For reasons that are elaborated below,[71] this Article suggests that the courts use the promissory estoppel doctrine as a means to achieve justice in contract formation. Rather than serving the limited role of avoiding injustice in special and extreme cases, the promissory estoppel doctrine should aim to actively promote justice in the contracting process. The doctrine of promissory estoppel should be used to police misuses of power in negotiations.[72] In other words, by enforcing promises, the promissory estoppel doctrine will correct power imbalances between parties, and will empower the weaker party on the one hand and prevent the stronger party from denying her promise on the other. Promissory estoppel will prevent harmful behavior by the dominant party to the detriment of the other party. Accordingly, equitable values will make the formation of contract more conscionable and egalitarian. Rather than adhering to the formality of the doctrine of consideration, promissory estoppel will enable the courts to counterbalance the rigidity of the bargain theory. Then, promissory estoppel will be a meaningful and viable alternative to consideration, with justice at its core.

This active role of the court is explained by the view that power imbalances between parties or relations of trust may disadvantage promisees who can only enforce the promises made to them by using the doctrine of promissory estoppel.[73] The formal bargaining process places barriers to forming a contract in the way of such promisees; thus, they can turn only to promissory estoppel. Consequently, the justice element of promissory estoppel and its equitable nature are important parts of this doctrine. Basing this doctrine only on promise and reliance while ignoring the justice element not only empowers the already powerful party, but also defies the equitable purpose of the promissory estoppel doctrine. It enables the dominant party to enjoy the benefits of her promise and then deny it, while

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[71] *See infra* Part II.C.

[72] Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 910 (1987); Hillman, *supra* note 15 (stating courts should use promissory estoppel to protect employees).

[73] Gan, *supra* note 3, at 85.

simultaneously leaving the promisee to bear the loss caused by her reliance on the promise. Rather than maintaining the status quo, the justice element is a tool to redistribution.

A robust justice element is desirable from the underprivileged parties' point of view. However, protecting the reliance interest and encouraging mutual trust and cooperation between the parties will benefit all parties, including dominant parties. Privileged parties might benefit from exploiting the other party by gaining advantage from the latter's behavior based on the promise and later denying their promise. However, this benefit is outweighed by the benefits of a regime of trust and cooperation between the contracting parties.

One might argue that the concept of justice is too vague and focusing on it might give courts too much discretion. Thus, a more limited application of justice gives parties the benefit of predictable and stable contract law. However, if the courts begin to apply a distributive theory of justice, then, in time, a known concept of justice will be developed on which parties can rely. In addition, the courts have used, and have developed, other open-ended standards such as public policy, unconscionability, and good faith. Thus, the courts are up to the task of developing a workable and viable notion of justice under the promissory estoppel doctrine.

One might also argue that according to the words of section 90, justice has a minor and limited role. In other words, enforcement is restricted by justice considerations to extreme cases where "injustice can be avoided only by enforcement of the promise."[74] However, because of the equitable and important role of promissory estoppel as indicated above, and further explored below, the courts should give the justice element a more robust role. The weight of the justice element will enable courts to achieve the just solution and to include policy considerations in the formation process. Expanding, rather than limiting, enforcement of promises using the justice element will serve good causes, such as strengthening trust and reliance between the parties and policing power imbalances in the bargaining process.

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[74] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

Unconscionability doctrine, like promissory estoppel, deals with power imbalances between parties;[75] however, each doctrine serves a different role. The former gives the court the discretion not to enforce an unconscionable term or contract and does not relate to enforcing promises. Although procedural unconscionability[76] looks at the negotiations and the formation process, it does not enable the promisee to enforce a promise. Accordingly, both promissory estoppel and unconscionability protect the right of underprivileged parties to contract in different ways. These doctrines have distinct rationales and purposes. However, the two doctrines should coexist in harmony. This harmony will be achieved by utilizing both doctrines to police power imbalances between parties and by allowing both doctrines to serve distributive justice goals. Thus, distributive justice considerations should not be left to the doctrine of unconscionability alone. Rather, both promissory estoppel and unconscionability should be used by the court to police the formation of contracts and to view this process through the eyes of distributive justice theory.

B. From an Ignored Element to an Independent Element

In contrast to the way justice is currently used, it is time for the courts to stop ignoring the justice element of promissory estoppel. Disregarding this element is not only contrary to the wording of section 90,[77] it also goes against the doctrine's equitable nature and goals.[78] Rather, courts should examine the justice element as a separate element and not make do with only referring to the promise and reliance elements of promissory estoppel.[79] The justice requirement is an independent element of this doctrine, supplementing the promise and the reliance

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[75] *Id.* § 208; U.C.C. § 2-302 (2012); *see also* Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey*, in COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 309 (Larry A. DiMatteo, Qi Zhou, Séverine Saintier & Keith Rowley eds., 2013).

[76] *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489–90 (1967).

[77] Disregarding the justice element is also contrary to the view of Professor Williston, the drafter of the Restatement. Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 484 (1950).

[78] *See id.*

[79] *Id.* at 483–84 (supporting the view that justice is a separate element of promissory estoppel and rejecting the view that justice is a guide to the application of the promise and reliance elements of the doctrine).

prongs. This independent and new meaning of justice will be based on a theory of distributive justice that is further discussed below. Thus, the justice element has a broader meaning than the loss or harm to the promisee due to her detrimental reliance and the unjust enrichment of the promisor.

As mentioned, promissory estoppel has three main independent elements: the promise, the promisee's reliance, and justice, which includes avoiding injustice.[80] The justice element differs from the others in that it is a matter of law, while the other two elements constitute questions of fact.[81] Accordingly, the jury determines the questions of fact, while the court determines the questions of law and policy. The first two elements should be weighed in inverse to the third element. That is, the more clear, definite, and unambiguous the promise, the less weight need be given to justice considerations. Similarly, the more the reliance is detrimental to the promisee, the lighter the burden of justice. And vice versa, if the two elements are weak, then the justice needs to be very meaningful. If the promise is not concrete enough and the reliance caused little or no loss, then the promisee needs to show significant justice considerations in order to enforce the promise. In other words, courts should delicately balance these three elements. Even if the promise is a little unclear or the reliance is not highly detrimental, this is not the end of the court's examination. The court should not make do with concluding that the promise and reliance elements are weak. Rather, the court should further examine the justice element and only after balancing the relative impact of all the doctrine's prongs conclude whether all the elements were satisfied. Similarly, even if the promise is very clear and the reliance is highly injurious, the court may not conclude that the injustice is inferred and thus is satisfied. Rather, the court should further examine the justice element independently and weigh it against the former two elements.

For example, in *Feinberg v. Pfeiffer Company*,[82] an employer promised to pay an employee a pension for life upon her retirement and did pay her the monthly pension for five years.[83]

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[80] *See supra* note 5 and accompanying text.

[81] *See, e.g.*, R.S. Bennett & Co. v. Econ. Mech. Indus., Inc., 606 F.2d 182, 186 (7th Cir. 1979); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 683, 698 (Wis. 1965).

[82] Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959).

[83] *Id.* at 164–65.

Subsequently, however, the employer stopped paying and denied any contractual obligation toward the former employee, claiming that the payments were gratuitous.[84] The employer's promise for pension was clear, definite, and unambiguous.[85] It was a formal resolution of the board of directors, which was communicated to the employee by telephone on the day of the board meeting.[86] Likewise, the employee showed detrimental reliance on the promise.[87] She testified that she retired in reliance on the promised pension.[88] As the court stated:

> At the time she retired plaintiff was 57 years of age. At the time the payments were discontinued she was over 63 years of age. It is a matter of common knowledge that it is virtually impossible for a woman of that age to find satisfactory employment, much less a position comparable to that which plaintiff enjoyed at the time of her retirement.[89]

In addition, the employee received the pension for several years and did not seek another employment soon after her retirement, making her reliance on these payments even more detrimental.[90] Because of the definite and formal promise and the financial loss caused by the reliance, the justice element need not be particularly weighty. The court states, for example, that it does not matter whether the employee was unemployable due to an illness, her age, or whether the employee became unemployable before or after the pension payments were discontinued.[91] There are situations in which the denial of the pension would seem harsher and more unconscionable, and thus the justice element would be given more weight. However, in this case, due to the solid promise and reliance, the burden of the justice element is lighter and the financial loss will do to satisfy the justice element.

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[84] *Id.* at 165, 167.
[85] *Id.* at 164–65.
[86] *Id.*
[87] *Id.* at 166.
[88] *Id.*
[89] *Id.* at 169.
[90] *Id.* at 166, 169.
[91] *Id.* at 168–69.

Another example is *Grouse v. Group Health Plan, Inc*.[92] An employer made a job offer to Grouse.[93] As a result, Grouse resigned from his job and declined another job offer.[94] When he was ready to start working, after giving his former employer two weeks' notice, he was told that someone else had been hired.[95] In this case, the promise, a job offer, was made via telephone to Grouse and was not as definite as the promise made in *Feinberg*.[96] Similarly, the financial loss due to the reliance was less acute in *Grouse* as compared to *Feinberg*.[97] Though Grouse had difficulties securing other full-time employment, his wage loss was not as severe as Feinberg's pension loss.[98] Accordingly, the injustice element needs to satisfy higher standards in *Grouse*. As the court asserts, the employer's behavior was such that "[u]nder these circumstances it would be unjust not to hold Group Health to its promise."[99] The court wished to discourage such behavior by employers and thus enforced the promise even though the loss to the employee and the promise were weak.[100] Taking into account the power imbalance between the parties, the justice element weighs in favor of compensating the promisee.[101] Thus, rather than dismissing promissory estoppel claims because a promise was not clear and definite enough,[102] courts should weigh all three factors of the doctrine.

Dickens v. Equifax Services, Inc.,[103] discussed in the Introduction, provides another example in the context of employment relations. The court concluded that the supervisor's assurances did not constitute a clear promise and that the employee's reliance on these assurances was unreasonable.[104]

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[92] Grouse v. Grp. Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).

[93] *Id.* at 115.

[94] *Id.*

[95] *Id.* at 116.

[96] At the interview, only company policies, procedures, salaries, and benefits were discussed and not a concrete job offer. *Id.* at 115.

[97] *Grouse*, 306 N.W.2d at 116; Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 164 (Mo. Ct. App. 1959).

[98] Grouse rejected a job offer based on the offer he received, so apparently he could have secured another job. *Grouse*, 306 N.W.2d. at 115.

[99] *Id.* at 116.

[100] *Id.*

[101] *Id.*

[102] *See, e.g.*, Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 746 (Minn. 2000); Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 372 (Minn. 1995).

[103] No. 95-1217, 1996 WL 192973 (10th Cir. Apr. 22, 1996).

[104] *Id.* at *6.

One can disagree with this analysis and conclude that the employee's reliance was not only reasonable but also detrimental and caused him, and his wife, substantial loss. And one can conclude contrary to the court that the supervisor's assurances constitute a clear and definite promise. But even if one accepts that the promise and reliance elements were weak, the court should not have ignored the justice element. Under the latter prong, the court should consider the long-term relations between the parties, the power imbalance between the employer and employee, the allocative effects of the contract, and public policy considerations in the context of employment relations. These considerations not only counterbalance the weakness of the first two prongs, they also weigh heavily in favor of enforcing the promise.

Two insurance cases provide other examples for the relation between the three elements of promissory estoppel. The first case is *Marker v. Preferred Fire Insurance Co.*[105] Marker purchased real property, and during the negotiations he agreed to retain the seller's insurance policy on the property until the policy expired.[106] Marker informed the insurance company representative that he was not interested in renewing the insurance policy, and he would have his father write a new policy.[107] Marker asked the representative to notify him of the policy's expiration date, and the representative replied, "I'll do that."[108] A tornado hit the property after the insurance policy had expired.[109] Marker sued the insurance company, relying on promissory estoppel as the basis of contractual obligation and claiming he relied on the promise to let him know when the insurance policy expired to his detriment.[110] In *Marker*, the court rejected the promissory estoppel claim stating:

> In the first place there is no evidence whatsoever of any affirmative inducement or misrepresentation made by Johnson to Marker. The circumstances which brought about any promise of notification from Johnson arose from a rather casual request by Marker that Johnson should let Marker know the expiration date of the policy so that Marker could have it

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[105] 506 P.2d 1163 (Kan. 1973).
[106] *Id.* at 1166.
[107] *Id.*
[108] *Id.* at 1170 (internal quotation marks omitted).
[109] *Id.* at 1167.
[110] *Id.* at 1168.

> renewed. To this request Johnson allegedly responded, 'I'll do that.' The evidence falls far short of showing that Johnson intended or expected Marker to rely upon the promise or that Marker reasonably had the right to rely upon Johnson's promise. Furthermore a refusal to enforce the doctrine in this case would in no way sanction the perpetuation of a fraud or result in other injustice. It is also clear from the evidence that from the time the real estate contract was signed, plaintiff Marker had the original policy in his possession which clearly disclosed the expiration date. Furthermore another copy of the policy was mailed to Marker by Johnson after November 5, 1965, when Johnson executed the endorsement to the policy which added the names of Mr. and Mrs. Marker as additional named insureds. Johnson could reasonably have assumed that he was carrying out his promise to notify Marker of the expiration date of the policy when he mailed a copy of the policy to Marker. Also we again wish to stress the fact that Marker was an attorney and was himself a licensed agent for Preferred Fire Insurance Company. The promise of Johnson to advise Marker of the expiration date of the policy was a promise wholly without consideration and essentially was made as a mere accommodation to Marker. The terms of the policy were always within the knowledge of the plaintiff and if he failed to remember that the policy expired at a certain time before the tornado, it was his own negligence and not that of Johnson which prevented plaintiff from renewing his policy.[111]

The second insurance case is *Prudential Insurance Co. of America v. Clark*.[112] Clark, a marine, purchased a life insurance policy with no war risk or aviation exclusion clauses after enlisting.[113] An agent of another insurance company persuaded him to drop his insurance by promising him an equivalent insurance policy.[114] Based on this promise, Clark dropped his insurance policy and bought the new policy.[115] That policy, however, did include a war risk or aviation exclusion clause.[116] After Clark was killed in Vietnam, the insurance company paid the beneficiaries but later sued them to return the money,

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[111] *Id.* at 1170.
[112] 456 F.2d 932 (5th Cir. 1972).
[113] *Id.* at 934.
[114] *Id.*
[115] *Id.*
[116] *Id.*

claiming it paid the claim through oversight and mistake.[117] The court rejected the insurance company's suit based on promissory estoppel.[118]

The promise of the insurance agent in *Clark* was affirmative as compared to the mere "I'll do that" assurance in *Marker*. Also, Marker's reliance was unreasonable for two reasons. He was a licensed insurance agent, and he had the insurance policy in his hands, making him aware of the expiration date.[119] In contrast to Marker, Clark dropped his insurance policy based on the agent's promise.[120] These differences between the two cases explain their different results. Clark's beneficiaries proved both the concrete promise and detrimental reliance elements of promissory estoppel.[121] Thus, the justice element carried little weight, and the court accepted their promissory estoppel claim. In contrast, Marker proved only a weak promise and unreasonable reliance on his part.[122] Therefore, he needed to show very strong justice considerations in order to enforce the promise. He failed to do so, and the court rejected his promissory estoppel claim.[123] Juliet Kostritsky argues that while in *Clark* there was a difference of status between the professional agent and the layman insured, in *Marker* no such power imbalance between the parties exited.[124] She concludes that the power imbalance is the reason for the different outcome in these two cases.[125] The above analysis of *Clark* and *Marker* adds to Kostritsky's explanation. It is not only the status disparity between the parties, but also the justice element in conjunction with the other elements of the promissory estoppel doctrine that distinguish between the cases.[126]

Another example is the famous *Hoffman v. Red Owl Stores, Inc.* case.[127] An agent for Red Owl represented on numerous occasions to the Hoffmans that Red Owl would build a store building for the Hoffmans to operate in return for their

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[117] *Id.* at 935.
[118] *Id.* at 936.
[119] Marker v. Preferred Fire Ins. Co., 506 P.2d 1163, 1171 (Kan. 1973).
[120] *Clark*, 456 F.2d at 936.
[121] *Id.* at 936.
[122] *Marker*, 506 P.2d at 1170–71.
[123] *Id.* at 1170.
[124] Kostritsky, *supra* note 72, at 918.
[125] *Id.*
[126] Another difference between the two cases is that while *Clark* involves loss of life, *Marker* involves loss of property.
[127] 133 N.W.2d 267 (Wis. 1965).

investment of $18,000.[128] In reliance upon these representations, the Hoffmans sold their bakery building and business and their grocery store and business, they purchased a building site to operate the store, and they rented a residence for themselves.[129] The Hoffmans followed Red Owl's requests in order for the deal to go through; however, the negotiations between the parties were terminated, and Red Owl did not make good on its representations.[130]

The court acknowledged that the promise was mainly oral assurances that were not highly definite.[131] Nevertheless, the court held that under promissory estoppel the promise need not be as definite as a promise supported by consideration,[132] and it accepted the Hoffmans' promissory estoppel claim. It is possible to explain that this is due to the detrimental reliance by the Hoffmans;[133] however, even though the court did not mention the justice element, it came to the right decision in the context of a justice analysis as well. The ill treatment of the Hoffmans and the relations of trust between Red Owl's representatives and the Hoffmans lead to such a conclusion.[134] Although the promise element is weak, the justice element tipped the scales in favor of the Hoffmans. Taking into account the franchise relations as part of the justice analysis counterbalances the weakness of the other elements. While the court disregarded the justice element in its opinion, the above analysis may explain why the court accepted the promissory estoppel claim in spite of the indefinite promise.

In some of the cases discussed here, the conclusion under the justice analysis resembles the conclusion of the court. However, a meaningful justice element would make a substantive change in the promissory estoppel doctrine. In some cases, the justice analysis will result in a different conclusion, and in others the analysis will give meaningful support for the conclusion. Indeed, in some cases, even though the court did not explicitly consider the justice element, it seems that the court was guided by a sense

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[128] *Id.* at 274.
[129] *Id.* at 268–69.
[130] *Id.* at 274–75.
[131] *Id.* at 274.
[132] *Id.*
[133] William C. Whitford & Stewart Macaulay, Hoffman v. Red Owl Stores*: The Rest of the Story*, 61 HASTINGS L.J. 801, 855 (2010).
[134] *Hoffman*, 133 N.W.2d at 275.

of justice in reaching its decision. This Article suggests that courts affirmatively and explicitly consider justice as an independent element rather than be guided by a vague sense of justice. Furthermore, in order to better understand the formation process, courts should take into account the relations between the parties and the power dynamics, the allocative implications, and other policy considerations. This will make the court's analysis more contextualized and lead to just conclusions.

Taking the power imbalance between the parties and their relations into account along with other public policy and distribution considerations under the justice element does not mean a presumption in favor of accepting the promissory estoppel claim of the underprivileged party. Under such a presumption, the justice element overshadows the other elements. However, the courts should consider all of the doctrines' elements and should give more weight to the justice element than they currently do.

C. From Corrective Justice to Distributive Justice

There is a debate among legal scholars whether private law,[135] in general, and contract law, in particular, should promote distributive justice considerations.[136] Much of the literature

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[135] The debate as to whether tort law should promote distributive justice is similar to the debate in contract law. Supporting the view that private law should promote distributive justice, see, for example, Ken Cooper-Stephenson, *Corrective Justice, Substantive Equality and Tort Law, in* TORT THEORY 48, 48 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Ken Cooper-Stephenson, *Economic Analysis, Substantive Equality and Tort Law*, *in* TORT THEORY 131, 131 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Ted Decoste, *Taking Torts Progressively*, *in* TORT THEORY 240, 241 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 51 (2007); Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z. L. REV. 401, 404 (2001); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 194–95 (2000); Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J.L. & JURIS. 91, 91 (2003); see also Dan Priel, *Private Law: Commutative or Distributive?*, 77 MOD. L. REV. 308 (2014). *But see, e.g.*, ERNEST J. WEINRIB, CORRECTIVE JUSTICE 263–64 (2012); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 210–14 (1995); Alan Schwartz, *Products Liability and Judicial Wealth Redistributions*, 51 IND. L.J. 558, 587–89 (1976).

[136] Some scholars support the view that contract law should promote distributive justice. *See, e.g.*, HUGH COLLINS, REGULATING CONTRACTS 285–86 (1999); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 147 (2008); Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 139–40 (1999); Robert L. Hale, *Bargaining, Duress, and*

advocating application of distributive justice under contract law negates the arguments raised against such application.[137] Many scholars who support achieving distributive goals through contract law do not develop arguments for doing so. Rather, they challenge the contrary view according to which distributive justice should not be considered under contract law.[138] This Article takes a different approach. The author's previous article demonstrated how promissory estoppel has a disparate impact on different social groups.[139] Specifically, underprivileged promisees use promissory estoppel to enforce the promises made to them.

Economic Liberty, 43 COLUM. L. REV. 603, 624–27 (1943); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1656–57 (1998); Duncan Kennedy, *Distributive and Paternalist Motive in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563 (1982); Josse G. Klijnsma, *Contract Law as Fairness*, 28 RATIO JURIS 68 (2015); Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 600 (2005); Kevin A. Kordana & David H. Tabachnick, *Taxation, the Private Law, and Distributive Justice*, 23 SOC. PHIL. & POL'Y 142, 142 (2006); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 397 (2006); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom To Contract*, 24 J. LEGAL STUD. 283, 285 (1995); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1395 (2006); Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008–14 (2001). Other scholars contend that contract law is unsuitable to promote distributive justice or that other areas of law, such as tax law, are more efficient and suitable to that end. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE 105–07 (1981); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 100–01 (1993); Horst Eidenmuller, *Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR*, 5 EUR. REV. CONT. L. 109, 119–20 (2009) ("[I]t would have been better for the DCFR to not even try to achieve distributive purposes by the means of private law. On the one hand, redistribution by private law is always less efficient than redistribution by social and tax law, while on the other hand it is virtually impossible to attain when it comes to contract law."); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994); W.N.R. Lucy, *Contract as a Mechanism of Distributive Justice*, 9 OXFORD J. LEGAL STUD. 132, 147 (1989); William K.S. Wang, *Reflections on Contract Law and Distributive Justice: A Reply to Kronman*, 34 HASTINGS L.J. 513, 513–14 (1982). *But see* Liam B. Murphy, *The Practice of Promise and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

[137] *See, e.g.*, Aditi Bagchi, *Distributive Justice and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193 (Gregory Klass, George Letsas & Prince Saprai eds., 2014); Kronman, *supra* note 136; Lewinsohn-Zamir, *supra* note 136, at 396; Posner, *supra* note 136.

[138] Bagchi, *supra* note 137.

[139] Gan, *supra* note 3, at 56.

Based on this groups-based analysis, this Article further argues that distributive justice considerations are warranted under the analysis of the promissory estoppel doctrine. Rather than concentrating on why the application of distributive justice in contract law is not inappropriate, this Article establishes that the justice element of promissory estoppel should be used as a tool for applying distributive justice based on the previous article's groups-based analysis of the contract formation process.

This Article supports the view that contract law should serve the goals of distributive justice and not only those of corrective justice.[140] Corrective justice is narrowly concerned with balancing between the interests of the parties to the contract or remedying wrongful losses that one party inflicted on the other.[141] Unlike corrective justice, distributive justice takes a broader view and is concerned with the allocation of wealth, resources, or entitlements among members of society.[142] These distributive justice goals should be achieved by general contract law, not only by tax law and regulation in specific areas of law such as housing and employment. Furthermore, justice means more than the damage caused to the promisee by her detrimental reliance on the promise. Rather, justice should include public policy considerations beyond correcting the imbalance between the parties. The impact of the promise, the harm caused to the promisee by the reliance, and the benefit to the promisor are only some of the relevant considerations. The court should weigh unjust enrichment and the promisee's loss alongside other factors such as power imbalance between the parties, their relations, and distributive justice considerations.[143] Another consideration

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[140] For distributive justice in contract law see, for example, Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1097 (1971); James Gordley, *Morality and Contract: The Question of Paternalism*, 48 WM. & MARY L. REV. 1733, 1737 (2007); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815, 1817 (1976); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 780 (1985); see also Helge Dedek, *Duties of Love and Self-Perfection: Moses Mendelssohn's Theory of Contract*, 32 OXFORD J. LEGAL STUD. 713, 716 (2013) (Mendelssohn's theory of contract is "entirely rooted in altruism and distributive justice." (emphasis removed)).

[141] Zamir, *supra* note 38, at 108.

[142] Markovits, *supra* note 140, at 1817.

[143] These considerations should be taken into account not only under the distributive justice analysis but also under relational theory of contract. *See, e.g.*,

is to provide a viable avenue for enforcing promises when the formal requirements of consideration are lacking due to a power imbalance between the parties. This broad interpretation of justice is not limited to corrective justice but includes social aspects of the contract as well. By looking beyond the parties, contract law gives justice a deeper meaning. The formation of contract should be addressed not only from the point of view of the promisor and the promisee, but from a larger social aspect.[144]

Promissory estoppel is mainly used by certain groups of promisees—such as employees, family members, general contractors, insurees, and franchisees—against the more privileged promisors.[145] As promissory estoppel suits are brought mainly by underprivileged groups' members, courts should address these promisees' needs and the distributive results of their claims. Thus, in examining the justice element, courts should take into account power imbalances and the relations between the parties, members of different groups. Since promissory estoppel disparately impacts different social groups, it should address the distributive effects of the formation process. Promissory estoppel should be sensitive to the allocative implications of the contracting process and how formation of contract has different implications for different social groups.[146] This factor will enable the courts to better understand the contracting process and to empower underprivileged promisees.

Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 484 (1985).

[144] For a theory of relational justice that goes beyond distributive justice, see Hanoch Dagan & Avihay Dorfman, *Just Relationships* (Tel Aviv Univ., Working Paper, 2014), *available at* http://ssrn.com/abstract=2463537.

[145] Gan, *supra* note 3, at 80–81.

[146] For a different view on justice under the doctrine of promissory estoppel, see Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 759–60 (2001) ("The traditional rules of restitution and promissory estoppel work when the facts fit, that is, when there is a clear unjust enrichment or a clear promise clearly relied upon. The problem is how to decide if an obligation exists when there is not a negotiated and well-drafted contract, nor an explicit promise that was foreseeably relied upon nor a clearly unjust act that enriched the defendant at the plaintiff's expense. I think that the best we can hope for is some amount of rough justice. That a claim doesn't fit the rules of promissory estoppel or the rules of restitution should not end the matter, though it may make us ask that the plaintiff show us something else. I would start by looking at the relationship between the parties. Of course everything is a relationship; the word is not magic. Relationships can be good or bad—or some of both. They can be very formal. They can be paternalistic. They can be exploitative. And they can be indifferent, a relationship where there is no relationship.").

Not taking this factor into account has distributional effects: It maintains the status quo and sustains the current allocation. As is demonstrated in the examples that follow, there are different kinds of power imbalance and relations dynamics. There are differences between employer-employee, franchisor-franchisee, insurance company-insuree, general contractor-subcontractors, and husband-wife relationships to name just a few examples. Thus, the court should engage in a nuanced analysis of the relationship between the parties.

Many promissory estoppel cases are brought in the employment context and provide good examples of typical promissory estoppel cases described above. These cases deal with two social groups and the power imbalance between them. Both denied pension cases and denied job offer cases demonstrate the power dynamics between employers and employees in negotiations. The former misuse their powerful position to make a promise and then deny that promise after benefiting from it. When the promisees cannot enforce the promise based on breach of contract, promissory estoppel is their only claim for enforcing the broken promise. Looking not only at the parties but beyond them to the employer-employee relations, then, promissory estoppel is an important tool to empower employees. This redistributive goal is to enforce the promises made to employees.[147]

Feinberg,[148] a denied pension case, and *Grouse*,[149] a denied job offer case, discussed earlier, provide two examples. In the former, the court should have considered the long-term work relations between the parties[150] and the way employers treat elderly people as they retire from work. In the latter, the court should have considered the ill treatment of employment candidates.[151] In such cases, the court should examine whether

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[147] Hillman, *supra* note 15, at 27. For justice in the employment context, see also Larry A. DiMatteo et al., *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 484–85, 509–10 (2011); Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 119–21 (1992).

[148] Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959). For a similar case, see also Katz v. Danny Dare, Inc., 610 S.W.2d 121 (Mo. Ct. App. 1980).

[149] Grouse v. Grp. Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).

[150] Feinberg worked in the company from 1910 to 1949. *Feinberg*, 322 S.W.2d at 164–66. She received the pension until 1956. *Id.* at 166.

[151] Grouse was made a job offer not in accordance with company's policy that required a written recommendation which Grouse did not provide. The interviewer

employers misuse their power advantage over the employees, and prospective or former employees. They should also disallow employers to make promises to employees and then deny the promises to the detriment of the employee. *Dickens*,[152] discussed in the Introduction, provides another example. In that case, the relations between the employer and employee and the power imbalance were relevant considerations under the justice element. The court should have considered whether to allow an employer to misuse his power over the employee, offer the employee relocation and encourage the employee to radically change his position, and then deny such an offer after benefiting from the employee's move. Unfortunately, the court ignored the justice element.

In another employment case, the court declared:

> In the present case, to the extent that Suehisa's statements could be construed as promising Gonsalves that he would retain his job regardless of the findings of the investigation, we hold that they are unenforceable as a matter of public policy. An interpretation by Gonsalves that would ensure his continued employment, despite findings that he sexually harassed others in his workplace, would be to either absolve Nissan of its obligations to take immediate and appropriate action to prevent sexual harassment or to hinder Nissan in its fulfillment of its obligations. To enforce Suehisa's "promises" after a finding of sexual harassment would be offensive to public policy. Thus, we hold that, in the present case, to the extent that promises were made to Gonsalves that he would retain his job regardless of the outcome of the investigation, those promises were unenforceable, and Gonsalves is unable to maintain a claim for promissory estoppel as a matter of public policy.[153]

The court's decision is based on public policy considerations outside the promissory estoppel doctrine. What the court should have done was consider under the justice element of promissory estoppel the consequences of enforcing such a promise to an employee. Promising an employee that he can keep his job in

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called Grouse to make sure he quit his position but did not call him to let him know that the position was filled by someone else. Only when Grouse called to report that he was free to begin working was he told that someone else was hired. When Grouse complained, he got an apology, but no further actions were taken. *Grouse*, 306 N.W.2d at 116.

[152] Dickens v. Equifax Servs., Inc., No. 951217, 1996 WL 192973 (10th Cir. Apr. 22, 1996).

[153] Gonsalves v. Nissan Motor Corp., 58 P.3d 1196, 1213 (Haw. 2002).

spite of a complaint of sexual harassment is unjust. It will have a damaging effect on work relations and will work against the goal of eradicating sexual harassment in the workplace. Looking at employer-employee relations and work relations at large, with an emphasis on a problem of sexual harassment in the employment context, is part of justice considerations. These considerations reach beyond the specific parties in this case. Sexual harassment is a result of power relations in the employment setting.[154] Under the justice element of promissory estoppel, the court should include examination of employer-employee relations dynamics.

Another employment case involves the relations between a union and management.[155] The employees argued that they made wage and benefit concessions in order to modernize the plant and keep it open.[156] After the plant was closed, the employees sued the employer.[157] The court rejected their promissory estoppel claim because the employer's officials' oral statements did not constitute a promise.[158] However, the court disregarded the justice element. The court should have policed the way the company conducted its business at the expense of the employees and work relations at large.[159] The court viewed the corporation as an owner that had discretion to close the plant.[160] The court did not consider the context of the long-term relations between the employees and employer, and the financial behavior of the corporation to the detriment of its employees. This larger picture should inform the court to better understand the facts. Taking into account this background complicates the owner's discretionary rationale to the court.

A similar example involves a case dealing with the relations between farmers and the banks that loan them money.[161] In *State Bank of Standish v. Curry*,[162] the Currys, dairy farmers,

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[154] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979).

[155] Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290, 1292–95 (S.D. Ohio 1983).

[156] *Id.* at 1296.

[157] *Id.* at 1295.

[158] *Id.* at 1297.

[159] AMY KASTELY ET AL., CONTRACTING LAW 312–16 (4th ed. 2006).

[160] *Id.*

[161] *See generally* State Bank of Standish v. Curry, 500 N.W.2d 104 (Mich. 1993).

[162] 500 N.W.2d 104.

argued that the bank promised to make them a loan, on which they relied, and the bank argued that assurances were not made in the context of a specific loan.[163] When the bank denied the loan, the farmers sued, and the court accepted the farmers' promissory estoppel claim.[164] The court based its decision on the promise made by the bank[165] and on the Currys' reliance on that promise[166] and disregarded the justice element.[167] The court did not consider generally the long-term relations between the farmers and the bank,[168] the trust between the parties, the power dynamics between the parties, and the dependency of the farmers on the banks.[169] The Currys' loan is set in the background of power dynamics between the bank and its customers and the farming industry's economics.[170] This context should be addressed under the justice element to enable the court to better understand the situation and to consider the distributive implications of its decision on the larger society, here, the farming industry.[171]

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[163] *Id.* at 106–07.

[164] *Id.* at 111.

[165] *Id.* The bank officer stated that since "the Currys were doing a good job[,] . . . the bank would support them." *Id.* at 106. The Currys received loans from the bank for many years. *Id.*

[166] Based on the bank's promise to make the loan, the Currys did not submit a bid in the government's dairy buy-out program. *Id.*

[167] *Id.* at 113 n.4 (Riley, J., dissenting) ("The essential justification for the doctrine of promissory estoppel is the avoidance of substantial hardship or injustice were the promise not to be enforced. Too liberal an application of the concept will result in an unwitting and unintended undermining of the traditional rule requiring consideration for a contract. This is particularly true where the promise is the loan of money. Such promises, even when unsupported by consideration, do induce borrowers to neglect to secure the needed money elsewhere, and lenders must be held to anticipate such conduct. To hold as enforceable, however, a voluntary promise of a loan made to one who, in reliance thereon, fails to exercise a valueless right to seek the money elsewhere, would be tantamount to rendering all such voluntary promises of a loan enforceable without consideration. A determination declaring such a deviation from presently accepted contract principles should only come from a confrontation with that issue, and not as an unintended consequence of the loose application of promissory estoppel to promises to lend money." (internal quotation marks omitted)).

[168] The Currys obtained yearly loans from the bank since 1975 and until 1986, when they were refused the loan, the subject of this case. *Id.* at 105.

[169] KASTELY, *supra* note 159, at 290.

[170] *See generally State Bank of Standish,* 500 N.W.2d 104.

[171] For other similar promissory estoppel cases involving relations between creditor and debtor see, for example, Aceves v. U.S. Bank, N.A., 120 Cal. Rptr. 3d 507 (Cal. Ct. App. 2011); Garcia v. World Sav., FSB, 107 Cal. Rptr. 3d 683 (Cal. Ct. App. 2010); see also Amy B. Parker, *Mending Broken Promises: Allowing*

Another interesting case, *Ypsilanti v. General Motors Corp.*,[172] concerns a situation in which a corporation decided to close a plant after it received tax abatement from the town.[173] The question was whether a promise was made by the corporation to keep the plant's production and keep creating jobs for the town's employees on which the town reasonably relied and gave the corporation the tax abatement.[174] In one case, the trial court accepted the town's promissory estoppel claim and held that the corporation is bound by its promise and is enjoined from transferring the production from the plant to another facility.[175] On appeal, however, the court reversed and rejected the promissory estoppel claim.[176] While the trial court found a clear promise on which the town reasonably relied, the court of appeals held that these elements were not satisfied.[177] However, interestingly, while the court of appeals disregarded the justice element of promissory estoppel and only addressed General Motors' promise and the people of Ypsilanti's reasonable reliance on that promise, the trial court gave the justice element considerable weight.[178] The trial court held:

> This Court . . . simply finds that the failure to act in this case would result in a terrible injustice and that the doctrine of promissory estoppel should be applied. Each judge who dons this robe assumes the awesome, and lonely, responsibility to make decisions about justice, and injustice, which will dramatically affect the way people are forced to live their lives. Every such decision must be the judge's own and it must be made honestly and in good conscience. There would be a gross inequity and patent unfairness if General Motors, having lulled the people of the Ypsilanti area into giving up millions of tax dollars which they so desperately need to educate their children and provide basic governmental services, is allowed to simply

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Homeowners To Pursue Claims of Promissory Estoppel Against Lenders When Denied Loan Modifications, 47 NEW ENG. L. REV. 985 (2013).

[172] No. 92-43075-CK, 1993 WL 132385, at *1 (Mich. Cir. Ct. Feb. 9, 1993), *rev'd*, 506 N.W.2d 556 (Mich. Ct. App. 1993).

[173] *See, e.g.*, *id.*; Charter Twp. of Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556, 557–58 (Mich. Ct. App. 1993).

[174] *Ypsilanti*, 506 N.W.2d at 558.

[175] *Id.*

[176] *Id.* at 562. The Michigan Supreme Court refused to hear the case. Charter Twp. of Ypsilanti v. Gen. Motors Corp., 509 N.W.2d 152 (Mich. 1993).

[177] *Id.* at 559.

[178] *Ypsilanti*, 1993 WL 132385, at *13.

> decide that it will desert 4500 workers and their families because it thinks it can make these same cars a little cheaper somewhere else. Perhaps another judge in another court would not feel moved by that injustice and would labor to find a legal rationalization to allow such conduct. But in this Court it is my responsibility to make that decision. My conscience will not allow this injustice to happen.[179]

Contrary to the court of appeals, the trial court gave the justice element a broad meaning.[180] It considered the long-term relations between the parties[181] and the financial consequences to the town if the plant were closed.[182] It looked beyond the parties to the larger economic and social context.[183] This difference in the two courts' approaches to the justice element of promissory estoppel also explains the different results they reached. Unfortunately, unlike the trial court, the court of appeals did not use justice as a guide in making its decision.[184]

Clark[185] and *Marker*,[186] discussed above, provide other examples. Both cases involve relations between an insurance company and an insured.[187] As Kostritsky argues, the power dynamics between the parties are relevant factors in the courts'

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[179] *Id.* at *13.

[180] *See id.*

[181] General Motors operated the two plants in Ypsilanti from 1975 through 1990 and received eleven tax abatements of over 1.3 billion dollars. *Id.* at *4.

[182] Consideration of the relation between the town of Ypsilanti and General Motors is apparent also in the trial court's analysis of the promise—the many meetings between General Motors' representatives and the town's officials—and reliance—the many years of tax abatements worth millions of dollars.

[183] For an analysis of this case taking into account this special context, see Adam Michael Lett, Note, *Tax Abatements and Promissory Estoppel: A Match Not Made in Ypsilanti*, 44 DEPAUL L. REV. 1301 (1995); Joshua P. Rubin, Note, *Take the Money and Stay: Industrial Location Incentives and Relational Contracting*, 70 N.Y.U. L. REV. 1277 (1995); David L. Gregory, *Company Closings and Community Consequences*, 72 U. DET. MERCY L. REV. 1 (1994); see also DON MONTIE, MORE OF BEEN THERE (2012).

[184] For a different opinion, see Halle Fine Terrion, Comment, Charter Township of Ypsilanti v. General Motors*: The Politics of Promissory Estoppel Run Amok*, 43 CASE W. RES. L. REV. 1475 (1993). For other similar promissory estoppel cases involving relations between the plant and the corporation, see, for example, Local 1330, United Steel Workers v. U.S. Steel Corp., 631 F.2d 1264 (6th Cir. 1980); see also Harris Freeman, *The First of Thousands? The Long View of Local 1330's Challenge to Management Rights and Plant Closings*, 7 UNBOUND: HARV. J. LEGAL LEFT 55 (2011).

[185] Prudential Ins. Co. of Am. v. Clark, 456 F.2d 932 (5th Cir. 1972).

[186] Marker v. Preferred Fire Ins. Co., 506 P.2d 1163 (Kan. 1973).

[187] For another similar promissory estoppel case involving insurance, see, for example, Green v. Helmcamp Ins. Agency, 499 S.W.2d 730 (Tex. Civ. App. 1973).

analyses though the courts did not consider explicitly the justice element of promissory estoppel.[188] The relations between the parties and the imbalance of power between them is part of the justice element and is a consideration for or against enforcing the promise.

Another example involves franchisee-franchisor relations. In *Red Owl*, the classic promissory estoppel case discussed above, the court disregarded the justice element.[189] The court should have addressed the relational character of the contract.[190] This context relates to the incompleteness and indefinite nature of the promise of the franchisor.[191] But, more generally, this context also relates to the franchise relationship itself and its allocative aspects. In such cases, the court should take into account this consideration rather than be guided by a vague sense of justice.

One example of taking into account public policy considerations beyond the parties under the justice prong of promissory estoppel is the issue of a promise of confidentiality to news sources under the First Amendment of the United States Constitution. In such cases, the courts consider how enforcing the promise of anonymity will affect freedom of the press. In the leading case, *Cohen v. Cowles Media Co.*,[192] the court concluded:

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[188] Kostritsky, *supra* note 72, at 918.

[189] Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965) ("We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment.").

[190] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 928 (1990).

[191] *Id.* at 979.

[192] Cohen v. Cowles Media Co., 479 N.W.2d 387 (Minn. 1992). For the history of this case, see Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990); Cohen v. Cowles Media Co., 445 N.W.2d 248 (Minn. Ct. App. 1989). For an analysis of this case, see, for example, Jerome A. Barron, Cohen v. Cowles Media *and Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419 (1994); Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087 (2001); Kyu Ho Youm & Harry W. Stonecipher, *The Legal Bounds of Confidentiality Promises: Promissory Estoppel and the First Amendment*, 45 FED. COMM. L.J. 63 (1992); Joseph H. Kaufman, Comment, *Beyond* Cohen v Cowles Media Co.*: Confidentiality Agreements and Efficiency Within the "Marketplace of Ideas"*, 1993 U. CHI. LEGAL F. 255 (1993); Daniel A. Levin & Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After* Cohen v. Cowles Media Company*: A Survey of Newspaper Editors*, 24 GOLDEN GATE U. L. REV. 423 (1994); Joseph W. Ragusa, Comment, *Biting the Hand That Feeds You: The Reporter-Confidential Source Relationship in the Wake of* Cohen v. Cowles Media Company, 67 ST. JOHN'S L. REV. 125 (1993); Carl Werner, Note, *Collision Without Injury: Three Years After* Cohen*, Contract Principles and Freedom of the Press Co-Exist Nicely*, 30 HOUS. L.

> The newspapers argue it is unjust to be penalized for publishing the whole truth, but it is not clear this would result in an injustice in this case. For example, it would seem veiling Cohen's identity by publishing the source as someone close to the opposing gubernatorial ticket would have sufficed as a sufficient reporting of the "whole truth." Cohen, on the other hand, argues that it would be unjust for the law to countenance, at least in this instance, the breaking of a promise. We agree that denying Cohen any recourse would be unjust. What is significant in this case is that the record shows the defendant newspapers themselves believed that they generally must keep promises of confidentiality given a news source. The reporters who actually gave the promises adamantly testified that their promises should have been honored. The editors who countermanded the promises conceded that never before or since have they reneged on a promise of confidentiality. . . . It was this long-standing journalistic tradition that Cohen, who has worked in journalism, relied upon in asking for and receiving a promise of anonymity. Neither side in this case clearly holds the higher moral ground, but in view of the defendants' concurrence in the importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid an injustice. In short, defendants are liable in damages to plaintiff for their broken promise.[193]

In these cases, the courts looked beyond the parties to the contract and took into account considerations of freedom of speech, the relations between the reporters and the source, the ability of the journalists to truthfully report the news, and the right of the public to receive the full information.[194] These public policy considerations, and not merely correcting the equilibrium between the parties, were at the center of the cases.[195] Furthermore, these public policy considerations were addressed

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REV. 2085 (1994); Gregory F. Monday, Note, Cohen v. Cowles Media *Is Not a Promising Decision*, 1992 WIS. L. REV. 1243 (1992). For more promissory estoppel cases enforcing promises by the media, see, for example, Ruzicka v. Conde Nast Publ'ns, 999 F.2d 1319 (8th Cir. 1993).

[193] *Cohen*, 479 N.W.2d at 391–92.

[194] *See generally id.*

[195] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668–72 (1991).

under the justice element of promissory estoppel, as opposed to yielding the result to public policy considerations outside the scope of the promissory estoppel doctrine.[196]

Unconscionability doctrine serves distributive justice goals.[197] Thus, policing the allocative aspects of the formation process using both promissory estoppel and unconscionability doctrine will harmonize contract law.

There are different theories of distributive justice.[198] In spite of these differences, choosing one theory of distributive justice to be applied under the promissory estoppel doctrine is beyond the scope of this Article. As this doctrine is concerned with different social groups that interact with one another,[199] there is a need to take this background into account, under any theory of distributive justice.

D. The Remedy

Courts should have broad discretion to award the remedy that justice requires. The courts should have full range of contractual remedies to choose from to tailor to the specific case before them. Most times, courts would probably award either expectation damages or reliance damages, but the remedies should not be so confined. A court may award the promisee the value of the promised performance or the losses she suffered as a result of her change in position. But in some cases, restitution, specific performance,[200] or prejudgment interest,[201] for example, might be a more adequate remedy. In *Ypsilanti*, discussed above, specific performance, rather than damages, was the appropriate

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[196] *Cohen*, 479 N.W.2d at 391–92.

[197] Bagchi, *supra* note 137, at 135.

[198] *See, e.g.*, SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE (2004); JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1996).

[199] Gan, *supra* note 3, at 100.

[200] For cases involving promises to convey land where specific performance was awarded under the doctrine of promissory estoppel, see, for example, Mazer v. Jackson Ins. Agency, 340 So. 2d 770, 772–73 (Ala. 1976); Christy v. Hoke, 618 P.2d 1095, 1096 (Ariz. Ct. App. 1980); Elgin Nat'l Indus. v. Howard Indus., 264 So. 2d 440, 441 (Fla. Dist. Ct. App. 1972); Johnson v. Pattison, 185 N.W.2d 790, 795, 797–98 (Iowa 1971); Cellucci v. Sun Oil Co., 320 N.E.2d 919, 921, 926–27 (Mass. App. Ct. 1974), *aff'd*, 331 N.E.2d 813 (Mass. 1975); Lear v. Bishop, 476 P.2d 18, 22 (Nev. 1970); see also Skebba v. Kasch, 724 N.W.2d 408 (Wis. Ct. App. 2006) (awarding specific performance in the employment context).

[201] *See, e.g.*, Remes v. Nordic Grp., 726 A.2d 77, 78 (Vt. 1999).

remedy.[202] The equitable nature of promissory estoppel supports this discretion and flexibility in remedies.[203] As opposed to the formal bargained-for rules, this doctrine should be more open-ended and award the appropriate remedy in each case.

The result of the above analysis will be a harmonious promissory estoppel—opening the justice element to a broader set of considerations alongside wide discretion in awarding remedies. Not only will the court take into account many different factors, such as how the parties are relatively situated as well as social factors and public policy, the court will also tailor the remedy to the specific situation. Like the justice element of promissory estoppel, the remedy should also be applied broadly.

E. Why Is Justice Important?

Promissory estoppel is an important doctrine for subordinated social groups. For example, Neil G. Williams has argued that parties who breach a promise to marry, usually men, should be liable for damages under promissory estoppel.[204] These reliance damages would compensate the promisee, usually a woman, for the economic harm she suffered without the stereotypes associated with the breach of promise to marry suit.[205] Gillian K. Hadfield provides another example. She argues that promissory estoppel offers an alternative logic that would help solve the "dilemma of choice."[206] This dilemma is "the

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[202] Indeed, the trial court that accepted the promissory estoppel claim ordered that GMC is enjoined from transferring the production from the plant to another facility. Charter Twp. of Ypsilanti v. Gen. Motors Corp, No. 92-43075-CK, 1993 WL 132385, at *13–14. (Mich. Cir. Ct., Feb. 9, 1993), *rev'd*, 506 N.W.2d 556 (Mich. Ct. App. 1993).

[203] Holmes, *supra* note 32, at 516 ("The remedy for breach is discretionary and personalized, predicated on the principles and standards of good faith, conscience, honesty, and equity. A promisee or third party recovering under promissory estoppel should neither be penalized nor experience a windfall. Equitable promissory estoppel empowers courts to fashion a personalized remedy from the full range of remedies. Courts can award expectation, reliance, restitution, specific performance, exemplary, injunctive, or other appropriate relief to fit the crime and achieve corrective justice between the parties.").

[204] Neil G. Williams, *What To Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1021–22 (1995).

[205] *Id.* at 1022–23.

[206] *See* Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1249–50 (1998) (internal quotation marks omitted). *But see* Debora L.

conflict between promoting women's autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other."[207] In other words, the tension is between freedom of contract on the one hand and paternalism on the other.[208] This Article supports the view that promissory estoppel is an important doctrine for underprivileged social groups but by using a different approach and for different reasons.

In a recent article, the author argues that promissory estoppel is an important doctrine because it strengthens the right of disadvantaged parties to contract.[209] Many promissory estoppel cases are situations in which the promisees cannot prove a breach of contract claim because they fail to meet the formalities of the consideration doctrine. Thus, promissory estoppel is their only way to enforce the promise made to them. Because of this function, promissory estoppel then raises issues of participation in benefitting from and access to contract. In other words, it involves the issue of the inclusiveness of contract law. This article is theoretical and argues for the importance of promissory estoppel due to this important role it plays. More generally, it calls for a more inclusive contract law that is sensitive and open to the inclusion of disadvantaged social groups.

Patricia J. Williams argues that rights discourse, both rights in general and also specifically the right to contract, is important for blacks and minorities.[210] While Williams addresses the importance of rights generally, the author's previous article focuses on promissory estoppel.[211] Furthermore, in her critique of Critical Legal Studies, Williams stresses the importance of formality of rights to empower the underprivileged. While this author maintains that although promissory estoppel is a flexible

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Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 773–75 (2010).

[207] Hadfield, *supra* note 206, at 1238.

[208] *Id.*

[209] Gan, *supra* note 3, at 52.

[210] Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406–08 (1987). "One consequence of this broader reconfiguration of rights, again in the context of contract, is to give voice to those people or things which, by virtue of their object relation to the contract, historically had no voice." *Id.* at 425–26.

[211] Gan, *supra* note 3, at 52.

doctrine and an alternative to the formal doctrine of consideration, it strengthens the right of underprivileged parties to contract. The Article, then, stresses the importance of the doctrine of promissory estoppel in providing disadvantaged parties an avenue to enforce promises, to participate in and benefit from contracts, to be included in the realm of contract, and to have a meaningful right to contract.[212]

This Article is a follow-up article. The aim of this Article is to show how promissory estoppel can become a more important doctrine and to better serve its role by giving the justice element a more robust meaning. This Article puts the theoretical suggestion into practice and indicates one way to make promissory estoppel a more meaningful doctrine—by giving justice a broader and weightier interpretation. Furthermore, the previous article identified that promissory estoppel is especially important to certain groups of promisees, such as employees, which are typically the weaker party. Hence, coloring section 90 in distributive justice colors will empower these promisees. The previous article advocated using promissory estoppel to achieve allocative justice in the formation process.[213] This Article shows how such a goal can be achieved by a rigorous application of the justice element based on a theory of distributive justice.

Surely other changes can be made in the promissory estoppel doctrine to strengthen it. For example, courts demand a high threshold of proof to prove each element of the doctrine.[214] Thus, one might argue that lowering this burden of proof will do. However, rather than changing the current analysis of the promise or the reliance elements of promissory estoppel, changing the justice element has some advantages. First, unlike the other elements of promissory estoppel, the justice element is currently underdeveloped. Second, strengthening the justice element will strengthen the equitable nature of promissory estoppel. Third, an elaborated justice element will make promissory estoppel more flexible and a viable alternative to the formal and rigid doctrine of consideration.[215] As a result, the

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[212] *Id.*

[213] *Id.*

[214] Hillman, *supra* note 15, at 24; *see also* Union Pac. R.R. Co. v. Cedar Rapids & Iowa City Ry. Co., 477 F. Supp. 2d 980, 999 (N.D. Iowa 2007) (" 'Strict proof' is required for all of the elements of [a promissory estoppel] claim . . . .").

[215] For promissory estoppel as a viable alternative to formal formation rules, see Hadfield, *supra* note 206.

formation process will be less formal and more conscionable. The contracting process will also be more egalitarian by using the justice element to balance the power difference between the parties. Fourth, a broader justice element will result in a more effective enforcement of promises. It will strengthen the promissory estoppel doctrine to the benefit of unprivileged promisees. The reliance interest of parties will be better protected and more promises will be enforced to the advantage of promisees who cannot meet the demands of the doctrine of consideration but nevertheless have compelling cases to enforce the promises made to them. Last, contract law will be more harmonious in promoting distributive justice through both promissory estoppel and unconscionability.

A significant justice element will, then, make promissory estoppel a more meaningful doctrine of contract formation. This will result in a more flexible, egalitarian, and conscionable contracting process. And more generally, this will result in a more inclusive and pluralist contract law. This will benefit first and foremost the underprivileged parties. But this is desirable also to parties generally, including dominant parties. It might be that in the short run, privileged parties profit from denying their promises after benefiting from the promisee's behavior. However, in the long term, all parties, including privileged parties, will benefit from promoting trust and cooperation between the parties,[216] from protecting the reliance interest,[217]

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[216] For the importance of promissory estoppel in promoting trust and cooperation, see, for example, John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37, 38 (2008); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake*," 52 U. CHI. L. REV. 903, 905 (1985); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 823 (1941); Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 506 (1983); see also David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 438–40 (2013); Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1039–40 (2010).

[217] For the reliance interest in contract law, see generally L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); Victor P. Goldberg, *Protecting Reliance*, 114 COLUM. L. REV. 1033 (2014). For expectation-based explanations for promise keeping, see generally Florian Ederer & Alexander Stremitzer, *Promises and Expectations* (Cowles Found. Discussion Paper No. 1931, Sept. 4, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368941.

and from including in contract law parties who have been excluded from it in the past.[218]

CONCLUSION

This Article advocates for a change in promissory estoppel doctrine. It argues that enforcing promises under this doctrine should not be limited to avoiding injustice, but rather courts should actively promote justice. It further claims that justice should be an independent and significant element of promissory estoppel based on a theory of distributive justice. Though applying distributive justice to contract law doctrines is not a novel concept, current promissory estoppel case law and literature are mainly based on corrective justice theory. This robust justice element will make promissory estoppel a more important doctrine—a viable and meaningful alternative to the doctrine of consideration. As a result, the contracting process will be more flexible and sensitive to distribution and public policy issues; the power imbalance in negotiations will be policed; the reliance interest of parties will be better protected; and underprivileged parties will be empowered and they will be better able to use and enjoy their right to contract.

[218] For the importance of opening contract law to include outsiders, see generally Beverly Horsburgh, *Decent and Indecent Proposals in the Law: Reflections on Opening the Contracts Discourse To Include Outsiders*, 1 WM. & MARY J. WOMEN & L. 57 (1994); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995).