A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense

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INTRODUCTION

We could all imagine a world in which the law afforded a remedy for the breach of every promise made, whether such promises were spoken or unspoken, "obviously in jest," or just as obviously serious. The law of contracts, however, has adopted a different system—one of limited enforceability—in which some, but not all, promises are enforceable. "The first great question of contract law, therefore, is [to decide] what kinds of promises should be enforced." To differentiate enforceable from unenforceable promises and thus "to tell us which interpersonal commitments the law ought to enforce" various doctrinal approaches evolved. The nineteenth century classical scheme made resolving questions of contract enforce-

1. Such a world would not appeal to the contracts teacher, lawyer, or judge, for it would render their jobs superfluous. Such a system would remove the main function of a contracts scholar—that of distinguishing between enforceable and unenforceable promises. The undifferentiated enforcement of promises would obviate the need for precise legal delineation. Such obviation inevitably results from a decision that drawing distinctions is impossible or fruitless. Adaptation theorists attempting "to distinguish adaptive from maladaptive law" would experience the same destruction of their role if one called all law adaptive. Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017, 1030 (1981). If one adopts a "Fanglossian" adaptive theory, surmising "that whatever law exists is on that account presumptively adaptive," the adaptation theorist would be without purpose. Id.


4. Although, manifestly jesting promises would ordinarily be unenforceable, those that were obviously serious would be enforceable. Under the objective theory of contract, a reasonable person would believe that his assent was only "invited" by a serious promise and not by a jesting one. Restatement (Second) of Contracts § 24 (1981).

5. "To be enforceable, the promise must be accompanied by some other factor. . . . The question now to be discussed is what is this other factor. What facts or facts must accompany a promise to make it enforceable at law?" 1 A. Corbin, CORBIN ON CONTRACTS § 110, at 490 (1963) (footnote omitted), cited in Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 269 n.1 (1986).

6. Eisenberg, The Principles of Consideration, 67 Cornell L. Rev. 640, 642 (1982), cited in Barnett, supra note 5, at 269 n.1. The Restatement (Second) of Contracts reflects that view in § 1, which defines a contract as a "promise or set of promises for the breach of which the law gives a remedy . . . ." Id.


8. For a discussion of the major tenets of the classical model of contract law, see Feinman, Critical Approaches to Contract Law, 30 UCLA L. Rev. 829, 831-36 (1983) [hereinafter cited as Feinman, Critical Approaches]; Feinman,
ability seem deceptively easy. One simply applied orthodox doctrinal mechanisms like the bargain theory and, in some cases, the statute of frauds to determine whether the parties had achieved the restrictive conditions of contract liability. Bargain theory enforces promises that induce detrimental reliance if the promisor clearly and expressly signals his willingness to be bound on the basis of specified detrimental reliance by the promisee and the promisee either signals a willingness to furnish or actually furnishes, the requested conduct in exchange for the promisor’s promise. In some instances the


For a discussion of the classical model’s attachment to formal rules, see infra notes 155-64 and accompanying text.

9. Realist critics contended that the simplicity of the rules masked the “indeﬁnitely manipulable” nature of the formation rules. Gordon, supra note 1, at 1025.


For a discussion of “the rationale of legal formalties” like the bargain theory and the statute of frauds, see Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 799 (1941).

11. There was “a dual tendency toward narrowing the range of situations in which contractual liability was imposed, but also toward making that liability near absolute when imposed by limiting the scope of doctrines allowing contractual obligations to be avoided.” Metzger & Phillips, Promissory Estoppel and the Evolution of Contract Law, 18 Am. Bus. L.J. 139, 147 (1980) [hereinafter cited as Metzger & Phillips, Evolution]. But see discussion of an expanded concept of excuse infra notes 186-91 and accompanying text.

12. A working deﬁnition of the bargain element of contract follows. Doctrinally, promises require consideration to be enforceable. To furnish consideration “[a] performance or return promise must be bargained for,” that is, “sought by the promisee in exchange for his promise and . . . given by the promisee in exchange for that promise.” Restatement (Second) of Contracts § 71 (1981).

More fundamentally, the search for a bargain or exchange element in contract seeks evidence of the promisor’s signal that he will be made “better off” by promisee conduct that the promisee could elect to withhold. This view of bargain is consistent with “the fundamental economic principle that if voluntary exchanges are permitted . . . resources will gravitate toward their most valuable uses . . . making both of them [the contracting parties] better off” from the exchange. A. Kronman & R. Posner, The Economics of Contract Law 1-2 (1979).

Normally, contract law requires strong evidence of the promisor’s verbal communications that his promise is given in exchange for, or in response to, some conduct of the promisee to satisfy the bargain requirement and to assure that the exchange is “value-maximizing.” R. Posner, Economic Analysis of Law 35 (2d ed. 1977). A more profound explanation for attaching binding effect to promises sup-
promisee must show compliance with requisite formalities such as the statute of frauds in addition to an explicit reciprocal bargain.\textsuperscript{14}

The doctrine of promissory estoppel\textsuperscript{14} arose as a deviant approach to enforceability.\textsuperscript{16} Promissory estoppel enforces promises inducing detrimental promisee reliance,\textsuperscript{18} even if that reliance is not

ported by consideration that also explains the reason for attaching binding effect to promises inducing reliance is discussed infra notes 202-28 and accompanying text; see also Barnett, supra note 5, at 314, discussing a framework of consent within which both reliance and bargain theories can be accommodated in terms of alternate mechanisms for measuring "manifesting assent." \textit{Id.}


14. The promissory estoppel doctrine is now reflected in \textit{Restatement (Second) of Contracts} § 90 (1981), which states:

\textit{Promise Reasonably Inducing Action or Forbearance:}

1. 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.

2. A charitable subscription or marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

\textit{Id.}

15. The history of the adoption of § 90 is generally well known. In 1932, during the proceedings for the drafting of the first \textit{Restatement of Contracts}, Professor Corbin challenged the one-sided classicist view of bargain based enforceability as even then failing to consider the reality of the decided cases. He focused on the apparently deviant cases of contract law, in which courts had found contractual liability even without all of the elements of a traditional contract. See G. Gilmore, \textit{The Death of Contract} 62-66 (1974); see also Dalton, supra note 2, at 1084. To insure that the law reflected the reality of all the cases and not just a select subgroup, he successfully urged the adoption of § 90. Section 90 made promises inducing unbargained for reliance enforceable, provided that the reliance was reasonably foreseeable by the promisor and of a "definite and substantial character." \textit{Restatement of Contracts} § 90 (1932).

As originally adopted, § 90 states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." \textit{Id.}


Two authors recently have disputed the centrality of detrimental reliance to
bargained for by the promisor. Promissory estoppel initially served a limited role as a bargain substitute. It gradually emerged as a greater threat to orthodox doctrines, substituting for other formal requisites to classical contract such as assent and the statute of frauds.

promissory estoppel claims, citing "the diminished role of reliance in establishing liability." Farber & Matheson, supra at 910. This Article agrees with Professors Farber and Matheson that the cases reflect a diminution in the kind of reliance that is actionable under § 90. This Article concludes, however, that courts do continue to look for evidence of reliance, whether diminished or not, that results in a benefit to the promisor. The explanation for courts continuing to do so is related to the assensual nature of promissory estoppel. See infra text accompanying notes 202-28.

17. Under traditional contract theory, only reliance that was sought by the promisor in exchange for his promise justified enforcing the promise. Thus, "the bargain requirement tends to narrow the range of promissory liability [by preventing] the promisor from being bound where the promisee relies to his detriment but this reliance was not what induced the promisor to make the promise." Metzger & Phillips, Independent Theory, supra note 16, at 478.

For example, a potential employee who relies on an employer's promise of employment by selling his home and moving to the employer's location often cannot enforce the employer's promise under orthodox bargain theory because the employer's promise is not supported by consideration. The employee's detrimental reliance was not sought explicitly by the employer. Under the orthodox bargain theory, only that which the employer explicitly bargained for from the promisee—such as the return promise of the employee to work or his actual performance of work—would qualify as consideration. Under the doctrine of promissory estoppel such promises might nevertheless be enforceable. See cases cited infra note 59; see also Feinman, Judicial Method, supra note 8, at 682 (19th century classical view "could not include a cause of action for promissory reliance in the absence of bargain and consideration").

18. The tendency, at least initially, was to view promissory estoppel as a consideration substitute. See, e.g., Dalton, supra note 2, at 1083; Henderson, supra note 16, at 350.


This Article contends that in deciding promissory estoppel claims involving a statute of frauds defense, courts sometimes rely on certain factors. Specifically, the more disparities that exist between the parties' knowledge and status, or the greater the enmeshment between the parties, the more likely it becomes that the plaintiff will prevail despite the technical availability of a statute of frauds defense. Conversely, when the parties are on equal footing or the plaintiff has superior knowledge or status, the plaintiff will be more likely to lose on a promissory estoppel claim defended by a statute of frauds bar. This Article classifies results as proplaintiff according to the standards set forth infra note 30.
This Article will demonstrate that these apparently divergent

In the following cases, promissory estoppel claims succeeded despite the defendant's statute of frauds defense. Had the courts subscribed to a doctrinal application of the statute of frauds, these cases would have had different results. In each case, the parties were not at arms-length either because of a disparity in status or knowledge or an enmeshment in broader ties. When those factors are present, the court finds for the plaintiff, notwithstanding the defendant's attempt to interpose a statute of frauds bar to enforcement. See Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., Inc., 804 F.2d 787 (2d Cir. 1986) (plaintiff's promissory estoppel claim overcame statute of frauds defense in context of twenty year business relationship); Glasscock v. Wilson Constr., Inc., 627 F.2d 1065, 1067 (10th Cir. 1980) (promissory estoppel applied to employer's promise "to protect a plaintiff who has relied to his detriment on an unenforceable oral employment contract"); Ralston Purina Co. v. McCollum, 271 Ark. 840, 611 S.W.2d 201 ( Ct. App. 1981) (parties were enmeshed in broader ties, having had a six year relationship in which plaintiff customarily expended money after oral agreement without written documentation); Monarco, 35 Cal. 2d 621, 220 P.2d 737 (promise to give son farm enforced despite statute of frauds; family relation); Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983) (summary judgment for employer on ground that statute of frauds barred recovery of lost profits on securities sale inappropriate); McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970) (one year employment contract; statute of frauds overcome); Meylor v. Brown, 281 N.W.2d 632 (Iowa 1978) (summary judgment for defendant car dealer inappropriate when plaintiff car buyer interposed promissory estoppel to overcome statute of frauds); Clark v. Coats & Suits Unltd., 135 Mich. App. 87, 352 N.W.2d 349 (1984) (employees' promissory estoppel claim allowed to proceed despite defendant's statute of frauds defense); Lovely v. Dierkes, 132 Mich. App. 485, 347 N.W.2d 752 (1984) (employee reliance precludes granting summary judgment to defendant employer based on statute of frauds defense); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981) (enmeshment due to 29 year employer/employee relationship renders accelerated judgment for defendant-employer inappropriate despite contention statute of frauds barred breach of contract action); Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371 (Minn. Ct. App. 1984) (summary judgment for employer based on statute of frauds defense inappropriate in view of promissory estoppel claim); Alpark Distrib., Inc. v. Poole, 95 Nev. 605, 600 P.2d 229 (1979) (promissory estoppel could overcome statute of frauds defense); Kline v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 616 P.2d 644 (1980) (promissory estoppel claim of franchisee enmeshed in broader ties with defendant-franchisor overcame statute of frauds defense); cf. Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985) (oral employment contract of 13 year employee not barred by the statute of frauds).

In the following cases, the plaintiff's claim of promissory estoppel failed to overcome the defendant's statute of frauds defense. This Article argues that the plaintiffs' claim failed in these cases not because of the statute of frauds or because the court found some element of § 90 missing. Rather, the plaintiffs' promissory estoppel claims failed because they were more sophisticated and experienced than, or on an equal footing with, the defendant or because the transaction was sufficiently complex to allow one to presume both parties had equal knowledge. See Johnson v. Gilbert, 127 Ariz. 410, 621 P.2d 916 (Ariz. Ct. App. 1980) (plaintiff as joint venturer in a land development with defendant could not rely on promissory estoppel to overcome statute of frauds); Walker v. Irton, 221 Kan. 314, 322, 559 P.2d 340, 346 (1977) (promissory estoppel failed to overcome statute of frauds in sale of farm between individuals having no trust relationship); Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc., 88 A.D.2d 877, 452 N.Y.S.2d 590, aff'd., 57
approaches (bargain and promissory estoppel) share unifying elemental criteria that situate them all squarely within an assent-based theory of enforceability. This Article differs from scholarship that depicts promissory estoppel as having a different conceptual or theoretical basis for enforcement. This Article posits that promissory estoppel, together with other orthodox doctrines, are merely substitute doctrinal methods for showing the assent required for an enforceable consensual exchange.

N.Y.2d 1038, 444 N.E.2d 35, 457 N.Y.S.2d 785 (1982) (promissory estoppel failed to overcome statute of frauds in complex commercial lease context); Ginsberg v. Fairfield-Noble, 81 A.D.2d 318, 440 N.Y.S.2d 222 (1981) (plaintiff was sophisticated businessman); Cooke v. Blood Sys., Inc., 320 N.W.2d 124 (N.D. 1982) (promissory estoppel not available to landlord negotiating commercial lease); Consolidated Petroleum Indus., Inc. v. Jacobs, 648 S.W.2d 363 (Tex. Ct. App. 1983) (plaintiff's promissory estoppel claim to enforce purchase price of 100,000 shares of stock barred by statute of frauds); First Nat'l Bank v. Moore, 628 S.W.2d 488 (Tex. Ct. App. 1982) (plaintiff-bank as presumably sophisticated party lost suit against a father promising to indemnify bank for losses incurred by bank's handling of son's account; promissory estoppel not available to defeat statute of frauds); Wamser v. Bamberger, 101 Wis. 2d 637, 305 N.W.2d 158 (1981) (defendant seller of stock not estopped from raising statute of frauds to defeat oral contract when plaintiff was prospective buyer of all shares of defendant's company); cf. Good v. Paine Furniture Co., 35 Conn. Supp. 24, 391 A.2d 741 (1978) (plaintiff with 20 years' experience in real estate and thoroughly familiar with legal rules could not prevail on agreement that failed to comply with state statute similar to statute of
This unified theory of enforceability threatens to disrupt the fa-

Normativity in Economic Theory of Law, 62 MINN. L. REV. 1015, 1035 (1978). This Article suggests, however, an alternative ordering for such data based on assent.

The assertion that promissory estoppel is essentially an assent-based doctrine questions the premises of a substantial body of legal scholarship. Those scholars view promissory estoppel, along with other doctrines such as good faith and unconscionability, as evidence of “the reabsorption of contract into the mainstream of tort.” G. Gilmore, supra note 15, at 87, cited in Farber & Matheson, supra note 16, at 905 n.12; cf. Metzger & Phillips, Independent Theory, supra note 16, at 506-07. The purported reabsorption has altered perceptions about what the role of the court is or ought to be in questions of contract enforceability. When contract law was perceived as wholly distinct from tort law and “within the exclusive realm of private ordering,” the judicial role was supposedly limited to enforcement of the parties’ agreement, judged by certain abstract, objective, neutral rules. Feinman, Critical Approaches, supra note 8, at 832, 834.

As courts, however, realized that the agreement might represent the will of only the dominant party, Kessler, Contracts of Adhesion — Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629, 632 (1943), they apparently became increasingly willing to judge pure questions of contract liability according to external, substantive standards of “contractual morality.” Summers, Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 198 (1968); see also Metzger & Phillips, Independent Theory, supra note 16, at 506-07, and less willing to decide liability on the basis of the parties’ private agreements. This willingness separates modern judges from their classical counterparts who viewed such standards as irrelevant to their primary purpose of interpreting agreements to reflect the private wills of the parties. Professor Feinman and the legal realists would argue that to suppose that policy judgments did not intrude into this world was a classical myth. Feinman, Critical Approaches, supra note 8, at 834; see also Gordon, supra note 1, at 1026.

The increased willingness to judge enforceability of private agreements according to notions of fairness and other like external standards derived from “the assault on freedom of contract” and reflected a new “regulatory conception of free contract.” Kennedy, Distributive and Paternalist Motives, supra note 8, at 578. The attack produced a tension concerning the court’s proper role in deciding questions of contract liability. Accordingly, the judge acts both as interpreter/facilitator and as regulator/policeman. Kennedy, Private Law Adjudication, supra note 8, at 1735.

“The modern law’s response is both a frank acceptance of the courts’ role in applying social values in some areas and a retention of the core of contract as founded on private agreement.” Feinman, Critical Approaches, supra note 8, at 834 (“contract law is perceived to be like tort law, but not to be tort law”). But see infra notes 266-92 and accompanying text, suggesting a way to reconcile the public and private aspects of the law.

In the contest of promissory estoppel, however, viewing the expanded liability of promisors as essentially tort-like results reflecting the intrusion of policy judgments on questions of contract liability may be a mistake. Id. This Article argues that courts decide promissory estoppel cases on the basis of a finding of assent, which preserves the distinction between assent-based and tort liability. Farber & Matheson, supra note 16, at 906 n.12. This Article argues that what may be perceived as judicial attempts to impose social values on the outcome may only be an effort to consider sensitively the ways in which different individuals “assent.”

Professors Farber, Matheson, and Barnet view promissory estoppel case law as a theory of obligation that has less in common with tort-based notions of protect-
miliar portrait of promissory estoppel and bargain as divergent doctrines reflecting the internecine warfare between assent and nonassent based liability rules. Because promissory estoppel measures recovery by the harm to the promisee, some scholars have assumed ing promises against harm than with pure contract law conceived in terms of assent. See supra note 21; Farber & Matheson, supra note 16, at 906 n.12. Specifically, this Article shares Professor Barnett's view that it is important to recognize the broader "features of the contractual process" including a search for features "that normally correspond to the presence of contractual intent." Barnett, supra note 5, at 290. This Article, like Professor Barnett's article, seeks to agitate conventional notions that consideration is the exclusive means to make out a "prima facie" case of assent. Id. at 314. Moreover, this Article agrees that the proper focus of assent theory is on manifested intent to "alienate rights" because "[w]ithout such communication . . . attendant uncertainties of the transfer process will discourage reliance." Id. at 302. This Article agrees with Professors Farber and Matheson that to view reliance recovery as divorced from exchange is misguided.

This Article, however, extends beyond Barnett's or Farber & Matheson's theories in exploring why, under certain circumstances, courts reasonably infer assent to be bound even with less unequivocal and less explicit communicative conduct than would ordinarily be required.

To rationalize the results of contract law in terms of assent might be viewed by Professor Kennedy and others as an attempt to explain the case law in terms of the now discredited freedom of contract model. Professor Kennedy might argue that making assent the basis for enforceability, only re-elevates the once "dominant ideology" that "argues for freedom of contract as a coherent [and exclusive] guide to decision making." Kennedy, Distributive and Paternalist Motives, supra note 8, at 376. Professor Kennedy would regard the assent theory as useless since it, like the freedom model, would fail to provide a workable test for enforceability. "The real problem with freedom of contract is that neither its principles, nor its principles supplemented by common moral understanding, nor its principles, supplemented by historical practice, are definite enough to tell the decision maker what to do . . . ." Id. at 580-81.

Because of these shortcomings in the freedom of contract model, and presumably in the assent model as well, Professor Kennedy looks to "distributive, efficiency and paternalistic" motives to resolve questions of enforceability. See generally id. This Article disagrees with the conclusion that courts need to reject the freedom model as an unsatisfactory basis for decision making. The assent theory, if expanded and refined as suggested here, would provide a workable mechanism for determining enforceability because it would preserve an important domain for individual freedom and is preferable to models, like those Kennedy embraces, that depend on paternalism or to other models called "standards based" that are beset by "the difficulties of extreme indeterminancy. . . ." Barnett, supra note 5, at 277, 290.

24. The once widely held belief that damages in promissory estoppel cases should be restricted to the reliance (or harm) measure of recovery "is inconsistent with judicial practice in these cases." Feinman, Judicial Method, supra note 8, at 686 n.42. "[T]he typical damage remedy applied in promissory estoppel cases is no longer restricted to the reliance interest;" expectancy is now the basic measure of recovery. Id. at 687-88. The explanation for the availability of expectation damages in promissory estoppel cases is consistent with interpreting promissory estoppel as assent-based. See also Dalton, supra note 2, at 1090. Despite the general erosion of the importance between reliance and expectation damages some distinctions should continue to be drawn. See infra note 28.
that the doctrine serves a tort law goal of compensating the promise for injury and, therefore, is a mechanism for public regulation rather than for implementation and facilitation of private agreements. On the other hand, scholars have assumed that the orthodox theory of contract law with its self-proclaimed emphasis on ascertaining the parties' mutually manifested intent, serves the different goal of enforcing private voluntary agreements. This Article will demonstrate that these doctrines merely manifest fundamental criteria useful in identifying the critical foundations of contract. Under certain conditions, only explicit bargaining or formalized contracting satisfies the elemental criteria for establishing assent. Under other conditions, explicit bargaining or formalized contracting may not be necessary to assure reasonably that the foundational assent criteria are met.

This new approach to contract suggests that liability obtains when either (1) complete contracting is possible and an explicit bargain or a bargain plus formalities is reached, or (2) persuasive barriers to, or explanations for the parties dispensing with, explicitly reciprocal or formalized contracting exist and a plausible benefit to

25. See, e.g., W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton On Torts § 1, at 5-6 (5th ed. 1984) (broadly defines a tort as "a body of law . . . directed toward the compensation of individuals . . . for losses . . . suffered within the scope of their legally recognized interests . . . .").

26. See Restatement (Second) of Contracts § 3 (1981); see also E.A. Farnsworth, supra note 10, § 3.1, at 106 ("contractual liability is consensual"); Feinman, Critical Approaches, supra note 8, at 831-32.


28. Among the circumstances that the Article identifies as relevant to determining if barriers to, or explanations for dispensing with, explicitly reciprocal contracting exist are (1) the relative status and knowledge of the parties; (2) the enmeshment of the parties; and (3) trust and confidence relations. Professors Farber and Matheson also discuss factor 2 in their recent article on promissory estoppel. See generally Farber & Matheson, supra note 16, at 925-30. In exploring the circumstances in which barriers to, or explanations for the parties' dispensing with, explicitly reciprocal contracting exist, this Article is written in the spirit of other literature that has explored "implicit contracting." See, e.g., O. Williamson, The Economic Institutions of Capitalism 1-84 (1985) [hereinafter cited as O. Williamson, Economic Institutions]; Arrow, The Economics of Agency in Principals and Agents: The Structure of Business 37 (J. Pratt & E. Zeckhauser eds. 1985); Baumol, Williamson's The Economic Institutions of Capitalism, 17 Rand. J. Econ. 279 (1986). The Article will examine (1) why such implicit contracting occurs; (2) whether a liability rule, as an adjunct to the heterodox arrangements that parties are likely to employ, would enhance the achievement of goals presumed to be sought by contracting parties; and (3) what the content of such a rule would be. A regime of relief formulated in light of an implicit contracting analysis should not necessarily be expected to replicate that which follows in the case of explicit contracting.

If one considers implicit contracting to occur in the following manner, it may
the promisor can be identified.29 Cases meeting the first criteria should be and generally are decided under the rubric of orthodox contract law's requirement of explicit evidence of bargain or bargain plus formalities. Cases meeting the second criteria should be and generally are decided under promissory estoppel doctrine.

In deciding whether persuasive barriers to, or reasons why the parties dispersed with, complete and explicit or formalized contracting, courts examine several factors. None of these factors is necessarily determinative, but all are important. These factors include: (1) the relative status and knowledge of the parties; (2) the enmeshment of the parties in some broader relationship; and (3) the existence of any relationship of trust and confidence between the parties. If one or more of these factors is present, the plaintiff is more likely to succeed on a promissory estoppel claim.29 An explicitly reciprocal

indeed be appropriate to compensate the plaintiff for his costs, despite the increased availability of expectancy to injured promises. The scope of the damages issue is beyond the scope of this Article.

Under a model of implicit contracting, a promisor (R) and promisee (E) may often engage in discussions regarding an undertaking that R might be willing to take in the future. However, because of a lack of information on R's part and an unsophistication or ignorance about the need for such explicitly reciprocal contracting on E's part, persuasive reasons for dispensing with an orthodox bargain may exist. Under these circumstances, a court may find an undercurrent of an implicit contract, the terms of which vary from those of the potential future promise R would be willing to make. Instead, the terms of the implicit bargain flowing from R to E might be as follows: "E, in exchange for your taking initial steps toward making it possible for us to formalize our subsequent relations, which steps are in some sense valuable to me, I promise to keep you informed of changes in my willingness to later reach a more completely explicit bargain."

So conceived, it becomes possible to conclude that and understand why bargain incurs incrementally. O. WILLIAMSON, ECONOMIC INSTITUTIONS, supra at 71-72; Williamson, Transition-Cost Economics: The Governance of Contractual Relations, 22 J.L. & ECON. 233 (1978) [hereinafter cited as Williamson, Contractual Relations]. Similarly, it becomes possible to view promissory estoppel manifestations as within assent-based obligation, but as justifiably calling for an interim measure of recovery that stops short of damages for breach of R's potential future promise.

29. Professors Farber and Matheson have identified a benefit to the promisor as a central factor in deciding liability questions under promissory estoppel. Farber & Matheson, supra note 16, at 914. These authors view such a benefit as evidence of an "economic exchange." Id. This Article recognizes the importance of the benefit factor for a different reason. It explains why promissory estoppel is assent-based. See infra notes 202-28 and accompanying text.

30. See generally Farber & Matheson, supra note 16, at 925-30, for a discussion of the importance of ongoing relationships in predicting outcome. In classifying the results of cases that comprise the legal "microdata," see supra note 23. This Article regards a case as decided for the plaintiff if the decision (1) denies a motion for summary judgment or directed verdict for the defendant, or (2) finds in favor of the plaintiff on the merits. Arguably, the results in the first instance cannot be classified as for the plaintiff because the decision formally holds only that the plaintiff may proceed to trial on contested factual issues. The classification, how-
or formalized bargain is unlikely to occur in such a context, although an exchange between the parties exists.

The three identified factors should be explicitly incorporated into the law of promissory estoppel. Some courts have relied explicitly on these factors. Courts that have not recognized these factors have, nevertheless, reached results consistent with them. Explicit reliance on these factors will enable a court to determine whether sig-

ever, is appropriate because courts’ views of whether the plaintiffs may proceed on a promissory estoppel theory are strongly influenced by the relative status and knowledge of, commensurate, and relations of trust between the parties.

When promissory estoppel claims are raised in cases not involving one of the factors identified here, courts generally have no difficulty granting summary judgment. See, e.g., R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984); Gruen Indus., Inc. v. Biller, 608 F.2d 274 (7th Cir. 1979); Bender v. Design Store, 404 A.2d 194 (D.C. 1979); Peterson v. Petersen, 355 N.W.2d 26 (Iowa 1984); Progress Enter., Inc. v. Litwin Corp., 225 Kan. 212, 589 P.2d 583 (1979); Moore, 628 S.W.2d 488; Wanner, 101 Wis. 2d 637, 305 N.W.2d 158. Although each of these cases arguably raises factual issues inherently incapable of resolution on a summary judgment motion, each involved parties on equal footing. In each case, the court denied the plaintiffs the opportunity to proceed to trial.

If, however, a factor identified in this Article as outcome predictive is present, the court is less likely to decide the case on a motion for summary judgment and will more readily allow the plaintiff raising the promissory estoppel claim to proceed to trial. See, e.g., Clark, 135 Mich. App. 87, 352 N.W.2d 349; Lovely, 132 Mich. App. 485, 347 N.W.2d 752; Eklund, 351 N.W.2d 371. In the foregoing cases, plaintiffs who detrimentally relied on an offer of employment and who subsequently sued the defendant employer when he failed to fulfill his promise all survived a motion for summary judgment. All of the cases involved a disparity in status. See Vastoler v. American Can Co., 700 F.2d 916 (3d Cir. 1983) (plaintiff employee secured reversal of summary judgment for defendant employer); Anthony v. Ryder Truck Lines, Inc., 611 F.2d 944 (3d Cir. 1979) (summary judgment for employer inappropriate); Schmidt v. McKay, 555 F.2d 30 (2d Cir. 1977) (summary judgment for union inappropriate when plaintiff was individual employee); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (summary judgment for employer inappropriate); see also 1A A. Corbin, supra note 5, § 200 at 216-17. Corbin agrees with the variability in case results, saying, “[t]he relative economic needs and capacities of the parties . . . should be taken into consideration, particularly in determining the form of remedy and the extent of recovery.” Id. But see Metzger & Phillips, Evolution, supra note 11, at 194 (“no necessary relationship between inequality of bargaining power and the invocation of the doctrine”); see also Feinman, supra note 16, at 1383-84.

The approach suggested here cannot rationalize all of the cases. Some case results do not reflect the “patternning” Michelman, supra note 23, at 1035, outlined here. This Article would reject these results on policy grounds. See infra text accompanying notes 231-37. Professor Gordon would characterize this effort to identify a hidden agenda for decision making as an “apologetic,” reformist “intellectual exercise.” Gordon, supra note 1, at 1019. It is reformist because it advances a new theory that can revise the basic explanatory structure to accommodate a body of otherwise irreconcilable decisions. It is “apologetic” because it assumes that “existing practices are rational and good, or may readily be made so by procedures and options currently available to policymakers.” Id.
significant barriers to explicitly reciprocal or formalized contracting exist and thus determine whether it is appropriate to insist on orthodox contract formalities.

The other component of the theory—the identification of a plausible benefit to the promisor—helps to explain why promissory estoppel remains an assent-based theory despite the common perception of promissory estoppel as a tort-like doctrine.\(^{31}\) This Article discusses the relationship between the benefit to the promisor, the benefit-bestowing action taken by the promisee, and the presence of an exchange and assent.\(^{32}\)

Section one of this Article describes how legal scholars have identified the doctrine of promissory estoppel as an evolving tool to socially regulate the contracting process.\(^{33}\) Section two explores the impact of status, knowledge disparities, and confidence and trust relations on the outcome of cases. Section three documents the impact of the factors discussed in section two on the application of a key doctrinal element of promissory estoppel — the promise. Section four discusses causes of the failure to achieve explicitly reciprocal or formalized contracting. It documents the implications of imposing a liability rule in such circumstances for modern contract theory, when considered in conjunction with a plausible benefit to the promisor. Section five proposes a test for deciding promissory estoppel cases and identifies the benefits of the test. Section six answers potential criticisms of the proposed approach. Finally, section seven applies the proposed approach to decided cases that have taken insufficient account of the factors identified here.

I. CONTEXTUALIZING PROMISSORY ESTOPPEL: THE RISE OF THE DOCTRINE AS A SOCIAL AND ECONOMIC DEVELOPMENT

Some contract theorists have perpetuated a vision of bargain theories or bargain plus formalities and promissory estoppel as contradictory approaches to enforceability by depicting each doctrinal approach as a product of differences in values, behavioral assumptions, and "economic conditions."\(^{34}\) Orthodox approaches to enforce-

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31. See, e.g., G. Gilmore, supra note 15, at 87; Summers, supra note 23, at 223-25; cf. Henderson, supra note 16, at 363 ("over the years some limited protection of reliance losses has been recognized on the basis of the tort notion that a dealer ought to be entitled to enjoy the fruits of a franchise or distributorship at least for a period of time which permits him to recoup his investment").

32. See infra notes 202-28 and accompanying text.

33. See infra notes 39-49 and accompanying text.

34. Professor Feinman might characterize scholarship in this vein as "functional." Feinman, Historical Perspective, supra note 16, at 1375.

Functional explanations may differ about whether the needs served by the expansion of the reliance doctrine have long been present or have been produced only under modern conditions. The former view attributes the
ability—bargain theory or bargain plus formalities—are viewed by many scholars as a product of "models of social reality"86 premised on an almost mythical belief in the equal ability of all contracting parties to achieve explicit and formalized reciprocal bargains and on similar flawed views of social reality.86 Orthodox doctrinal mechanisms also served important belief systems of individualism, formalism, and laissez-faire.87 If such assumptions are true, the classicist system is sensible, despite its assertive rejection of a concern with the "scope of social duty"88 and harsh refusal to excuse those failing to comply with orthodox formalities.

Liberal theorists view the rise of a deviant agenda for enforceability—promissory estoppel—as a positive "adaptation" to "new models of social reality"89 and to different assumptions about human behavior, including the ability of legal rules to affect behavior and of the differential ability of parties to achieve explicitly reciprocal or formalized bargaining. The liberal theorists characterize promissory estoppel as a progressive doctrine that has evolved to respond to certain "social needs"90 and to a shift in values from individualism to interdependence.91 Recognition of these differences made it problem-

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Id. at 1377.

35. Gordon, supra note 1, at 1027.

36. The legal realists increased awareness about the unreality of the social model upon which classical formalism was premised. "The final defect, in some ways at the heart of the others, was the gap between the formal ideal of doctrine and the reality of social behavior. Contract in theory did not take into account the complexity of social reality, including the unequal distribution of economic advantage in society..." Feinman, Critical Approaches, supra note 8, at 836; see also Metzger & Phillips, Independent Theory, supra note 16, at 475-78.


39. Gordon, supra note 1, at 1027.

40. Professor Gordon might characterize theorists in this mold as "adaptation theorists." To find such theorists in the promissory estoppel area would not be surprising because "[a]daptation theory is so pervasive in the scholarship of the past two centuries that it would be a challenge to find work in which it was not present." Gordon, supra note 1, at 1029 n.43. Professor Gordon finds that adaptation theorists remain highly vulnerable to the attack that "they do not usually feel that they have to specify what a 'social need' is, or how the particular needs they refer to originated and have changed over time." Id. at 1030.

41. Fuller, supra note 10, at 823 ("with an increasing interdependence among the members of society we may expect to see reliance (unbargained-for, or half-bargained-for) become increasingly important as a basis of liability"); Metzger & Phillips, Independent Theory, supra note 16, at 506; Metzger & Phillips, Evolution, supra note 11, at 200-06.
atic for courts to continue to restrict themselves to effectuating private agreements, judged by orthodox contract rules. Courts recognized that orthodox agreements often only represent the desires of the stronger party. Therefore, courts began to scrutinize contractual agreements more strictly. That scrutiny was often explained in terms of the importation of external fairness standards into what had heretofore been regarded as a value neutral domain of private will interpretation. In this context, courts interested in law as a regulatory device arguably relied on promissory estoppel for policing contracting abuses, expanding the social responsibilities of contracting parties, and policing "the disadvantageous effects of the unfettered market." Thus rationalized, Professor Gilmore's situating of promissory estoppel in the realm of tort rather than contract and the scholarly view of the doctrine as a tool for effecting distributive jus-

Professor Feinman would characterize tracing the expansion of reliance doctrine to social developments as a "functional hypothes[i]s." Feinman, Historical Perspective, supra note 16, at 1377. The functional hypothesis does not make sense to Professor Feinman, however, because "there is no clear correspondence between a particular image of contract law and a particular social order." Feinman, Critical Approaches, supra note 8, at 853. This lack of correspondence is in part due to the fact that "[b]ecause contract law relies on contradictory principles . . . it lacks coherence." Id. Because the underlying principles are divergent, finding a unifying theme that is responsive to actual "social needs" is difficult. Consequently, the legal system, instead of merely adapting to certain social needs, "had constantly to choose among these purposes, so that the actual social need served was that of mediating these conflicts by dressing up doctrinal formulae in traditional language to obscure" the value choices being made. Gordon, supra note 1, at 1035. This view posts the "indeterminacy" of the value choices being made. Gordon, Tentative Outline for Session on Theoretical Perspective on Contract Law, 20 (Oct. 10, 1986) (delivered at A.A.L.S. Workshop on Contracts) (available at The Wayne Law Review) [hereinafter cited as Gordon, Tentative Outline]. The view threatens to undermine "the models of instrumental rationality underlying both the liberal theory of law and the enterprise of legal scholarship." Gordon, supra note 1, at 1022.

42. See Feinman, Critical Approaches, supra note 8, at 848-49.
43. Kessler, supra note 23, at 632.
44. See E. Murphy & R. Speidel, STUDIES IN CONTRACT LAW 13 (3rd ed. 1984); Feinman, Critical Approaches, supra note 8, at 834 ("modern law's response is . . . a frank acceptance of the courts' role in applying social values . . . ."); Metzger & Phillips, Independent Theory, supra note 16, at 507-08. Professor Unger recognizes this altered role for the state, writing "]t]he other notable set of attributes of postliberal society is . . . the gradual approximation of state and society, of the public and the private sphere. For one thing, the state's pretense to being a neutral guardian of the social order is abandoned." R.M. UNGER, LAW IN MODERN SOCIETY 193-94 (1976), cited in Metzger & Phillips, Independent Theory, supra note 16, at 503-04.
45. See supra note 38.
46. Feinman, Critical Approaches, supra note 8, at 849. "Currently, contract law facilitates exchange by educating and disciplining parties in the norms of commerce . . . ." Id.
47. See G. Gilmore, supra note 15, at 87.
tice and altruistic goals,\textsuperscript{48} rather than for ascertaining the presence of assent, is understandable.\textsuperscript{49}

II. The Impact of Status, Knowledge Disparities, Enmeshment, and Trust Relations on Promissory Estoppel Case Law

Having sketched the rise of promissory estoppel as a product of the disillusionment with the premises of orthodoxy and of the resurgence of substantive social limits on the contracting process, and without deciding whether this view is accurate, this Article proceeds to discuss the apparent connection between a model of human behavior and the doctrinal developments in the promissory estoppel arena. Such connection is reinforced by the results in the case law. In cases expanding the availability of a reliance-based liability rule, the courts appear increasingly sensitive to the fallacy that all persons have an equal ability to protect themselves through the orthodox bargaining process.\textsuperscript{50} Courts explicitly have justified an expanded promissory estoppel doctrine in terms of a new, more complex model

\textsuperscript{48} Kennedy, Private Law Adjudication, supra note 8, at 1777.

\textsuperscript{49} Professor Feinman would characterize this synopsis of promissory estoppel scholarship as reflecting "mainstream liberal theory." Feinman, Critical Approaches, supra note 8, at 848. That theory begins with the premise that "the network of private, unregulated transactions . . . form[s] the basis of the economic system." L. Freidman, Contract Law in America 184 (1965), cited in Feinman, Critical Approaches, supra note 8, at 848 n.66. This theory then postulates that the legal system should facilitate that basic economic system. The means of achieving that goal has, however, changed "as the nature of the economy has changed." Id.

Professor Feinman faults this view because it depicts consensus that an underlying goal of contract law is the facilitation of economic exchange. That view ignores the essentially contradictory nature of such underlying goals as "freedom of contract" and "social control" and, therefore, cannot both be accommodated. Id. at 849. "At best . . . contract embodies a temporary compromise without coherence." Id.

The "mainstream historical picture," id. at 848, can be faulted on two other grounds. "Critical functionalism" advocates, id. at 849, argue that the application of the law is exploitative—that it adapts not to underlying social and economic needs but instead "to meet the changing needs of the dominant class." Id. This view differs from that of the pluralist in assuming the dominance of one class—the capitalists—and their ability to use law to further their economic needs at the expense of the underclass. Id. at 848-49.

Other critics fault the historical view of the rise of reliance as misguided because it pretends to be rational "application[s] of accepted principles of fairness," id. at 853, when the use of contract doctrine actually "legitimizes an illegitimate status quo," id., and "denies the contradiction between individualism and collectivism." Id. at 856.

\textsuperscript{50} But see Metzger & Phillips, Independent Theory, supra note 16, at 505-06 ("the expansion of promissory estoppel cannot be so directly tied to the rise of the corporation and the disparities in bargaining power it produced as can the partial dissolution of classical contract law").
of human behavior which recognizes that many parties will dispense with "the precision envisioned by the classical formation/bargain consideration model."\textsuperscript{51}

The success of promissory estoppel as a claim to liability varies according to: (1) inequalities in status or knowledge; (2) enmeshment in broader ties; and (3) relations of trust and confidence.\textsuperscript{62} Together these factors comprise a model of "social reality" that the courts are using to support their decisions.\textsuperscript{63}

The importance of all three factors reflects a trend toward the resurgence of status\textsuperscript{64} and the parties' circumstances\textsuperscript{65} as powerful

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52. Professor Gordon may claim that in constructing these categories based on the facts of the cases this Article is not sufficiently "fact-skeptical." Gordon, \textit{supra} note 1, at 1035 n.65. The Article takes the facts of a case at face value, disregarding the possibility that "the facts as stated in a case . . . that describes the social situation to which the legal text is to respond are also in part artifacts of the legal system." \textit{Id.} at 1035.

Even if one assumes some artifacts in depicting the facts of a case, the question for contract theory is how a court's characterization of the facts affects the courts' approach to promise enforcement.

53. \textit{Id.} at 1027-28. This Article separates these characteristics because in certain situations some, but not all, of the characteristics may be present. For example, two business entities between whom no marked disparities of status or knowledge exist, nevertheless may be enmeshed in an ongoing relationship.

54. This resurgence suggests that Henry Maine's famous theory that the trend in "progressive societies" to downgrade the importance of status in favor of contract, \textit{H. MAINE, ANCIENT LAW} 163-65 (10th ed. 1884), is of diminishing accuracy today. As described by Maine, the ancient systems of organization "fixed a man's social position irreversibly at his birth," \textit{id.} at 295, concurrently with his rights and obligations. To conceive of a system in which the parties themselves could set rights and obligations by agreement was impossible. As societies progressed, however, "individual obligation" eventually predominated over the ancient bonds of family. \textit{Id.} at 163. Maine regarded the dominance of individual contract over status as necessary for economic development. \textit{See id.} at 295-97.

The reevaluation of status described in this Article is an intuitive, albeit often unarticulated, reaction to the defects of a system that insisted on applying strict bargain principles even when persuasive barriers to explicitly reciprocal or formalized contracting existed. \textit{But see} Feinman, \textit{Critical Approaches}, \textit{supra} note 8, at 831. Professor Feinman questions the historical accuracy of the eighteenth century view of obligations as status based. "In fact, in the eighteenth century the contradictions in legal thought between legal obligation as deriving from status and from contract . . . were highly visible." \textit{Id.} at 831 n.9.

55. Consideration of individual circumstances of the parties in legal analysis is not new. It is rooted in the doctrine of assumpsit, which held persons with certain status, such as innkeepers and common carriers, to an implied duty against misfeasance. \textit{WINDSLEY, LECTURES ON LEGAL HISTORY} 106 (2d ed. 1957), \textit{cited in E. MURPHY & R. SPEIDEL, supra} note 44, at 15. \textit{See also, E.A. FARNSWORTH, supra} note 10, at § 1.6. This use of assumpsit dates back to at least the fifteenth century. \textit{Id.}

More recently, Karl Llewellyn championed the view that courts should assess the individual circumstances of the parties in deciding cases. His approach was, in
predictive tools in the outcome of promissory estoppel cases. In turn, these developments reflect a current tendency to "fram[e] the legal issue[s] in light of the nature of the parties and their place within the sphere of commerce." Moreover, these developments are consistent with changes in contract law and with such doctrines as unconscionability, holder-in-duty course limitations, and actionable non-disclosure, which increasingly have taken account of particular circumstances of the parties, including their status and sophistication, in determining liability issues.

part, a reaction to the dissatisfaction with the abstract approach taken by the classicists who regarded particular facts as irrelevant to the decisionmaking process. The classicists feared that without an abstract method judges would seize upon facts to impose their personal views in deciding cases. See Feinman, Judicial Method, supra note 8, at 682.

Despite the view, shared with Llewellyn, that individual facts should be part of legal analysis, the methodology suggested in this Article fundamentally differs from Llewellyn's. The proposed methodology does not view the facts as containing the "single correct legal solution," id. at 699, and thus is not empiricist in nature. Instead, the courts should review the facts to sensitize them to the differentiated ability of the parties to comply with orthodox contractual requirements and to aid them in fashioning rules appropriate to the nature of the parties' behavior.

36. Feinman, Judicial Method, supra note 8, at 698.

37. The doctrine of unconscionability embodied in U.C.C. § 2-302 typifies a doctrine developed to consider the individual circumstances of the parties. Unconscionability takes account of unequal knowledge and lack of real opportunity to bargain. A court that finds such procedural defects will more readily entertain claims that the contract is substantively unconscionable and therefore unenforceable. For a discussion of the difference between procedural and substantive defects in the unconscionability area, see Lef, Unconscionability and the Code - The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 489-501 (1967). For an example of a case in which the court relied on procedural defects as a basis for scrutinizing the substantive provisions of the contract, see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), in which the court stated:

[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract . . . the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id. at 449-50 (footnotes omitted); see also Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 106, 109-11 (S.D. Miss. 1979). But cf. Dalton, supra note 2, at 1024-38 (criticizing the emphasis on process defects as tending to obscure the importance of public values in contract laws by "reassur[ing] that the public decisions are being made in neutral and consensual territory," id. at 1026.).

Courts have drawn distinctions regarding the availability of the unconscionability doctrine based on the plaintiff's status. Thus, the unconscionability defense is generally denied to merchants because of their superior knowledge. E. Murphy & R. Speidel, supra note 44, at 663-64. Due to their relatively equal knowledge and status, merchants are deemed capable of protecting their own interests. See W.L. May Co. v. Philco-Ford Corp., 273 Or. 701, 708, 543 P.2d 283, 287 (1975) (unconscionability claim failed because "both parties . . . were sophisticated business people. This is clearly not the case of an innocent consumer who has unsuspectingly
The cases discussed in this subsection support the proposition that when a disparity in status\textsuperscript{58} between the plaintiff and defendant exists, promissory estoppel operates to protect plaintiffs with the in-
signed an adhesion contract," id. at 708, 543 P.2d at 287; see also County Asphalt, Inc. v. Lewis Welding & Eng’g Corp., 323 F. Supp. 1300, 1308 (S.D.N.Y.), aff’d 444 F.2d 372 (2d Cir. 1970), cert. denied, 404 U.S. 939 (1971). These cases are cited in E. Murphy & R. Speidel, supra note 44, at 663-64.

The importance of merchant versus consumer status, with its concomitant disparities in sophistication, also is reflected in the development of the close-connectedness exception to the holder-in-due course rules applicable in the context of commercial paper. The doctrine of close-connectedness provides that if a sufficiently close connection between the purchaser of a negotiable instrument and the original seller exists, the purchaser may fail to qualify as a holder-in-due course even if he technically qualifies as such. Stripped of holder-in-due course status, the purchaser becomes subject to the defenses the consumer could have raised against the original seller. See J. White & R. Summers, Uniform Commercial Code § 14-8 (1972). As with unconscionability, the courts generally have restricted the availability of the close-connectedness doctrine to cases involving a disparity in status between the parties, with the plaintiff being a consumer and the defendant a finance company. Id. at 483. See Jones v. Approved Bancredit Corp., 256 A.2d 739 (Del. 1969); Calvert Credit Corp. v. Williams, 244 A.2d 494 (D.C. App. 1968); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968). These cases are cited in J. White & R. Summers, supra § 14-8. But see Arcanum Nat’l Bank v. Hessler, 69 Ohio St. 2d 549, 433 N.E.2d 204 (1982).

The judicial limitation on the holder-in-due course doctrine and its limited availability to nonconsumers reflects the importance that courts attach to a disparity in status. Courts also have recognized the importance of disparities in knowledge and experience in developing the "shingle theory," applicable to sales of securities by brokers and dealers. The shingle theory postulates that, by virtue of one’s status as a broker/dealer with superior knowledge and expertise, one assumes certain disclosure obligations to one’s customer. Courts have based the disclosure obligations on the superior knowledge of the broker/dealer and the broker/dealer’s holding himself out as an expert. See L. Loss, Fundamentals of Securities Regulation 951-58 (1983); see also Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir.), cert. denied, 321 U.S. 786 (1943). The Hughes court recognized the importance of a disparity in knowledge as a basis for imposing disclosure obligations. The court addressed whether the failure of a dealer, selling securities to its customers at prices "substantially over those prevailing in the over-the-counter market," to disclose the markup constituted fraudulent conduct. Id. at 435. In finding the dealer liable, the court cited the dealer’s "special duty, in view of its expert knowledge and proffered advice, not to take advantage of its customers' ignorance of market conditions." Id. at 437; cf. Fleming & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 524-27 (1977), which discusses the expanding duty to disclose in contexts involving "relations of trust and confidence." Id. at 525.

58. Professor Ellinghaus identifies “inequality in bargaining position” as an outcome determinative factor in unconscionability cases and defines such inequality as “a disparity of status as opposed to a disparity which is the product of a particular contingency.” Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 767 (1969). A disparity involves parties “of a statically different order.” Id.
ferior status but not those plaintiffs with superior status.

1. Status

The results in the cases appear to reflect a determinative impact for a factor apparently consistent with the theory. This factor appears to reconcile seemingly inconsistent case law. Thus, plaintiffs who are actual or potential employees are particularly likely to prevail on promissory estoppel claims based on employment promises made by employers. Franchises enjoy similar success in lawsuits against potential or current franchisors, and insureds are particularly likely to prevail


60. Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958); Klinke v.
on promissory estoppel claims against insurers unless special facts show the plaintiff insured and the defendant insurer to be equally sophisticated.\(^{61}\)

Two cases that illustrate the impact of a difference in status are *Prudential Insurance Co. of America v. Clark,{ }^ {62}\) and *Marker v. Preferred Fire Insurance Co.*\(^{63}\) In *Clark*, the insured was a Marine Corps enlistee during the Vietnam War. After enlisting, he procured a life insurance policy that covered him for war risk and aviation. \(^{64}\) Subsequently, an insurance agent persuaded Clark to drop his policy by promising an equivalent policy. When issued, the policy excluded coverage for war risk and aviation, in contravention of the understanding between the agent and the insured.

After Clark was killed in combat, the insurance company paid the beneficiaries. The company later brought an action seeking to recover the monies, alleging mistake and improper payment. \(^{65}\) Although the jury found for the beneficiaries, the judge refused to enter a judgment in accordance with the verdict. The beneficiaries appealed. The appellate court reversed and ordered judgment for the beneficiaries based on promissory estoppel: the agent's promise had induced the insured to cancel the original policy. \(^{66}\)

In contrast, *Marker* illustrates that, absent marked disparities in status, the court is less likely to grant relief on promissory estoppel grounds. In *Marker*,\(^ {67}\) the plaintiffs acquired real property insured by the defendant. During purchase negotiations the plaintiff agreed to retain the seller's existing insurance policy on the property until the policy expired. The plaintiff instructed the defendant's insurance agent not to renew the policy and to notify him of the pol-

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62. 456 F.2d 932 (5th Cir. 1972).
64. 456 F.2d at 934.
65. *Id.* at 935.
66. *Id.* at 937.
icy's expiration date. The agent agreed.

A tornado hit the property after the insurance policy had expired. The plaintiff sued the insurance company, alleging that the agent's promise to notify him of the policy's expiration date caused him to detrimentally rely by not renewing the policy.

In deciding that the facts did not warrant a promissory estoppel recovery, the court found it unreasonable for the plaintiff to rely on promised notification of the expiration when the promise was made in response to a "rather casual request." The court stressed the plaintiff's status as an attorney and licensed insurance agent.

68. Id. at 429, 506 P.2d at 1166.
69. Id. at 431, 506 P.2d at 1168. The plaintiff also argued that the agent promised to notify him of the impending policy expiration, citing the special obligations of brokers to their clients. The court rejected this argument and failed to find a relationship of broker and client. Id. at 433, 506 P.2d at 1169.
70. Id. at 435, 506 P.2d at 1170.
71. Id. at 436, 506 P.2d at 1171. Cases that resemble Marker because of the absence of disparate status between the parties also result in defeat for the plaintiff. See Gocken v. Kay, 751 F.2d 469 (1st Cir. 1985) (promissory estoppel claim denied when parties were two experienced stock traders); Reproson, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984) (company proposing to purchase subsidiaries having sales of $40 million in complex transaction denied right to claim promissory estoppel); Republic Nat'l Bank v. Sabet, 512 F. Supp. 416 (S.D.N.Y. 1980), aff'd, 681 F.2d 802 (2d Cir. 1981), cert. denied, 456 U.S. 976 (1982) (promissory estoppel not available to corporate president); State v. First Nat'l Bank of Ketchikan, 629 P.2d 78 (Alaska 1981) (bank loses action against Alaska for purported assurances regarding the availability of a forthcoming state loan to potential borrower); Lachs v. Coast Fed. Sav. & Loan Ass'n, 60 Cal. App. 3d 885, 893, 131 Cal. Rptr. 836, 841 (1976) (plaintiff hotel developers lost action against lender; court cited the plaintiffs' status as "experienced businessmen"); Tull v. Mister Donut Dev. Corp., 7 Mass. App. 626, 630, 389 N.E.2d 447, 450 (1979) (promissory estoppel claim fails when plaintiff deemed "a reasonably informed participant in a commercial venture"); Union Nat'l Bank in Minot v. Schimek, 210 N.W.2d 176, 181 (N.D. 1973) (bank unable to assert promissory estoppel despite promise when defendant "did not know what the guaranty contract was nor the reason why the Bank wanted it"); First Nat'l Bank in Clarksville v. Moore, 628 S.W.2d 488 (Tex. Ct. App. 1982) (lender unable to assert promissory estoppel claim to enforce individual's promise to guarantee son's debt); Briercroft Sav. & Loan Ass'n v. Foster Fin. Corp., 533 S.W.2d 898 (Tex. Ct. App. 1976) (lender's promissory estoppel claim fails); Silberman v. Roethe, 64 Wis. 2d 131, 146, 218 N.W.2d 723, 730-31 (1974) (where promissory estoppel not available court considers fact that all parties involved "were businessmen" and case did not involve "a situation of an individual taken advantage of by a corporation"); Babler v. Roelli, 39 Wis. 2d 566, 569, 159 N.W.2d 694, 696 (1968) (plaintiff, having "extensive experience as milk hauler" unable to assert promissory estoppel claim because should have known defendant lacked authority to bind local dairy); see also Chimart Assocs. v. Paul, 66 N.Y.2d 570, 571, 574, 489 N.E.2d 231, 232, 234, 498 N.Y.S.2d 344, 345, 347 (1986) (plaintiff a "sophisticated, counseled" businessman, unable to assert that written contract diverged from his understanding of terms of oral agreement when parties engaged in "arms-length" bargaining).

Although the courts may justify denying promissory estoppel recovery by
Together, Clark and Marker demonstrate the impact of the status factor on the outcome of litigation. When a clear and marked disparity in status exists between a professional agent and a layman insured, the plaintiff prevails on his promissory estoppel claim. When the plaintiff is himself an agent so that he has parity of status with the defendant, he will lose a similar claim, at least in cases when none of the other factors are present.

2. Disparities in Knowledge of Applicable Law

Disparities in knowledge is another factor that appears to explain divergent outcomes. This factor most often correlates with rationally other than an equality in status, knowledge, or sophistication, such as the failure to meet a doctrinal element of promissory estoppel, the results evidence a pattern denying promissory estoppel recovery to certain classes of plaintiffs. See supra note 20.

If, on the other hand, the facts reveal a disparity between the parties, a plaintiff is more likely to succeed. See cases cited supra notes 30, 59-60 and accompanying text; see also Kramer v. Alpine Valley Resort, Inc., 108 Wis. 2d 417, 321 N.W.2d 293 (1982) (artist-plaintiff, craftsman of handmade products, prevailed against commercial complex developer).

72. For a discussion of these cases, see Feinman, Judicial Method, supra note 8, at 701-07. Feinman recognizes that “[t]he different results in Clark and Marker were determined not so much by differences in the ways the doctrine was applied as by differences in the ways the underlying facts were perceived.” Id. at 702. Thus, the factual context was a key element in the result. The problem that Feinman perceives making the underlying facts determinative could be fraught with difficulties. Even if courts properly could categorize the fact situation (a near impossible task since fact categorization is subject to “manipulation,” id. at 704), the court must still decide between competing values, such as paternalism toward the insured versus “freedom of the insurer,” id. at 706, that cannot be decided in an objective, nonarbitrary manner. Id. at 711. See infra text accompanying notes 248-50.

For further discussion of these cases, see Farber & Matheson, supra note 16, at 922-24. Farber and Matheson rationalize the different results not in terms of the parties’ disparate status, but in terms of the economic benefit factor. They conclude that only the defendant in Clark stood to benefit economically from a continuing exchange with the plaintiff. The defendant-agent in Marker stood to gain no benefit because of the impending termination of the broker-client relation. Thus, only the promise in Clark which involved an economic, albeit nontraditional, exchange should be enforced. See infra text accompanying notes 202-08.

73. Disparities in knowledge are reflected in promissory estoppel cases. See, e.g., Celucci v. Sun Oil Co., 2 Mass. App. 722, 731, 320 N.E.2d 919, 925 (1974), aff’d, 368 Mass. 811, 331 N.E.2d 813 (1975) (“[a] misrepresentation of law... made by one possessed of superior knowledge to take advantage of the relative ignorance of another may be ground for judicial relief”). Such disparities are an important factor in contract law for developing judicial rules excusing liability, as well as rules establishing liability for nondisclosure.

The importance of unequal knowledge as a basis for imposing liability is recognized in insurance case law. See R.E. Keeton, Insurance Law—Basic Text § 2.5(a), at 53 (1971) (“Often the liability of an intermediary to an applicant is based
the status factor—such that disparity in status is accompanied by
disparity in knowledge and vice versa—but not necessarily so. Disparities
in knowledge can assume several forms, including: (1) disparities in
knowledge regarding applicable contract formalities such as the
statute of frauds; and (2) disparities in knowledge about how
to protect one’s self-interest in the transaction. Courts generally are
skeptical of promissory estoppel claims when there are no marked
disparities in the parties’ knowledge of the applicable contract
formalities and the plaintiff has failed to adhere to such formalities.
From the courts’ disinclination to honor claims when the plaintiff
can discover the applicable rules, one can infer that a plaintiff is
more likely to win on a promissory estoppel claim if the court is
convinced that the plaintiff has unequal knowledge of the applicable
contract formalities.

The second type of knowledge disparity is also likely to affect
outcome. If the defendant’s position renders him an expert with su-
perior ability to uncover information about the proposed transaction
that the plaintiff must know to protect his own self-interest, the
plaintiff is likely to prevail.

The importance that the relative status of the parties and the
relative capacity to know the law of contract formalities have on out-
come is apparent in cases in which the plaintiff loses in part because
of the parties’ parity of both (1) status and (2) knowledge of con-
tact formalities. Jungmann v. St. Regis Paper Co.74 illustrates how
a convergence of equal status and legal sophistication about contract
formalities can affect outcome. In Jungmann, the plaintiff’s status as
an attorney, together with his knowledge of orthodox contract for-
malities, prompted the court to reject his promissory estoppel claim.
The defendant was a potential buyer of property on which the plain-
tiff held an option. Represented by two attorneys, the plaintiff ar-

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74. 682 F.2d 195 (8th Cir. 1982).
rived at a preliminary understanding with the defendant's representatives, one of whom indicated to the plaintiff that they "had a deal." The defendant, having found better property, refused to consummate the deal. The plaintiff sued on the oral contract and won a jury verdict. The defendant obtained judgment notwithstanding the verdict and promissory estoppel was not available.

The plaintiff's only argument against applying the statute of frauds was promissory estoppel. Therefore, the court of appeals first considered whether the plaintiff had proved the elements of promissory estoppel and then affirmed the district court's rejection of the plaintiff's promissory estoppel claim for lack of a "clear and definite agreement." The appellate court stressed that "[e]vidence revealed that the parties knew the statute of frauds applied to contracts for the sale of land." The plaintiff was an "attorney and an experienced real estate investor." The plaintiff's experience and knowledge of the law made the application of promissory estoppel inappropriate.

The importance of status and knowledge of legal formalities also is apparent in Gruen Industries, Inc. v. Biller. In Gruen, the plaintiffs, a parent corporation and its subsidiary, engaged in preliminary negotiations with the defendants for the sale of defendants' interest in another corporation. The plaintiffs advised the defendants that they did not want to finance the drafting of a written sales agreement without a "firm commitment" from the defendants. Such assurances were forthcoming; however, after the plaintiffs began preparing the formal purchase agreement, the defendants sold their shares to a higher bidder.

When the plaintiffs sued the defendants under a promissory estoppel claim based on the defendants' oral promise to sell the stock, the court of appeals for the Seventh Circuit affirmed the denial of the promissory estoppel claim. The court concluded that, under the circumstances, the plaintiffs' reliance on any oral promises from the

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75. Id. at 196.
76. Id.
77. Id. at 196-97.
78. Id. at 197.
79. Id.
80. Id. at 198.
81. Id.
82. 608 F.2d 274 (7th Cir. 1979).
83. Id. at 277.
84. Id.
85. Id.
86. Id. at 282. The plaintiffs also asserted a breach of contract claim, but that claim was barred by the statute of frauds. Id. at 277-78.
defendants was unreasonable. The court found that the transaction was sufficiently complex to necessitate a detailed and extensive written agreement. The court noted that the plaintiffs' representatives were "sophisticated businessmen" who should have known that the complexity of a stock purchase transaction mandates a written agreement. The court emphasized that the case did not involve "a situation of an individual taken advantage of by a corporation or individual with superior knowledge of legal and business practices."

Gruen and Jungmann demonstrate that when the plaintiff and the defendant do not have markedly disparate status and the defend-

87. Id. at 281.
88. Id. at 279. The court observed that the draft of the agreement, which was never completed, was 58 pages long. Id. at 279 n.4. The plaintiffs' awareness of the complexity of the transaction can be inferred from their having had such an extensive document prepared.
89. Id. at 281.
90. Id. (quoting Silberman v. Roethe, 64 Wis. 2d 131, 146, 218 N.W.2d 723, 730 (1974)). The importance of status in Gruen could be dismissed by arguing that, even with disparate rather than equal status, the plaintiff could not have succeeded. The conditional nature of the defendant's promise made it inherently unreasonable to rely on it. The promise was a conditional one because the "alleged agreement . . . was subject to numerous conditions, some of which were under the control of third parties." Id. at 280. If the fatal flaw of the plaintiff's case was the contingent nature of the promise, then no amount of tinkering with the parties' status would alter the outcome, despite the court's protestations as to the importance of status.

The true explanation for the court's refusal to sustain the claim in Gruen, however, is grounded in status. This is evidenced by comparing Gruen with Quimby, 31 Del. 264, 144 A.2d 123. In Quimby, Chrysler officials indicated to the plaintiff that to be considered for a particular dealership, he would have to obtain all of the company's stock held by the widow of a deceased dealer. Id. at 270, 144 A.2d at 126-27. At first, the defendant merely seemed to be making preliminary suggestions to the plaintiff that would enhance his chances of obtaining the dealership. The Quimby court easily could have decided that reliance on such ambiguous and conditional assurances was inherently unreasonable, as the Gruen court had done, particularly in view of the "successive conditions . . . imposed" by the defendants as negotiations progressed. Id. at 270, 144 A.2d at 129. The Quimby court found reliance by the less knowledgeable party reasonable and justifiable even if the conditional nature of the promises would have made reliance unreasonable had the parties been dealing at arms-length. See infra text accompanying notes 92-99.

The ability of a disadvantaged plaintiff to prevail even in cases in which the reliance on the underlying promise was arguably unreasonable is also apparent in the context of the terminability at will of employment contracts. In Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981), the court on appeal considered whether there was implied contract protection against termination at will despite an express disclaimer reserving discretion to terminate at will. The court found this issue to be a jury question. In other contexts, if the defendant, for example, expressly disclaims all contract liability in the absence of a formal written agreement, the court will refuse to find an actionable promise. See, e.g., Reprossystem, 727 F.2d 257. The proposed approach explains the difference in result.
ant did not exploit a plaintiff with inferior knowledge of the applicable legal formalities, the court is likely to reject a promissory estoppel claim, at least when there are no other factors, such as enmeshment, which could interfere with explicit or formalized bargaining. In both Jungmann and Gruen the parties appeared to be of equal status. All appeared to be sophisticated businessmen with expertise in the transaction at issue. Hence, no disparities in knowledge about the transaction were apparent. Finally, no continuing relationship of trust existed between the parties because they were arms-length bargainers in a single transaction involving the sale of real estate or stock. Because none of these factors was present, the court simply seized upon the equality of status as a convenient way to rationalize the result. Had one of the other factors been present, the court might not have found equal status a sufficient reason to reject the plaintiff's claim.

3. **Disparities in Access to Information About the Transaction**

Disparities in information about appropriate steps to protect one's self-interest are often present when one party is an expert in the transaction and the other party is a mere novice. When such disparities exist, the plaintiff is more likely to prevail if he is the novice. Such informational disparities will often, but not always, be present in conjunction with a disparity in status. The impact of the information gap factor on outcome is illustrated by *Chrysler Corp. v. Quimby*.

The plaintiff Quimby served as a director of an automobile sales company that had a dealership arrangement with the defendant Chrysler. When the president of the automobile sales company died, the plaintiff assisted Chrysler's representatives in identifying the company's shareholders. He also expressed to the Chrysler representative his desire to obtain the dealership agreement for himself.

Although Chrysler officials privately agreed that Quimby would not receive the dealership because of his inadequate experience in automobile sales, they indicated to Quimby that he would receive the dealership if he obtained all of the company's stock. They later...

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91. See, e.g., R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 76 (2d Cir. 1984) (court rejected promissory estoppel claim of limited partnership when the plaintiff's own memorandum reflected awareness of need to execute a formal written agreement).
92. 51 Del. 264, 144 A.2d 123 (1958).
93. *Id.* at 268, 144 A.2d at 126.
94. *Id.*
95. *Id.* at 269, 144 A.2d at 126.
96. *Id.* at 270, 144 A.2d at 126-27.
advised Quimby of their concern about his inexperience in the business and that, as a further condition for obtaining the dealership, he would have to sell a majority of the company's stock to a manager who would operate the company. The plaintiff finally had purchased all of the stock at a total cost of $60,000, Chrysler refused to enter into a dealership agreement with him. He sued for breach of contract, alleging promissory estoppel.

The Delaware Supreme Court affirmed the trial court's holding that the plaintiff had established a promissory estoppel claim. The court reasoned that Chrysler's representatives acted unfairly towards the plaintiff in continuing to mislead and negotiate with him knowing that their corporation had already rejected him.

Quimby illustrates a disparity in access to information necessary to protect one's self-interest. Notwithstanding the plaintiff attorney's expertise in the field of law, he was a novice in transactions involving automobile dealerships. This created a disparity in knowledge as well as access to necessary information. Chrysler's special knowledge of its dealership requirements and its evaluation of the plaintiff gave it a superior bargaining status and enabled the plaintiff to prevail on his promissory estoppel claim.

B. Enmeshment in Broader Ties

A second factor that favors plaintiffs raising promissory estoppel claims is enmeshment between the parties. Enmeshment ap-

97. Id. at 271, 144 A.2d at 127-28.
98. Id. at 274, 144 A.2d at 129.
99. Id. at 277-78, 144 A.2d at 131.
100. Both parties may suffer from the disadvantages of a lack of access to and high costs of information as well as the unforeseeability of the future. The lack of such information would present barriers to contracting with one another in a less than fully explicit way. See O. Williamson, Economic Institutions, supra note 28, at 45-47, 56-59; see also supra note 28.
101. In suggesting that courts tailor contractual liability to the context, making promissory estoppel more readily available in an ongoing relationship despite the absence of a traditional bargain, this Article draws on the scholarship of Professor Macneil. He rejected as entirely too myopic the view of the discrete transaction as paradigmatic of all contract transactions and drew attention to the "relational contract." See Whitford, Iain Macneil's Contribution to Contracts Scholarship, 1985 Wis. L. Rev. 545, 546. Professor Macneil's scholarship urged that contract law be differentiated to account for these differing contexts. For discussions of Macneil's relational theories, see Macneil, Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus," 75 Nw. U.L. Rev. 1018 (1981) [hereinafter cited as Macneil, Economic Analysis]; Macneil, Restatement (Second) of Contracts and Presentation, 60 Va. L. Rev. 589 (1974) [hereinafter cited as Macneil, Presentation]; Whitford, supra; cf. Henderson, supra note 16, at 374. Henderson asserts that one might expect courts to be particularly responsive to promissory estoppel claims "when a relationship, usually contractual, has already been established," id. at 373, and the promisee is suing the promisor on
pears to operate independently of status, so that even plaintiffs appearing to have equal or similar economic status and knowledge of the relevant contract law to that of defendants may be enmeshed in broader ties and thus able to prevail.102

The classical system was premised on the assumption that all transactions were discrete.105 The system did not take account of enmeshment in its rules. As described below, however, enmeshment is now factored into case analysis, with plaintiffs enmeshed in broader ties more likely to succeed in promissory estoppel actions.104

The impact of enmeshment is illustrated in Esquire Radio & Electronics v. Montgomery Ward & Co.106 The plaintiff Esquire and the defendant had a business relationship for over twenty years. At first, the plaintiff produced radios for resale under the labels of other retailers and producers, including Ward. As electronic equipment manufacturing shifted abroad, the plaintiff’s role changed to a “middleman vendor.”106 Under this arrangement, Esquire took delivery of goods that Ward had ordered from overseas manufacturers and had

a waiver on which the promisee has detrimentally relied. In such enmeshed contexts and “[i]n light of the fact that a formal relationship exists, the risk of serious reliance . . . is high.” Id. at 374. Henderson’s analysis is consistent with the view expressed here that courts should be more receptive to promissory estoppel claims in the context of ongoing relations. However, Professor Macneil would argue that the difficulty with the neoclassical efforts, reflected in the case law, to “build . . . flexibility into formal contracts,” is that it merely “modifies] the wisdom of the law of discrete transactions, without at the same time building relational foundations.” Farber & Matheson, supra note 16, at 926 n.90 (quoting I. MACNEIL, THE NEW SOCIAL CONTRACT THEORY 74 (1980)). See generally Farber & Matheson, supra note 16, at 925-30. These authors also discuss the importance of an ongoing relationship as an outcome predictive factor.

Although this Article supports Macneil’s conclusions that the classical model failed to adequately consider the increased importance of long-term relations in fashioning the rules of formation, it differs from Macneil in believing that courts, at least in the promissory estoppel area, have incorporated “relational foundations” into contract law through the reliance on the three factors identified here in deciding enforceability questions.

102. See, e.g., infra notes 105-12 and accompanying text.

103. See Macneil, supra note 59, at 859. Two major elements that Professor Macneil identifies as characteristic of the discrete transaction are “little personal involvement of the parties,” and “no significant past relations nor likely future relations.” Id. at 856-57 (footnote omitted).

104. See cases cited infra note 121; see also Farber & Matheson, supra note 16, at 925, in which the authors attribute, in part, the expanding reach of promissory estoppel in case law to the presence of an ongoing relationship.

One author recognized the importance of the relational contract as a factor favoring liability, but ultimately dismissed the connection between a relational contract and liability as merely accidental. Feinman, Historical Perspective, supra note 16, at 1383. This Article disagrees with Professor Feinman’s conclusion.

105. 804 F.2d 787 (2d Cir. 1986).

106. Id. at 791.
already paid for. Esquire would pay Ward for the imported goods, expecting reimbursement and a commission when Ward later repurchased the goods. The provision for immediate payment from Esquire gave Ward the security of available inventory without having to actually pay for the goods until needed.

The buy-back arrangement between Ward and Esquire remained unwritten.\textsuperscript{107} Therefore, when inventories accumulated, Esquire demanded reassurance that Ward would honor its buy-back promise. Ward not only furnished such assurances but also urged Esquire to increase inventories, adding that "[y]ou ought to carry more and not be so tight on the quantities."\textsuperscript{108}

Although the \textit{Esquire} court did not expressly predicate promissory estoppel liability on the enmeshment between the parties, the court deemed the enmeshment sufficiently important to invoke promissory estoppel.\textsuperscript{109} The court emphasized the enmeshed relationship between the parties when it referred to Esquire as "nominally a 'vendor'" but in reality "a service affiliate of Ward."\textsuperscript{110} Their relationship was further solidified when Ward requested Esquire to refrain from working for its competitors.\textsuperscript{111} Esquire acquiesced and worked almost exclusively for Ward. Eventually "over 95% of Esquire's resources were devoted to servicing Ward's requirements."\textsuperscript{112}

\textit{Vastoler v. American Can Co.}\textsuperscript{113} illustrates the application of enmeshment in an employment context. The defendant had employed the plaintiff for thirty-four years spanning 1937-1978.\textsuperscript{114} In 1963, the plaintiff reluctantly accepted a promotion from hourly worker to salaried supervisor.\textsuperscript{115} He accepted only after receiving assurances that the defendant would credit him fully for all past years of service when determining his pension benefits.\textsuperscript{116} When the plaintiff retired in 1978, however, the defendant refused to pay him the full pension benefits promised.\textsuperscript{117}

When the plaintiff sued to receive the unpaid benefits, the district court granted the defendant's motion for summary judgment.\textsuperscript{118} The Third Circuit, however, found sufficient evidence of the plain-
tiff’s detrimental reliance to remand the case for trial.\textsuperscript{119} The appellate court in \textit{Vastoler} apparently recognized the inherent inequality of the situation and went out of its way to find actionable detrimental reliance.\textsuperscript{120} The \textit{Vastoler} decision is consistent with many decisions in the employment context in which courts have welcomed promissory estoppel claims.\textsuperscript{121} Therefore, in employee relationships

\textsuperscript{119} \textit{Id.} The district court found that although the defendant had indeed promised the plaintiff full pension benefits, the plaintiff had not suffered any disadvantage that warranted applying promissory estoppel. \textit{Id.} at 917-18.

\textsuperscript{120} Farber & Matheson, \textit{supra} note 16, at 912. In evaluating the plaintiff’s detriment, the court disregarded the fact that the plaintiff earned more as a supervisor than as an hourly employee, and identified several other sources of the plaintiff’s detriment. First, the plaintiff refrained from seeking new jobs because of his anticipated pension benefits. 700 F.2d at 919. Second, the court emphasized the need to consider the “human dynamics and anxieties inherent in supervisory positions.” \textit{Id.}

When he accepted the supervisory position, the plaintiff assumed responsibility for his own job performance as well as for supervision and evaluation of the daily performances of approximately fifty workers. The position involved daily tension. The court, declining to follow the district court by quantifying detriment in “purely financial terms,” \textit{id.}, concluded that, because the plaintiff’s increased levels of stress and anxiety could constitute adequate detriment, the case warranted a trial. The court further noted that the plaintiff also may have relied detrimentally on his employer’s promise by not increasing his personal pension fund contributions. \textit{Id.}

\textsuperscript{121} The likelihood that a long-term employee will forego contract formalities has prompted courts to apply promissory estoppel theory when a long-term employment relationship exists. See Hass v. Darigold Dairy Prods. Co., 751 F.2d 1096 (9th Cir. 1985) (employee relied on union representative’s and employer’s assertions that she would maintain 11 year seniority status despite change from full-time to part-time work); Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980) (employee retired early, relying on employer’s promise that pension benefits would be based on employee’s 11 years of service with both employer and its predecessor company).

If the parties are enmeshed in a franchise or are enmeshed as a result of long-term bargaining towards a franchise, the plaintiff is also likely to succeed. See Quimby, 51 Del. 264, 144 A.2d 123; Alpark Distibns., Inc. v. Pool, 95 Nev. 605, 609 F.2d 378 (1979); Klinke v. Famous Recipe Fried Chicken, Inc., 94 W. Va. 2d 255, 616 F.2d 644 (1980); Hoffinan v. Red Owl Stores, Inc., 26 Wts. 2d 683, 133 N. W. 2d 267 (1965). A particularly sophisticated or knowledgeable plaintiff, however, will not prevail on a promissory estoppel claim despite enmeshment in broader ties through a franchise relationship. RCM Supply Co. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982) (refusal to entertain a promissory estoppel claim despite a long-standing relationship when plaintiff and defendant were both businessmen with no obvious disparities).

the reach of section 90 is potentially all encompassing because of the presence of an ongoing relationship.

C. Do the Parties Have a Relationship of Trust or Confidence?

When the parties are enmeshed in a relationship of trust and confidence, the plaintiffs are particularly likely to prevail on promissory estoppel claims. An element of trust is likely to cause a plaintiff to rely detrimentally and to forego insistence on contract formalities or on explicit unequivocal signals by the promisor as to the desired promisee conduct, which would otherwise be required to establish a contract claim.\footnote{122} For this reason, parties enmeshed in a relationship of trust and confidence are often impaired in their ability to protect themselves through the bargaining process, making such cases ripe for promissory estoppel relief.


Courts are receptive to other promises made in the employment context, such as promises to reimburse expenses. See, e.g., Hux v. Woodcock, 130 III. App. 3d 721, 474 N.E.2d 958 (1985) (plaintiff who paid costs relying on promise to convey real estate prevailed against law partners). Courts are receptive to promises regarding pensions made in the context of a long-term employment relation. See, e.g., cases cited supra note 60. Finally, courts also are receptive to promises made in the context of an ongoing business relationship. See, e.g., Esquire Radio, 804 F.2d 787.

Enmeshment in broader ties also has affected the outcome of cases between plaintiff insureds and defendant insurers. In these cases, the more extensive the dealings between the parties, the more likely the plaintiff insured is to prevail against a defendant insurer. See R.E. Keeton, supra note 73, at § 2.5(a) n.13; Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961); United Farm Bureau Mut. Ins. Co. v. Cook, 463 N.E.2d 522, 528 (Ind. 1984) (not error for trial court to decide insurance agent owed insured a duty in light of "long-established relationship of entrenchment"); Stein, Hinkle, Dawe & Asocs. v. Continental Cas. Co., 110 Mich. App. 410, 313 N.W.2d 299 (1981) (when defendant had handled plaintiff's insurance needs for 10 years a special relationship existed); Heilbaum v. Burwell & Morford, 1 Wash. App. 694, 463 P.2d 225 (1969). On the other hand, the plaintiff is less likely to prevail if the court finds an absence of prior dealings. See Howell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 52, 617 P.2d 1164, 1168 (1980) ("entire record reveals a course of dealing between the parties which negates the kind of relationship of entrenchment and initiative which is the basis for liability in Hardt v. Brink."); McCall v. Marshall, 398 S.W.2d 106 (Tex. 1965) (no duty to provide additional insurance protection absent prior dealings between the parties).

122. The need to recognize this factor in promissory estoppel case law is supported by its recognized importance in other areas of contract law. For example, the doctrine of the implied warranty of fitness for a particular purpose provides that in cases in which the buyer relies on the seller's skill and judgment to furnish suitable goods and the seller has reason to know of such reliance, a warranty that the goods are suitable will be implied. See U.C.C. § 2-315 (1977); see also supra note 73 (citing insurance cases in which courts imposed obligations when a party without technical knowledge trusted and therefore relied on the expertise of the other party).
In many cases in which plaintiffs have successfully claimed promissory estoppel a relationship of trust and confidence was present. Indeed, cases involving relationships of trust and confidence were among the historically significant cases on which Corbin relied in proposing the adoption of promissory estoppel theory.

In Larabee v. Booth, for example, the relationship of trust between the plaintiffs and the defendant caused the plaintiffs to forego insisting on the traditional contract requisites. The defendant owned a farm subject to her mother’s life estate. At a time when the plaintiffs and defendant were good friends, they discussed the plain-

123. A relationship of trust or confidence is also likely to occur when the defendant owes fiduciary-like duties to the plaintiffs. In such contexts, a plaintiff generally will prevail despite his failure to achieve explicitly reciprocal or formalized bargaining. See, e.g., Allen v. A.G. Edwards & Sons, Inc., 606 F.2d 84, 86 (5th Cir. 1979) (broker-dealer liable to its customer on a promise “to delay enforcement of . . . margin call” until plaintiff’s return); Hurd v. Hutzik, 419 F. Supp. 630 (D.N.J. 1976) (employees prevailed on promissory estoppel claim against pension plan trustees); Signal Hill Aviation Co. v. Stroppe, 96 Cal. App. 3d 627, 158 Cal. Rptr. 178 (1979) (plaintiff corporation prevailed, alleging reliance on promise of its director with fiduciary-like duties to the plaintiff); see also Graddick v. First Farmers & Merchants Nat’l Bank, 453 So.2d 1305 (Ala. 1984) (promissory estoppel claim by 90 year old widow, a trust beneficiary, against bank/trustee upheld); Ricketts v. Scotttorn, 57 Neb. 51, 77 N.W. 365 (1898); Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923).

Hardesty v. Richardson, 44 Md. 617 (1876), illustrates how the existence of a trust and confidence relationship can affect the outcome. The plaintiff purchased a farm for his son, with the understanding that his son would occupy and operate the farm. The plaintiff promised to convey title to his son “as soon as some preliminary arrangements were made.” Id. at 622. The son immediately took possession of the farm, made extensive, costly improvements upon it, and paid all taxes and insurance premiums relating to the property. Id. at 621-22. After the son had lived on and operated the farm for 5 years, the plaintiff brought an ejectment action to remove his son from the land. Id. at 618. The court denied the plaintiff’s ejectment claim and instead ordered the plaintiff to convey the land to his son. The state supreme court affirmed. Id. at 625.

Although the Hardesty court did not apply the promissory estoppel doctrine explicitly, it decided the case based upon detrimental reliance. Thus, Hardesty is a promissory estoppel case in fact if not in name. The supreme court held that the son’s actions to operate and improve the farm “were induced by and made upon the faith and in consideration of the father’s promise to convey the land.” Id. at 624. Because the son relied on his father’s promise, the court concluded that the plaintiff had made an irrecoverable gift of the property. Id.

Corbin noted this opinion in his discussion of cases in which a promise that induced reliance was enforced notwithstanding the absence of consideration. IA A. CORBIN, supra note 5, § 194, at 195-96 n.7. In Corbin’s view, the promisee’s reliance upon the promise rendered the promise enforceable. Id. at §§ 194-95. Such cases, however, also can be explained as resulting from a relationship of trust and confidence. In most, if not all, of the cases in which an oral promise to convey land was enforced, close ties that created trust and confidence existed between the parties.

tiffs’ proposed construction of a summer home on the land subject to the life estate. Subsequently, the plaintiffs requested permission to build a permanent home on the land. The defendant agreed to the plaintiffs’ request and entered into an agreement to convey the land to the plaintiffs upon the death of the life tenant. In reliance on that promise and written agreement to convey, the plaintiffs built their permanent house on the land. After the life tenant died, the defendant refused to convey the land. The plaintiffs sued for specific performance.125

The court concluded that the plaintiffs could recover the land based on promissory estoppel. By emphasizing the nature of the relationship between the parties, the plaintiffs were able to persuade the court, first, that the defendant reasonably should have expected the plaintiffs to detrimentally rely on the promise to convey and, second, that the reliance was reasonable. The court stated: “[I]n light of the parties’ friendship at the time of this promise, the court was justified in finding that [the defendants] should reasonably have expected this promise to induce [the plaintiffs] to act.”126

In contrast, the court in *Walker v. Ireton*127 ruled against the plaintiff after finding that a relationship of trust or confidence did not exist. In *Walker*, the plaintiff made an oral contract with the defendant to purchase the defendant’s farm for a thoroughbred horse operation. Difficulties arose after the oral agreement. The defendant offered the plaintiff $200 to cancel the agreement. When the plaintiff refused, the defendant breached the oral agreement by refusing to convey the land. When the plaintiff sought specific performance, the defendant moved for summary judgment asserting the statute of frauds.128 The court rejected the plaintiff’s promissory estoppel defense to the statute of frauds, stating that “there is no claim that there was any relationship of trust or confidence between the parties.”129

125. *Id.* at 489.
126. *Id.* at 491.
128. *Id.* at 315-17, 559 P.2d at 342-43.
129. *Id.* at 322, 559 P.2d at 346. The court found that a relationship of trust and confidence did not exist between the parties because the plaintiff and the defendant only had a “speaking acquaintance.” *Id.* at 315, 559 P.2d at 342.

The absence of a relationship of trust or confidence also might explain the results in cases in which the parties are negotiating at arms-length a deal to consummate a one-shot discrete transaction. See, e.g., Repro system, B.V. v. SCM Corporation, 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984); Jungmann v. St. Regis Paper Co., 682 F.2d 195 (8th Cir. 1982); Gruen Indus., Inc. v. Biller, 608 F.2d 274 (7th Cir. 1979).

Even when promises are made between parties already involved in business dealings, a promissory estoppel claim is unlikely to succeed if the defendant has actively discouraged the plaintiff from trusting the defendant. See, e.g., Jackson
III. DOCTRINAL APPLICATIONS OF THE PROMISE REQUIREMENT IN SECTION 90 REFLECTS THE STATUS, KNOWLEDGE, AND ENMESHMENT FACTORS

Doctrinal applications of a key element of section 90—the promise—reflect the impact of the factors discussed above and reinforce the internal coherence lent by that framework.

Some scholars would challenge the purported coherence, arguing that only wishful and naive thinking supposes a rational ordering scheme can be found. For example, Professor Feinman would dispute the doctrinal coherence of the case law in general and of the promise element in particular. He argues that courts cannot achieve coherence because they are attempting to serve the contradictory goals of (1) acting as a neutral facilitator of private wills and (2) acting as a mechanism for public regulation of the bargaining process. Therefore, cases applying the promise requirements of promissory estoppel necessarily lack coherence and reflect ad hoc approaches taken to this requirement. “[C]ourts are variously strict and flexible” in determining the degree of commitment and clarity required to make a promise actionable. Under the strict view, courts “carefully distinguish . . . promises, which are future oriented, from statements of belief which concern only the present,” and require the promise to “be definite and unequivocal.” More liberal courts relax the stringent standards and allow promises to be “inferred.” Courts will even grant recovery to plaintiffs alleging reliance on promises that would not have been actionable under a harsh view because they were “preliminary or conditional.”

This Article posits that the incoherence in cases interpreting the promise requirement can and should be rationalized in terms of the theory suggested here. The incoherence in doctrinal application is

Rapid Delivery Serv., Inc. v. Jones Truck Lines, Inc., 641 F. Supp. 81, 86-87 (S.D. Miss. 1986) (plaintiff had no basis to rely on continuation of relationship when defendant had specifically cautioned against such expectation).

130. The promise requirement is the “principal issue in applying promissory estoppel.” Feinman, Judicial Method, supra note 8, at 690.

131. Id. at 690.

132. Id. at 689-96.

133. Id. at 691.

134. Id.

135. Id.

136. Id. at 692. “This standard may be met not only by a particular promise or representation, but also by general statements of policy or practice.” Id.; see, e.g., Hurd v. Hutnik, 419 F. Supp. 630 (D.N.J. 1976), cited in Feinman, Judicial Method, supra note 8, at 692 n.68.

137. Feinman, Judicial Method, supra note 8, at 694. Adherents to a strict view would argue that reliance on such promises is inherently unreasonable and, therefore, not compensable under § 90. See Restatement (Second) of Contracts § 90 comment b (1981).
only superficial; if one probes the cases involving the promise requirement, they too can be rationalized in terms of the theory suggested here. If a court finds natural barriers to explicitly reciprocal or formalized contracting, it is likely to embrace promissory estoppel claims. Absent such barriers, a court is likely to adopt a restricted view of the proof of the elements of section 90.

Variations in how courts interpret the commitment needed to make a promise actionable become apparent by comparing *Hurd v. Hutnik*\(^{138}\) with *R.G. Group, Inc. v. Horn & Hardart Co.*\(^{139}\) In *Hurd*, the plaintiffs, retired employees, sued the defendants-employers for terminating the multi-employer pension fund under which they drew benefits. The plaintiffs contended that by terminating the fund, the defendants breached a promise to pay pension benefits for the retirees' lifetimes. The court upheld the promissory estoppel claim despite its finding that “there is no language in the collective bargaining agreements or in the trust agreement which explicitly guarantees a pension for life.”\(^{140}\) In this context, the court was willing to find the promise “implied in several . . . provisions of the pension plan.”\(^{141}\) The court was also willing in the employment context to overlook language preserving to the trustees a right to terminate the trust.\(^{142}\)

In another context, and in the absence of natural barriers to orthodox contracting, the court might well have found the reliance by the *Hurd* plaintiffs unreasonable. In *R.G. Group*, the plaintiffs were negotiating to acquire a franchise. From May to December 3, 1982 the parties met, exchanged a standard form franchise agreement, and discussed the franchise’s projected territorial limits. By December 3, when the parties reached agreement on the important terms, the defendant reassured the plaintiff that they had “a handshake deal.”\(^{143}\)

In the context of a complex transaction involving a $2,000,000 investment, trade secrets, and numerous other matters, the *R.G. Group* court was unwilling to find an actionable promise. The court

\(^{139}\) 751 F.2d 69 (2d Cir. 1984).
\(^{141}\) 419 F. Supp. at 655.
\(^{142}\) *Id.* at 636. “Though the agreement provides that ‘the trust may be terminated . . . ’ this Court holds that the collective bargaining agreement . . . did not extinguish the employers' contractual obligation to their retired employees.” *Id.*
\(^{143}\) 751 F.2d at 73.
held that it was clear to the parties that "any promise or agreement was conditional upon the signing of a written contract. Under those circumstances, there never was a 'clear and unambiguous promise' . . . ."144

In both R.G. Group and Hurd, the defendants made promises to the plaintiffs that could have been a basis for reliance. Moreover, in each case, the defendant took certain steps to make reliance on the promise unreasonable. In R.G. Group, the defendants made contradictory statements. On the one hand, the defendant promised a deal and on the other indicated no contract would exist until the execution of a formal contract. In Hurd, there were indications that the promises were not entirely unambiguous. The court itself recognized the absence of an explicit guarantee of a lifetime pension as well as a retained right of the trustees to terminate the trust under certain circumstances. In R.G. Group, the court accepted the promisor's maneuvering to prevent contract formation. The court refused to consider the availability of a promissory estoppel claim despite the defendants' assurances of a deal. However, in Hurd where certain factors undercut the promise being sued on, the court was willing to analyze the case on promissory estoppel grounds. The difference in result is explainable in terms of the different factual contexts.

IV. The Success Rate of Promissory Estoppel in Certain Fact Settings: Does the Explanation Warrant a Rule of Liability?

Disparities in status and knowledge, relations of trust and confidence, and the presence of an ongoing relationship may be predictive of outcome in a large number of cases. These factors tie into an assent-based view of promissory estoppel. To arrive at assent-based liability as a "scientific explanation"145 for the "welter of legal microdata,"146 including the case law, this Article explores why parties dispense with explicitly reciprocal bargains or other contract formalities, and documents the importance of the presence of a plausible benefit to the promisor as another factor present in promissory estoppel case law that seems to correlate closely with and be predictive of case outcome.

Understanding why many modern courts relax the orthodox contract requirements and embrace promissory estoppel in certain settings requires an understanding of why their predecessors insisted—at least in principle—on adherence to these rules147 as the

144. Id. at 79.
145. Michelman, supra note 23, at 1035.
146. Id.
147. The manipulable nature of the rules, as well as the "inescapable pres-
exclusive arbiters of contract enforceability.

Classicists insisted on the use of legal formalities or explicit bargaining because these signals assured the parties’ assent to be bound. If the promisor solemnizes his agreement to be bound through a legal formality, there is not much doubt that he intends to be bound, has done so deliberately, and is aware of the legal consequences. Since parties do not normally “force the raw material of meaning into defined and recognizable channels,” the use of a formality with such channeling evidences an intent to be bound.

Bargain, like formalities, provides assurance of an intent to be bound. If a promisor uses such express language as “in exchange for,” or “in consideration of,” to link his promise with specified promisee conduct, the promisor would surely consider himself better off and bound should the promisee furnish the specified conduct.

Both the bargain theory and formalities, such as the statute of frauds, can be rationalized in terms of an underlying concern with consent. If these doctrines are regarded as the exclusive means for measuring the presence of an enforceable exchange, however, some promises will be unenforceable, even if the promisor intends to be

ence of policy choices,” made adhering to rules an ideal more than a reality. Feinman, Critical Approaches, supra note 8, at 833, 844; see also Gordon, supra note 1, at 1025-26. This is the essence of the realist critique whose scholars devoted “[a] great deal of scholarship . . . showing that legal directives that looked general and formally realizable were in fact indeterminate.” Kennedy, Private Law Adjudication, supra note 8, at 1700. Professor Gordon would denominate this critique as an “internal empirical” one aimed at demonstrating the variance between “case outcomes” and “doctrinal theory.” Gordon, Tentative Outline, supra note 41, at 20.

The classicists’ insistence on the possibility of a neutral regime of rules is explained by some scholars as part of an “ideology . . . that . . . legitimates an illegitimate status quo.” Feinman, Critical Approaches, supra note 8, at 853. Cloaking policy choices with the aura of objective neutrality helps to promote a perception of the essential fairness of the system. Id.


The offer-acceptance rules which dominate contract formation reflect the importance we attach to bargains arrived at through the interplay of private interests. The general objective of these assorted rules is to guarantee parties seeking an exchange extensive freedom to express, or to refuse to express, a willingness to be bound.

Id.

149. See generally Fuller, supra note 10.

150. As Professor Barnett explains, “[t]he voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in as unambiguous a manner as possible. . . . Formal contracts ought [therefore] to be an ‘easy’ case of contractual enforcement . . . .” Barnett, supra note 5, at 311.

151. See Fuller, supra note 10, at 802.

152. Bargaining, like the use of formalities, may be “presumptive” evidence of assent. Barnett, supra note 5, at 309. A party who has used this “simple . . . external test of enforceability,” Fuller, supra note 10, at 801, has likely intended his promise to be binding.
bound. 153

If consensual exchanges are denied enforcement under orthodox contract theory, then one must look beyond consent to justify and explain the classical adherence to bargain and/or formalities as exclusive consent standards. The explanation for embracing these approaches as exclusive “indicia of consent” 154 lies in their previously perceived benefits. First, it was implicitly assumed that using these two standards for ascertaining consent would, because of their “rule-ness” quality155 and “formal realizability,”156 minimize judicial interference and discretion and, thereby, preserve the core realm of private autonomy.157 Because the rules were “technical, facilitative rules”158 that could be administered in a neutral, objective fashion, they were almost, if not quite, self-executing. Instances of unwanted judicial discretion were thereby minimized.159 These rules yielded additional benefits by causing people—economic actors—to “invest in formal proficiency”160 by learning the rules. Additionally, the rules facilitated economic exchange.161 Without such rules, parties would not invest, fearing that a capricious court, interpreting a nonformal “standard,”162 would exercise discretion and overturn their agreements. Thus, although administering such rules might cause occasional injustices because the rules might be “over or underinclusive,”163 generally such rules would “remove the inhibiting

153. Barnett, supra note 5, at 313 n.189. This is so because, as Professor Fuller recognized, these formalities are not universally necessary to show assent. There are situations in which “the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises . . . .” Fuller, supra note 10, at 805 (emphasis omitted).
155. Kennedy, Private Law Adjudication, supra note 8, at 1687.
156. Id. According to Professor Kennedy:
The first dimension of rules is that of formal realizability. . . . The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.
Id.
157. Restricting the judicial role to the application of rules could preserve autonomy in part because of the “abstract” nature of the rules. Feinman, Judicial Method, supra note 8, at 682. “The first [abstract] method appeared to serve individual freedom by preventing judges from imposing their own values . . . .” Id.
158. Gordon, supra note 1, at 1025.
159. Feinman, Judicial Method, supra note 8, at 682.
160. Kennedy, Private Law Adjudication, supra note 8, at 1698.
161. Id.
163. Professor Kennedy acknowledges that one well-recognized cost of a system of formal rules is its “over and underinclusiveness.” Kennedy, Private Law Ad-
effect on action that occurs when one’s gains are subject to sporadic legal catastrophe.” Because of these benefits, courts willingly refused to enforce noncomplying agreements.

Other means of showing consent are, however, at least as compatible with preserving individual autonomy. Therefore, the true explanation for restricting evidence of consent to formalities and/or bargain theory may lie in underlying assumptions about human behavior made by the classical formalist. The classicists conceived of the “social world as composed of independent freedom seeking individuals” who would readily become adept in the rules of orthodox contract formation. They assumed “that the rules of appellate doctrine are instantly incorporated in the incentive structures of individuals situated like the litigants . . . .” Moreover, “[p]ower relation . . . disparities . . . [were] usually treated as nonexistent or irrelevant . . . .” The classical model of reality also assumed that parties generally were involved in discrete one-shot transactions with no prospect for an ongoing relationship. Parties were deemed fully capable of anticipating all performance problems at the moment of contract formation.

When these assumptions prevail, no natural barriers to, or reasons for dispensing with, explicitly reciprocal promise formulation are deemed to exist. All parties are able to protect their self-interests. A failure to comply with the orthodox rules may well evidence an intention not to be bound.

A. Identifying Causes

If one or more of the factors discussed above is present, parties may fail, for a variety of reasons, to achieve an agreement enforceable under orthodox contract law even though the agreement evidences an assent-based obligation. A discussion of these reasons follows.

judication, supra note 8, at 1689 (citation omitted).

164. Id.
165. See supra note 153.
166. Feinman, Critical Approaches, supra note 8, at 832.
167. Gordon, supra note 1, at 1026. Gordon stated that this assumption applies to the realists but it would also apply to the classicists.
169. See supra note 101.
170. See Macneil, Presentation, supra note 101.
171. Feinman, Critical Approaches, supra note 8, at 832.
1. **Differential Capacity to Discover the Applicable Rules**

Parties with disparate status may also have different capacities to discover the legal rules governing their transactions.\(^{172}\) Therefore, the more ignorant party may rely to his detriment on another's promise. This may occur even if the promisor does not explicitly signal his intent to be bound upon the furnishing of such reliance and even without a formalized bargain. The ignorant party may not realize that legal rules will preclude enforcing promises that fail to satisfy orthodox criteria. In these situations, it may be appropriate to establish a liability rule that is consistent with the natural beliefs of those least able to know the law and that places the burden on those who can discover the law.\(^ {173}\)

2. **The Party With Superior Status Will Effectuate Necessary Formalities**

Another reason why the weaker party may rely even if the promisor has not signalled unequivocally his willingness to be bound on the basis of such reliance or has not formalized the agreement is that the promisee may assume that the party with the superior status has taken appropriate steps to make the promise enforceable. If the promisor's actions signal an intent to be bound, albeit in a less than fully explicit manner or without a formal written agreement, the promisee likely will assume that such explicit signals or other formalities are not required.

3. **Congruence of Interest Between the Parties**

Parties with inferior status, such as an employee or an insured, may assume that their interests are coterminous with those of the superior party—the promisor employer or insurer. Therefore, unless the promisor makes it otherwise clear, the promisee will assume that he can undertake reliance expenditures on behalf of the promisor that will be compensable because they were undertaken for the

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172. Classical formalists would not recognize a differential capacity of the parties to know and act according to the rules. Under the classicist view, each party had natural abilities to become "proficient" in the rules. Kennedy, *Private Law Adjudication*, supra note 8, at 1698.

173. This result would satisfy those concerned with promoting efficient results. The liability rule would encourage the party with superior knowledge of the legal rules to share that information. This approach is consistent with that taken in the context of nondisclosure. There, because the more knowledgeable party "may be the better preventer" of the loss in the form of unreimbursed reliance and because "of his superior access to relevant information," the law allocates the risk of the mistake to that party. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, in *The Economics of Contract Law* 115-16 (A. Kronman & R. Posner eds. 1979).
promisor’s benefit. It is as if the promisor, in discussing with the promisee an undertaking that the promisor might be willing to make in the future on terms that cannot or were not struck in an explicitly reciprocal form, tells the promisee: “In exchange for your taking valuable initial steps toward making it possible for us to finalize our subsequent relations, I promise to keep you informed of any changes in my willingness to later reach a more completely explicit bargain.” Thus, the promisee should be permitted to assume that the promisor will act in their joint interests or will inform the promisee that if he relies, he will be acting at his peril.

4. Inferior Economic Position of One Party

Even if the promisee knows contract law rules, his inferior status might indicate less economic leverage and cause him to rely while awaiting the promisor’s explicit signalling. Thus, a potential employee might hesitate to insist on explicit bargaining with the employer, to avoid appearing disloyal or lacking team spirit. In such situations courts might understandably relax bargain requirements.

5. Substitution of Trust for Formalities

Parties involved in a relationship of trust may feel that such trust obviates the need for an explicit communication from the promisor unequivocally indicating the basis on which he would be bound or other formalities. The promisor may actually hope that the promisee will rely on less explicit signals. Parties who trust each other are unlikely to perceive explicitly reciprocal communications or

174. See supra note 28.
175. According to Professor Priest, the role of lower economic leverage figured prominently in the development of the exploitation theory. See Priest, A Theory of the Consumer Product Warranty, 90 YALE L.J. 1297, 1300 (1981). For criticism of this assumption, see Whitford, Comment on a Theory of the Consumer Product Warranty, 91 YALE L.J. 1371, 1378-79 n.29 (1982).
176. As Professor Macneil asserts, “a huge residue of non-assertiveness remains explainable only by the willingness to sacrifice immediate exchange-gains to increase relational security.” Macneil, Economic Analysis, supra note 101, at 1048; see also Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963).
177. An example outside the contractual context is the principal-agent relationship. In this context, one would expect “complex fee functions.” Arrow, supra note 28, at 48. Yet, reality is quite different; “observed schedules are almost always simple.” Pratt & Zeckhauser, Principals and Agents: An Overview, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 16 (J. Pratt & R. Zeckhauser eds. 1985). Part of the explanation lies in factors that most analytic models fail to consider — “friendship, family, and connections.” Id. Thus, by inference, principals fail to work out fully contingent, highly specified arrangements because, when trust is present, the need to be fully explicit diminishes.
formalized written communications as necessary. As Professors Farber and Matheson assert, ""[w]here such relationships are highly interdependent, economic benefit is likely to be sought through informal understandings that reinforce the relationship, rather than through discrete bargains." 178

A trust relationship operated against explicit bargaining or other formalities in Vastoler v. American Can Co. 179 In Vastoler, a thirty-four-year employment relationship led an employee to assume he could rely on an informal understanding. Also, the employee may have dispensed with contract formalities regarding the pension in order to preserve the long-term relationship. The employee depends on the employer for continued financial support. Therefore, the employee naturally relies on the employer's assertions and does not risk irritating an employer by seeking a formal contractual obligation.

The preceding discussion illustrates how the weaker, less knowledgeable, or trusting party might fail to comply with the explicit reciprocal bargain requirements or might dispense with contract formalities. Similar results are likely to occur in ongoing relationships, even among business entities with equal status, economic power, and legal sophistication.

6. Misleading Conduct

The absence of an explicitly reciprocal or formalized contract may be explained by misleading conduct of the promisor. The defendant promisor may deliberately and affirmatively assuage the promisee's fears of the defendant's nonperformance by insisting that the parties have a deal. In this way the defendant promisor attempts to secure the desired promisee conduct without formally committing himself to an orthodox contract. The conduct of Montgomery Ward in Esquire Radio & Electronics v. Montgomery Ward 180 typifies such misleading conduct. When Esquire demanded reassurance that Wards would honor the buy-back arrangement, Wards replied, ""We will take the parts."" 181 In ongoing relationships, such reassurances diminish the demand for any orthodox contractual guarantees of performance. As in Esquire, the promisor provides such reassurances to induce the promisee to perform and to forego an explicitly reciprocal or formalized contract. Such reassurances understandably induce courts to grant promissory estoppel relief. 182

179. 700 F.2d 916 (3d Cir. 1983); see also Farber & Matheson, supra note 16, at 910-12.
180. 804 F.2d 787 (2d Cir. 1986).
181. Id. at 793.
182. In the following cases, misleading conduct seemed to be coupled with a benefit to the defendant promisor. See, e.g., id.; In re Texas Mortgage Servs. Corp.,
7. Information Gaps

In the situations considered thus far, the less knowledgeable party may forego contract formalities. In some instances, however, neither party may know enough to explicitly and formally contract. The promisor may confront the natural barrier of the unforeseeability of certain future events and thus be unwilling to commit to the promise that he might undertake in the future—the "projected promise." Nevertheless, one party may willingly commit in the form of a promise short of the projected promise. He may be willing to make a generalized performance commitment. Such commitment might take the form of an agreement by the promisor to exercise reasonable efforts to facilitate reaching the point at which the parties can be more specifically reciprocal in orthodox categories of time, price, quantity and quality. On this basis the other party may willingly rely on the promise in ways that benefit and increase the information available to the promisor. If one can find evidence of such implicit contracting, perhaps the very same terms of generalized performance commitments (such as "I will exercise reasonable efforts to facilitate our reaching the point at which we can be more explicitly reciprocal") apply to so many different contexts that parties do not think of conveying them expressly. The heterodox terms of implied bargain will always be similar, though the subject matter will always be different. Thus, although the failure to achieve a for-

761 F.2d 1068 (5th Cir. 1985) (bank's promise to mortgage broker to hold funds in trust induced promisee to wire promisor $300,000, directly benefiting bank); Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977) (promissory estoppel available to plaintiff who received benefit of delivered goods and then sought to avoid payment); Oates v. Teamster Affiliates Pension Plan, 482 F. Supp. 481 (D.C. Cir. 1979) (defendant's reassurances regarding pension directly benefited defendant by increased Teamster union membership); Monarco v. Lo Greco, 35 Cal. 2d 621, 624, 220 P.2d 737, 740 (1950) (defendant's promise induced plaintiff to "devote . . . his life to making the family venture a success"); Greenstein v. Flatley, 19 Mass. App. 351, 474 N.E.2d 1130 (1985) (defendant's reassurances that parties had a deal was intentionally designed to benefit defendant in preserving his options for a better deal); Moore Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934 (Tex. 1973) (statute of fraud's defense barred when the plaintiff detrimentally relied on the defendant's promise by not bidding on land to defendant's benefit by facilitating defendant's acquisition of the land); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 603, 133 N.W.2d 267 (1965) (defendant promisor's constant and misleading reassurances to promisee benefited promisor by helping it locate most capable franchisee); cf. Dulaney Foods, Inc. v. Ayers, 220 Va. 502, 508, 260 S.E.2d 196, 200 (1979) (promises of severance benefits upheld when "termination policy brought [company] industrial peace, avoidance of [employee] unrest, and consequently a smooth termination of operations").

Reassurances that the parties have a deal will be discounted absent any evident barriers to formalized contracting. See supra text accompanying notes 143-44 (discussing R.G. Group, 751 F.2d 69 (2d Cir. 1984)).
malized contract may be due to information gaps,\textsuperscript{183} sufficient reasons may exist to enforce the parties' exchange.

B. Rationalizing Inconsistent Results in Terms of an Explanatory Theory

The inconsistent results of promissory estoppel claims and the causes of the failure to achieve explicitly reciprocal or formalized contracts in certain fact settings suggest the need for "a descriptive law that can order the data, organize them into an elegant, trenchant, parsimonious macro pattern, and impart to them an implicit logic,"\textsuperscript{184} and a "hypothetical causal model"\textsuperscript{185} to determine when the law will attach binding effect to a promise.

1. Unequal Bargaining Power

One plausible theory for organizing promissory estoppel case law is based on disparities in knowledge and/or bargaining power. Although such a theory might be novel for promissory estoppel case law, it has already helped to organize a multitude of cases in the area of contract excuse and unconscionability.

In unconscionability contexts, courts apply a theory of unequal bargaining power to provide relief, in the form of excuse, to parties who would be bound under traditional contract doctrines.\textsuperscript{186} The court may excuse the weaker party from contract obligation if it perceives unequal bargaining power when the terms of the bargain are drafted by a seller on a take-it-or-leave-it basis,\textsuperscript{187} or the seller has

\textsuperscript{183} The effect of "differential information" on the specificity of principal-agent relations is explored by Arrow, supra note 177. Professor Arrow's conclusions are applicable in the promissory estoppel context if one views the promisor as the agent and the promisee as the principal. Because the principal lacks information, he appoints the promisor as his agent to act in his behalf. Due to information disparities, the promisee/principal cannot fully specify the contract terms but expects the promisor to act for him unless notified otherwise.

\textsuperscript{184} Michelman, supra note 23, at 1035.

\textsuperscript{185} Id.

\textsuperscript{186} These parties would be bound for having contracted with another party in a case lacking the facts to show fraud or duress, the only recognized excuses.

\textsuperscript{187} Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1173, 1179 (1983). In consumer transactions, courts invoke the unconscionability doctrine when the contract is offered to the consumer buyer on a take-it-or-leave-it basis with no opportunity to bargain over terms. The limitations of the individual bargainers render the bargaining process suspect and justifies applying the doctrine of contractual excuse. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) is a consumer transaction case exemplifying that a defect in the bargaining process warrants scrutinizing the contract for substantive unconscionability. See supra note 57.

Professor Kennedy has recently criticized the "rhetoric of unequal bargaining power" as an insufficient justification for imposing compulsory terms in contract
greater market leverage because of a monopoly or near monopoly power,\textsuperscript{188} or the buyer is unsophisticated relative to the seller.\textsuperscript{189} In such cases, the court declines to enforce the contract because it is skeptical that the contract reflects a true bargain,\textsuperscript{190} and believes that the stronger party has dictated terms and thus there is no true assent.\textsuperscript{191}

In promissory estoppel cases courts may display a similar concern for procedural unfairness by imposing liability on the economically stronger or more knowledgeable party.\textsuperscript{192} Courts may strive to protect promisees who, because of certain real-world disadvantages,\textsuperscript{193} have failed to protect themselves. The only difference in the case of promissory estoppel is the remedy devised. Instead of expounding the excuse for the less knowledgeable party, the court liberalizes the contract doctrines by imposing a liability rule that enables that party affirmatively to recover.

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\textsuperscript{188} Priest, \textit{supra} note 175, at 1300.

\textsuperscript{189} Rakoff, \textit{supra} note 187, at 1179.

\textsuperscript{190} The law and economists would explain the courts’ skepticism about the bargain in the following terms. The bargain should not be enforced because it does not contain terms that an average person in the promisor’s circumstances would consider within a range sufficient to make him better off. In such circumstances, the court believes that a rule of excuse will cut through market imperfections, such as asymmetry of information, more efficiently than private arrangements.

\textsuperscript{191} Kessler, \textit{supra} note 23, at 632. For critiques of the problems inherent in judging the voluntariness of agreements, see Dalton, \textit{supra} note 2, at 1027.

\textsuperscript{192} Although courts sometimes intervene on behalf of less knowledgeable parties in both the unconscionability and promissory estoppel contexts, and thus it could be said that courts intervene in both contexts because of an informational barrier to intelligent contracting, the situations are often quite different. In the unconscionability context, the barrier is primarily, it would seem, one of an unintelligibility arising from some special deficiency of one of the parties, rather than from the informational problem that results from (1) the need to expend resources to collect information necessary to specify a deal, (2) unforeseeability of the future, which affects all persons, or (3) the moral hazard problem, resulting from a party’s propensity to be opportunistic in performing his side of the exchange. See \textit{Williamson, Economic Institutions, supra} note 28, at 47. If this is correct, then the unconscionability rule is a judicial response to a barrier to contracting, but the barrier stems from the special problems of the individual party such as low natural endowment or prior failure to achieve and learn, in some cases, because of limited opportunities to do so. The barriers do not stem from other sources, such as the nature of the performance or the expenses that must be incurred by parties to contract with one another and to learn about one another’s characteristics. These latter barriers affect parties equal in endowment and achievement.

\textsuperscript{193} \textit{See supra} notes 100, 183.
2. Distributive or Altruistic Explanation

An altruism theory may also lend order to the variability in promissory estoppel case law. Because courts, in promissory estoppel cases, more readily grant relief to plaintiffs who seem to be disadvantaged economically relative to the defendant, they are arguably "at work on the indispensable task of imagining an altruistic order." Alternatively, courts may be deflecting the loss from a party they perceive as unable to bear it. Judges, therefore, may be formulating a kind of judicial anti-wealth redistribution rule and acting out of "distributive motives." Unspoken perceptions about fairness and equity may influence judges to decide promissory estoppel cases in favor of disadvantaged plaintiffs.

Professors Kessler and Gilmore recognized the erosion of the bargain element and other formalities of contract law in terms of underlying altruistic and distributive motives when they linked "the erosion of rigid rules" to the "socialization of our theory of contract." The pattern of results identified in this Article may be interpreted as consistent with a redistributive or altruistic agenda. Those explanations, however, are not wholly satisfactory. They do not explain why courts should impose liability only on the defendants. If redistribution explained disparate results in promissory estoppel case law, then it would seem logical for the courts to develop a liability rule that charged society as a whole. This approach would have the greatest potential for promoting fair results by widely spreading the cost of the promisee's loss.

194. Kennedy, Private Law Adjudication, supra note 8, at 1778. Altruism is a belief system or attitude that diverges sharply from the notions of individualism. For a discussion of the principal content of these competing belief systems, see id. at 1717-22.

195. Id. at 1778. This view of the hidden judicial agenda is consistent with the views of Professors Metzger and Phillips that the expansion of reliance is due to the resurgence of a moral climate of decision making and a return to 18th century substantive fairness notions. Metzger & Phillips, supra note 16, at 506-07.

196. Kennedy, Distributive and Paternalist Motives, supra note 8, at 570-71. To some critics, using contract law as a vehicle for achieving individualized justice as between parties with disparate status is desirable. Professor Kennedy, for example, believes that "there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit." Kennedy, Private Law Adjudication, supra note 8, at 1777.

197. Id.


199. Id.

carry distributive principles to their logical outcome suggests the involvement of other factors. The redistributive and altruistic interpretations are also deficient in failing to explain the results of cases in which parties with relatively equal economic status and sophistication recover under the doctrine of promissory estoppel. 201

3. Persuasive Barriers, the Benefit Factor, and Assent-Based Theory of Promissory Estoppel

Theories of procedural fairness on altruism or distributive fairness are too narrow to explain and justify attaching binding effect to certain promises. They do not explain why parties who are not disadvantaged either economically or in bargaining power should ever prevail against similarly situated parties. They also fail to explain why particular defendants, rather than society as a whole, should compensate injured promisees. An explanatory structure that can account for the availability of promissory estoppel to both advantaged and disadvantaged plaintiffs, and for confining liability to the class of defendant promisors requires an examination of a second apparently determinative factor in promissory estoppel case law—the presence of a plausible benefit to the promisor. 202 The benefit to the

201. See Esquire Radio, 804 F.2d 787 (2d Cir. 1986). The impact of redistributive motives apparent in some such cases is not disputed here. However, "the welter of [legal] microdata," Michelman, supra note 23, at 1035, requires an explanatory theory that encompasses as large a universe of the cases as is possible. This does not suggest that a theory must rationalize all of the cases to be legitimate. If it could, the theory ultimately would be malleable and, therefore, vacuous. However, the theory's usefulness increases proportionately to the number of cases it can explain.

202. See supra note 29. Benefit to the defendant-promisor is evident in several cases. See, e.g., Esquire, 804 F.2d 87 (discussed supra notes 105-12 and accompanying text); Goldstick v. ICM Realty, 788 F.2d 456 (7th Cir. 1986) (defendant's promise induced plaintiffs to release claim for legal fees allowing defendant to finalize property sale); In re Texas Mortgage Servs. Corp., 761 F.2d 1068 (5th Cir. 1985) (promissor-defendant directly benefited from transfer of trust funds by plaintiff-mortgage broker); Gittes v. Cook Int'l, 508 F. Supp. 717 (S.D.N.Y. 1984) (plaintiff-businessman and financial consultant prevailed on promissory estoppel claim when his detrimental reliance in resigning directorship benefitted the defendant financially through stock sale); Mazer v. Jackson Ins. Agency, 340 So.2d 770 (Ala. 1976) (defendant developers benefited from promise inducing the plaintiff homeowners to not oppose proposed annexation; plaintiffs prevailed on promissory estoppel claim when defendant revoked promise); Hux v. Woodcock, 130 Ill. App. 3d 721, 474 N.E.2d 958 (1985) (plaintiff prevailed against former law partners who benefited from his payment of costs, relying on their promise to convey real estate); Kirkpatrick v. Seneca Nat'l Bank, 213 Kan. 61, 515 P.2d 781 (1973) (plaintiff-accountant audited defendant bank's books to bank's benefit in reliance on promise to pay); Sanders v. Dantzler, 375 So. 2d 774 (Miss. 1979) (defendant's promise to buy plaintiff's service station benefitted defendant by inducing plaintiff to cancel lease with oil company, which enabled defendant to secure it); Everett v. Brown,
promisor is a broader concept than the traditional bargained-for consideration. A promisor may benefit from particular promisee conduct even though the conduct would not constitute bargained-for consideration because the promisor did not signal explicitly his willingness to be bound by that particular promisee conduct.

Professors Farber and Matheson regard *Pine River State Bank v. Mettibre* as illustrative of a contract yielding not insubstantial benefits to the promisor that would nevertheless fail the bargain requirement because the promisor did not bargain specifically for such benefits. In *Mettibre*, after the employee commenced work, the employer distributed to employees a handbook detailing its employment policies. The handbook described procedural job security provisions. Viewed from the traditional bargain theory perspective, no contract regarding the job security provisions existed. The employer's job security promises were not supported by consideration because the employer explicitly did not seek "an identifiable exchange" from the employee. Professors Farber and Matheson concede that to find an explicitly bargained-for exchange would be to "distort the facts." Nevertheless, they would enforce such employer promises, in part, because of the promisor employer benefits from the stability of the employee work force and other such benefits.

321 S.E.2d 685 (W. Va. 1984) (real estate agent prevailed on promissory estoppel claim when he relied on homeowner's implied promise to extend listing agreement; broker's action directly benefitted homeowner by securing a buyer); Remilong v. Crolla, 576 P.2d 461 (Wyo. 1978) (plaintiff-purchaser relied on defendanant-seller's promise to remove mobile homes from adjoining property, enabling defendant to sell at a higher price).

203. This Article contends that promise conduct furnishing the promisor a benefit evidences the promisor's intent to be bound, at least in a context in which persuasive barriers to, or explanations for dispensing with, explicit or formalized contracting exist. If such benefit can be shown, and such consent inferred, no reason justifies restricting actionable detrimental reliance to instances in which the promisee has actually expended monies. Detrimental reliance would naturally extend to situations in which, for example, the promisee missed possible opportunities, provided the promisor derived benefits. For a discussion of the erosion of the reliance requirement, see Farber & Matheson, supra note 16, at 929-35.

204. 333 N.W.2d 622 (Minn. 1983). This case is discussed in Farber & Matheson, supra note 16, at 920-22.

205. Farber & Matheson, supra note 16, at 920. This view was argued by the employer in *Mettibre*, 333 N.W.2d at 624.

206. Farber & Matheson, supra note 16, at 920.

207. *Id.* at 921. If the job security provisions were construed as a modification, consideration separate and apart from that given by the promisee for the original offer of employment would be required to enforce the contract. As the subject of a preexisting duty, an employee's job performance would not qualify as sufficient consideration. See Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902). But see RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

208. Farber & Matheson, supra note 16, at 921. Significantly, the *Mettibre* case was not decided under § 90 but under the unilateral contract doctrine. 333
Notwithstanding the not insubstantial, though not explicitly bargained-for, benefit factor, the explanatory theory that justifies intervention in such cases remains unclear. The explanatory theory offered by Professors Farber and Matheson for the case law is based on the convergence of two factors: (1) "a relationship that is expected to be ongoing"^{209} and (2) an economic motive for making the promise.^{210} These scholars believe that if these factors are present, the court should and will likely entertain a promissory estoppel claim. They postulate that if these factors are present, "inferences of reciprocity" exist, creating an exchange as real as an orthodox bargained-for exchange.^{211} Although the employer in Mettille may not have bargained explicitly for an "identifiable exchange,"^{212} he was in fact seeking such benefits as a nonunion work force in return for his job security promises. They argue that the elements of a bargain were present, albeit not of the traditional kind. This nontraditional bargain should be recognized and enforced in ongoing relationships.^{213} In such relationships "economic benefit is likely to be sought through informal understandings that reinforce the relationship, rather than through discrete bargains."^{214} They propose adopting a rule that would enforce promises made "in furtherance of economic activity."^{215}

The broad view of exchange adopted by Professors Farber and Matheson would also recognize an exchange in Hoffman v. Red Owl.^{216} In Hoffman, the plaintiff, a bakery store owner, sought to acquire a grocery store franchise from the defendant. The defendant initially assured the plaintiff that he could acquire a franchise by investing $18,000 in the operation. During the course of negotiating over two years, the defendant continued to add conditions, primarily in the form of added capital requirements. Moreover, the defendant advised the plaintiff to sell his bakery and to acquire a small grocery store. The defendant's unspoken but implied signal^{217} was that the plaintiff could secure the contract by following the defendant's ad-

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209. Id. at 925.
210. Id.
211. Id. at 921, quoted in Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L.J. 1261, 1308 (1980).
212. Id. at 920.
213. Id. at 925.
214. Id. at 925-26.
215. Id. at 929.
216. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). This case has not been previously rationalized in terms of an exchange. Other commentators have rationalized the result in Hoffman in terms of a liability rule based on "improper conduct in the negotiation process." E. Murphy & R. Speidel, supra note 44, at 296-98.
217. For a discussion of implicit contracting, see supra note 28 and accompanying text.
vice. The defendant was arguably bargaining for certain actions in exchange for his promise of a franchise despite the fact that he never signalled explicitly and unequivocally that he would consider himself bound should the plaintiff undertake the advised actions because he did not use language such as “in exchange for.” The plaintiff’s actions economically benefitted the defendant in several ways. The defendant was able to acquire more information about the plaintiff’s potential capability and about the market for a franchise. The defendant thus was assured of having a qualified franchisee, which obviated the need for training additional franchisees and reduced the costs and risks associated with finding another qualified franchisee.\footnote{218}

This Article shares the view of Farber and Matheson that promissory estoppel is a “contractual”\footnote{219} theory but rationalizes both promissory estoppel and bargain theory in terms of an underlying theory of assent-based obligation, rather than as an expanded view of exchange. Both promissory estoppel and bargain are merely tools for delineating the elemental criteria of contract law—the presence of assent-based obligation.\footnote{220} Under certain circumstances, only explicit bargaining or formalities will establish that the criteria for as-

\footnote{218. Under reciprocal inducement theory, however, the fact that the promisor may have benefited from and even desired the actions taken by the promisee was insufficient to attach liability. If the promisor did not bargain explicitly for such actions, no liability ensued. In \textit{Hoffman}, the promisor did not bargain explicitly for the promisee’s reliance in acquiring grocery store experience. Therefore, the franchisee’s detrimental reliance would be considered not bargained for. This approach explains Justice Hand’s refusal in \textit{James Baird Co. v. Gimbel Bros.}, Inc., 64 F.2d 344 (2d Cir. 1933), to accept the view that the reliance of the promisee-contractor, in using the bid from a subcontractor to obtain a construction contract, should render the promise to offer the materials binding, despite the fact that the offeror was clearly not indifferent to, and in fact desired, the actions of the promisee. As Justice Hand explained:

\begin{quote}
[T]he defendant offered to deliver the linoleum in exchange for the plaintiff’s acceptance, not for its bid, which was a matter of indifference to it. That offer could become a promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it.
\end{quote}
\textit{Id.} at 346.}

\footnote{219. Farber & Matheson, \textit{supra} note 16, at 905; see also \textit{supra} note 23.}

\footnote{220. “In sum, bargained-for consideration and nonbargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound.” \textit{Barnett}, \textit{supra} note 5, at 317.}

This Article contributes to Barnett’s theory by (1) developing an explanatory theory to delineate the boundary between bargain and reliance, once both are accepted as “indicia of consent,” \textit{id.} at 313; (2) developing a conceptual mechanism linking the presence of a plausible benefit to the promisor and evidence of assent to be bound; (3) offering a theory to support adhering to the bargain theory in a small residuum of transactions; and (4) responding to likely conceptual critiques of the theory.
sent have been met. In other cases, however, less explicit communication or explicit but informal communication can evidence assent.

The presence of a not insubstantial benefit to the promisor from promisee conduct evidences assent to be bound on the part of the promisor. The defendant promisor, for a variety of logical reasons, may dispense with explicit and unequivocal signals of his willingness to be bound. The promisor may instead use less explicit communication, secure in the expectation that those lesser signals will produce the desired conduct. Thus, to infer a willingness to be bound on the basis of promisee conduct that contributes a not insubstantial benefit to the promisor is plausible.

Together, the plausible benefit to the promisor factor and the existence of barriers to contracting factor offer a convincing explanatory basis for the case law. When barriers to explicitly reciprocal or formalized contracting exist, the absence of traditional forms of orthodox contracting does not necessarily indicate a lack of assent. Rather, in certain factual settings the parties are unlikely to manifest assent in traditional forms. Thus, the proposed theory sensitizes the reader to the possibility of assent being manifested in different ways.

An assent-based liability theory that adopts an incremental approach to the signals required to show assent\textsuperscript{221} would engender at least two different results than Farber and Matheson’s theory. First, an assent-based theory would promote broader enforcement of promises made in a “donative” setting.\textsuperscript{222} Second, the theory would provide a different rationale for refusing to enforce promises made in the context of a highly lawyered, discrete commercial transaction.

Donative promises would be enforceable under the proposed approach provided that one could show persuasive reasons for the absence of formalities and a plausible benefit to the promisor. Donative promises are often made in familial settings involving relations of trust and confidence. Therefore, persuasive reasons exist for promises relying without a formalized contract or explicit promisor signals that the reliance is being sought by the promisor in exchange for his promise.

Farber and Matheson would not enforce donative promises because they are not made “in furtherance of economic activity.”\textsuperscript{223}

\textsuperscript{221} See O. Williamson, Economic Institutions, supra note 28, at 223.

\textsuperscript{222} They would be classified as “donative” by Professors Farber and Matheson because they would not be “in furtherance of an economic commitment.” Farber & Matheson, supra note 16, at 929, 937. However, under certain circumstances, this Article suggests a limited enforcement of these promises.

\textsuperscript{223} Id. at 929. “Unlike promises made in an economic setting, these [donative] promises are not generally made to coordinate activities or generate reliance beneficial to the promisor.” Id. at 937 (footnote omitted).
Their approach, however, views economic commitments too narrowly. Their theory fails to recognize that even promises made in donative settings can evidence an exchange or bargain. In some circumstances, we can infer that the promisor has indicated a willingness to be bound because he believes he will be better off as a result of certain conduct by the promisee. The Farber/Matheson theory fails to explain cases enforcing donative promises inducing reliance in familial or other settings of trust.224

In Ricketts v. Scothorn,225 the court was presented with persuasive reasons for the absence of orthodox formalities and the presence of the requisite, albeit implicit, signals of assent. In Ricketts, the defendant-grandfather executed a promissory note promising to pay the plaintiff-granddaughter $2,000 on demand. Under the bargain theory of contract, this promise would be unenforceable because the grandfather did not explicitly bargain for anything in exchange for his promise. The grandfather gave no indication that he sought and would consider himself bound by the detrimental conduct of his granddaughter. Nevertheless, liability should be imposed on the defendant-grandfather. Both parties probably operated on the basis of informal understandings and trust, creating persuasive reasons for the absence of explicit bargaining. Moreover, the granddaughter's reliance provided a plausible benefit to the grandfather even if he did not specifically bargain for such benefit. The promisee relied by quitting her job. The grandfather's statement at the time of his promise that "none of my other grandchildren work, and you don't have to" reflected his interest in the promisee's reliance.226 In such circumstances, the absence of explicitly bargained-for consideration should not necessarily be equated with the absence of assent.

The proposed theory also differs from Farber and Matheson's in its rationale for denying effect to promises made between equals in a highly lawyered, discrete transaction.227 Professors Farber and Matheson would agree that such promises should not be enforced because they were not made in the context of an ongoing relationship.228 The assent-based approach suggested by this Article would deny enforcement because of the lack of manifested assent. In a highly lawyered, discrete transaction, in which both parties are aware of contract formalities and explicit reciprocal bargaining, one could not infer that the parties failed to achieve orthodox contracts

224. For a discussion of court decisions enforcing donative promises, see Boyer, Promissory Estoppel: Principle From Precedents, 50 Mich. L. Rev. 639 (1952), and cases cited therein.
225. 57 Neb. 51, 77 N.W. 365 (1898).
226. Id. at 54, 77 N.W. at 366.
228. Id.
because of natural barriers. In such a transaction, it is unlikely that the parties would forego formalities because of trust in the other party. Thus, one plausible explanation for dispensing with formalities is that both parties implicitly agreed to bear the risk of the other party's failure to perform. Making promissory estoppel available in such cases inappropriately could compensate parties who likely had chosen to have orthodox contract rules govern their conduct. To the extent that such parties have relied without the benefit of a formal contract, they relied without the expectation of contract enforceability. Intervening in such cases would also upset the expectations of the party who carefully and intentionally avoided reaching the moment of contract formation. For example, in a highly lawyered transaction, one can see why it might be appropriate to insist on orthodox formalities. In R.G. Group,\textsuperscript{229} in which the parties were negotiating a possible purchase, with the aid of lawyers in a one shot deal, the parties did not suffer from certain barriers to orthodox contracting such as lack of knowledge of the formalities or special problems of low natural endowment. Arguably, however, they, nonetheless, faced a barrier to explicit contracting. The need to expend resources to collect information about a deal and the unforeseeability of the future created informational barriers to the promisor. These barriers hampered the promisor's ability to specify in a highly specified, fully contingent, explicitly reciprocal manner the terms on which he would be willing to be bound in the future. However, notwithstanding these barriers, the absence of implicit contracting probably renders the application of promissory estoppel inappropriate.\textsuperscript{230} The court's finding of the parties' understanding that no agreement could exist until they signed a written agreement would make it hard to find evidence of the promisor's implicit contract signals that he is seeking some initial steps from the promisee that would facilitate finalizing the parties' subsequent relations and that were, therefore, valuable to the promisee. On these facts, it is difficult to infer a willingness by the promisor to keep the promisee informed of any change in willingness to reach a more completely explicit bargain. The parties' understanding of the promise as conditioned on signing the written contract precluded reasonably inferring implicit contracts of the kind described above.

V. THE SUGGESTED APPROACH AND ITS ADVANTAGES

In certain situations parties may fail to overcome certain natural barriers to explicit reciprocal bargaining. Alternatively, parties having achieved an orthodox contract, replete with explicit and

\textsuperscript{229} See supra note 143.

\textsuperscript{230} See supra note 28.
pointed evidence of reciprocal inducement signals, may fail to memorialize the agreement in writing. This Article explains the numerous barriers to achieving orthodox contracts and equates the presence of a benefit to the promisor with a willingness to be bound. The Article then suggests that there is no justification for myopically adhering to orthodox rules as the exclusive legitimate indicators of assent. The following section suggests a workable test to determine when an alternative liability rule should be employed.

Plaintiffs attempting to prevail on promissory estoppel claims should be permitted to offer evidence of persuasive natural barriers to explicit signalling of reciprocal inducement or to formalizing the contract. The plaintiff would point to disparate status, disparate knowledge of the law or the transaction, or to a relationship of trust or confidence, or to a complex relationship as evidence of such barriers. Evidence of any of these three factors should give rise to a rebuttable presumption that barriers to reciprocal inducement or other formalities exist. To require the plaintiff to go further and to prove, for example, that a status disparity created a natural barrier to orthodox contracting ignores the fact that, often, the best evidence of the inhibiting effect of disparate status is simply the absence of an orthodox bargain.

The defendant can rebut the presumption by presenting evidence to negate the inhibiting effect of disparate status on explicit bargaining or formalized contracting. Suppose, that a plaintiff had presented evidence of a status disparity, contending that his inferior status indicated that he had less sophisticated knowledge of the applicable law than the defendant. The defendant should be able to introduce evidence disputing the connection between the disparate status and the lack of an explicit bargain or contract formalities. The defendant might, for example, offer evidence that he had thoroughly explained to the plaintiff, in a manner understandable to the plaintiff, that any reliance expenditures taken by the plaintiff would not be for the defendant and would be at the plaintiff’s risk. The plaintiff could no longer plead ignorance to explain the absence of an explicit bargain or contract formalities. Similarly, a defendant can negate the existence of trust in an ongoing relationship by demonstrating that all matters were handled formally through legal memoranda. In such cases, orthodox contract doctrine should be applied because the absence of formalities is not explainable in terms of natural barriers to explicit or formalized bargaining. The absence may only connote the parties’ desire that ordinary contract rules govern their preliminary negotiations.

Once the plaintiff persuades the court that significant barriers to, or reasons for dispensing with, orthodox formalities exist, the plaintiff must then establish a plausible benefit to the promisor to prove assent to liability.
Significant benefits would result from the consideration of the factors identified in this Article in determining contractual liability. A theory that focuses on the nature and components of exchange and alternate evidence of its occurrence would provide a unified theory of the case law in terms of assent-based obligation and reconcile variable results among what has been described as a “motley group” of cases. By sensitizing courts to the complexities of the dynamics of assent, the theory would liberate contract law from the gatekeeper’s narrow-minded mentality that restricts the entrance to assent-based obligation to those who have used certain prescribed indicia and relegated others to the world of non-assent-based obligation.

By allowing courts to recognize assent in whatever form they find it and permitting them to attribute assent-verifying relevance to the factors identified above, courts’ theories of enforceability would be premised on a model of human behavior tailored to the perceptions of how “real, as opposed to hypothetical legal actors” respond to the threat of judicial nonenforcement of promises not pointedly explicit as to well specified consideration or not sufficiently formal. Thus sensitized to the dynamics of assent between real-world actors, courts could intelligently determine which rule of legal liability—promissory estoppel or orthodox contract law—would best promote optimal behavior and would best recognize economic exchanges on about the terms the parties indicate by their behavior they are tending towards, but about which they are unable, or deem it unnecessary, to be orthodoxy explicit.

In addition to sensitizing the courts to the fact that assent can be manifested in a variety of ways, the approach suggests the importance of the benefit factor useful in identifying assent, at least when it occurs in circumstances with persuasive barriers to, or explanations for dispensing with, orthodox contracting. If the promisor derives a plausible benefit, even if not of a discrete, tangible economic nature, perhaps an implied element of a bargaining process exists that warrants promise enforcement. Thus, if it is clear to a rea-
ble person that the promisor has substantial interest in the actions taken, even if they do not constitute a tangible benefit, and it is also evident that barriers to explicitly reciprocal exchange exist, perhaps an orthodox bargain is not necessary. To insist on such evidence of a bargain, in a context in which such will not occur because of barriers to more explicit contracting, is to make an *a priori* decision to withhold enforcement and to overlook real, but implied, signals of a bargain. In such contexts, it is incumbent upon the person in whom trust has been repose who wishes to be exempt from liability to clarify that the promisee will act at his peril and that the promisee's actions will not be regarded as a benefit to the promisor.

The suggested approach would also allow courts, guided by the goal of maximizing exchange, to determine when to apply traditional contract rules and alternatively, when to apply an alternate liability rule. Furthermore, the proposed theory of assent-based liability would also help to explain the need for limits on the availability of promissory estoppel. Promissory estoppel should not be utilized in circumstances such as the highly lawyered, discrete transaction in which no barriers to explicit and formalized bargaining occur, but should be available in the intrafamily setting. A theory of assent-based liability would also allay scholarly fears that the continued growth of the promissory estoppel doctrine could destroy contract law altogether. It would help "clos[e] the relational gap" in modern contract law by devising a system that sensitively considers how agreement may manifest itself in an enmeshed, as opposed to a "discrete," relationship.

VI. POTENTIAL OBJECTIONS TO THE PROPOSED THEORY AND APPROACH

Some critics will attack the suggested approach on the same grounds that the realists attacked the formalists, arguing that, notwithstanding the approach's "claims to predictability . . . [and] coherence," its virtues are overstated — it cannot work. Others will attack the approach as leading to bad results, or on political grounds "for its ideological bias in its continuing to privilege the 'individualist' over the 'communitarian' role." Others will argue that

235. See supra notes 227-28 and accompanying text.
236. See, e.g., Feinman, *Judicial Method, supra* note 8, at 685 ("reliance principle has the potential to overwhelm the expectation principle"). Observers feared the reliance principle primarily because they perceived it to be nonassent-based. Promissory estoppel will not be perceived as so alien to contract law once this assent-based nature is recognized.
239. *Id.* The centrality of autonomy and exchange principles in the proposed
in re-elevating the importance of assent, this Article has suppressed the important "public aspect of contract" doctrine, and in doing so has joined the ranks of those who have censored out or relegated "public aspect[s]" of contract doctrine to unimportant corners of contract law in order to "portray contract as essentially private and free." Still others will argue that the approach fails to overcome that internal contradiction of contract law that makes a "unified rational system" impossible.

A. The Classification Problem

The first criticism is that the required fact classifications would render the approach too difficult to implement. Since "no single characterization of facts is relevant or irrelevant" and since there are "no constraints on the categorization of the facts of any particular case," devising a test based on such classification would invite doctrinal incoherence and uncertainty. Critics might claim that courts cannot simply "identify" when the factors identified as barriers to explicit signalling of reciprocal inducement or written formalities are present or when a plausible benefit exists. Both parties will view ambiguous facts differently. One party will argue that ordinary, orthodox, contract law should govern. Conversely, the other party will urge the court to apply promissory estoppel law claiming, for example, that a relationship of trust existed between the parties. Thus, determining whether one of the outlined factors is present will be extremely difficult and "subject to considerable manipulation."

The classification criticism can be answered as follows. Courts regularly make difficult factual determinations to decide questions of good faith or reasonableness. Thus, the courts' burden is consis-

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\text{theory, concededly, may render it vulnerable to this political criticism.}
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240. \text{Dalton, supra note 2, at 1010.}
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241. \text{Id. at 1010-11.}
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242. \text{Id. at 1010.}
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243. \text{Gordon, Tentative Outline, supra note 41, at 20.}
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244. \text{Feinman, Judicial Method, supra note 8, at 704.}
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245. \text{Id.}
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246. \text{Id. Professor Kennedy explains, "the process [of classification] is not self-executing: people are certain to disagree strongly about how to classify, according to their purposes in making the distinction in the first place." Kennedy, Private Law Adjudication, supra note 8, at 1732.}
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\text{Difficulties in classifying facts increase the likelihood that courts will describe the facts to suit their purposes. For the dangers of this process and the need for fact skepticism, see supra note 52.}
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247. \text{For an example of the difficulties inherent in determining the good faith of a party's exercise of discretion to buy or sell in the context of an output or requirements context, see Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 369 (1980); see also Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521 (1981); Summers,}
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tent with that imposed on all modern courts that often apply more open-ended standards. Moreover, any difficulty of classification inherent in implementing the proposed theory merits the effort. Courts will encourage parties to develop evidence on whether natural and persuasive barriers to explicit reciprocal inducement or formalized contracting exist. This process will foster recognition of the nature and components of exchange, as well as alternate evidence of its occurrence.

B. Categorizing Facts: An Invitation to Judicial Policymaking?

Critics may claim that the suggested approach will invite courts to implement hidden policy agendas because it “cannot provide even the semblance of an objective basis for judicial decision.” 248 Further, critics may argue that if courts are invited to implement their policies, no neutral, objective means of deciding which policies to implement exists and that the facts alone are an insufficient guide for “choosing among competing values.” 249 To answer the above criticism, one must look to legal history. Such history indicates that this criticism rests on a much scorned premise: that it is possible or even desirable to construct a perfectly abstract system that can be administered without any intrusion by the much-hated, much-feared policy judgment. The legal realists had the proper response to the critic who would condemn the proposed approach for opening a Pandora’s box of policy—policy making is inevitable. Even the Willistonian formalists who pretended to be hermetically protected from policy judgments “regularly manipulated [their rules] to reach one result or the other in situations that could be distinguished only by close attention to social or economic context.” 250

Given the universality of policy making, the response to criticism that the approach suggested here will foster policymaking is “so what?” Such judgments are inevitable and the proposed approach is no worse than any other in that regard. An alternative response suggests that the proposed approach will be less likely to foster implicit unarticulated policy judgments than classical formalism. Since the proposed approach considers individual circumstances, including variations in human behavior, factors that the classicists studiously ignored or denied, interpreting the facts to avoid underlying inequities may be unnecessary. These “inequities” most likely result from insisting upon static unified rules of enforceability even when the assumptions about human behavior underlying the rules have been de-

supra note 23.
248. Feinman, Judicial Method, supra note 8, at 704.
249. Id. at 708.
bunked. For example, when contract law assumed that all parties could read and protect themselves by contract\textsuperscript{251} and denied excuses to parties who signed contracts they did not understand, courts often manipulated the facts to find duress or fraud to excuse the promisor and avoid unjust results.\textsuperscript{252} The pressure to manipulate the facts diminished when the courts recognized the realities of bargaining power and devised doctrinal excuses premised on more realistic assumptions about human behavior.

C. The Proposed Approach Lacks “Quality of ‘Ruleness’”\textsuperscript{253} and Will Discourage Investment and Exchange

Scholars might also attack the suggested approach by claiming that it lacks “the quality of ‘ruleness’”\textsuperscript{254} and “formal realizability”\textsuperscript{255} characteristic of nineteenth century classical rules.\textsuperscript{256} Since the approach requires courts to make complex factual classifications, the courts cannot merely “respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.”\textsuperscript{257} This uncertainty arguably will hamper predictable judicial decisionmaking and more severely, discourage transactions. Parties would hesitate to transact, not knowing whether their transactions would be enforced.\textsuperscript{258} Parties invest only if they can rely on judicial sanctions for nonperformance by other parties. Only formalized abstract rules can achieve this certainty.

The above criticisms are the familiar ones leveled against all informal legal approaches. Underlying them is a belief that if judges adhere to formalized rules, the parties will learn the rules and “adjust their activities in advance to take account of them.”\textsuperscript{259}

\textsuperscript{251} E.A. Farnsworth, supra note 10, § 4.14, at 248.
\textsuperscript{252} These were the limited “constitutive exceptions” to the general rule enforcing private agreements. Kennedy, Distributive and Paternalist Motives, supra note 8, at 569, 577.
\textsuperscript{253} Kennedy, Private Law Adjudication, supra note 8, at 1687.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 1687-88.
\textsuperscript{258} Id. at 1698.
\textsuperscript{259} Id. at 1688. A natural corollary to this belief in the ability of rules to encourage transactions is a belief that vaguer standards such as good faith, reasonableness and unconscionability will discourage investment in two ways.

The uncertainty of the outcome if the judge is at large in finding intent, rather than bound to respond mechanically to ritual acts like sealing, will reduce the payoff that can be expected from being careful. Second, the dangers of imprecision are reduced because the judge may bail you out if you blunder.

\textit{Id.} at 1698.
In response, the assumption that investment depends on formalized, orthodox, nineteenth century type contract principles hinges on certain behavioral assumptions about how idealized economic actors will react to nonformal standards. Concededly, some parties will hesitate to transact without knowing the rules and without confidence that the judiciary will strictly enforce the rules. In the highly lawyered, discrete transaction in which there is no likelihood of trust, parties simply will only rely on an explicit reciprocal bargain or a formalized written contract.

To conclude, on the basis of an incomplete model of human behavior, that one system—the orthodox one—that facilitates transacting in certain contexts will promote dealing in all contexts is not a necessary inference. Moreover, such an inference evinces a closed door policy. It assumes that because the orthodox formalistic rules were perceived to facilitate exchange and trust in a credit economy, it follows that a competing, nonformal, fact-oriented approach will hinder those goals. Recognizing that the formalistic orthodoxy was formulated on a distinct model of human behavior suggests that changes in assumptions about, and recognition of, variations in human behavior will render the orthodox model obsolete in contexts in which the model is inaccurate. Such changed assumptions may justify applying a different approach to enforcement that is tailored to a more accurate model of human behavior.

Moreover, the certainty characteristic of the formal system was mythological and extant only in the classicist imagination. Thus, the alleged necessity of formal investment rules is a problematic assumption. All systems presumably suffer from some uncertainty. Thus neither a system of formal rules or one of vague standards necessarily will better promote investment.

Having determined that informal systems may be appropriate and workable, the question remains why an approach enforcing promises in the identified circumstances actually will promote trans- actions between parties. In response, when one of the identified factors, such as a disparity in knowledge or a complex relation, is present, parties will rely on informal and implicit understandings without the benefit of a formal structure. In such situations, denying effectiveness to promises that were not orthodoxy enforceable actually would discourage transactions. Parties who would have relied without explicit, pointed signals of reciprocal inducement or without written contracts will now “invest in precautions to insure themselves against the increased risk of betrayal.” Transactions will be discouraged as a result of their increased costs. A legal sys-

260. See Speidel, supra note 162.
262. Farber & Matheson, supra note 16, at 928.
system that reduces their costs of achieving transactional benefits, recognizes that parties sometimes will rely on informal understandings, and effectuates those understandings is a better one. Given the difficulty of achieving a legal system that can operate mechanically, the proposed approach will maximize the courts' ability to effectuate certain policies, such as encouraging transactions at the least cost.

D. Overenforcement of Promises

Another potential criticism of the proposed approach is that almost all transactions can be put into one category or the other once all factors are considered. Thus, promissory estoppel would be potentially available in most cases, provided the requisite benefit to the promisor could be shown. Only a few residual transactions would warrant applying orthodox rules. The assertion that the suggested approach would circumscribe the reach of orthodox contract law is a valid criticism, however, only if such a result is deemed incorrect. Yet, if, however, the liability rule advocated in this Article provides the same incentives for parties to deal with one another as the orthodox rules, then the advocated rule will enhance the exchange and will not result in the over-enforcement of promises.

E. “Political Critique”

Despite this Article's flexibility in developing legal approaches that consider the multiplicity of human behavior, its approach may be criticized as flawed. It may be said to reflect an “ideological bias in its continuing to privilege the 'individualist' over the 'communitarian' pole; of the purposes of 'efficiency' over distributive fairness or paternalist sympathy.” The approach purportedly may reflect an individualistic bias by legitimizing a liability rule by reference to the wills of the parties. It fails to explore the possibility of formulating a liability rule based on criteria other than those designed to ascertain the individual wills of the parties. It excludes, for example, constructing a system of contracts based on distributive justice or sharing of losses. Admittedly, the Article's weakness is in postulating assent as one of a “few core principles” of the system. It has arguably embraced as policy objectives the ascertainment of assent and the facilitation of exchanges between parties. These objectives are not internally justifiable as indisputable first principles. In short, no easy way exists to convince the reader why these policy objectives should prevail over other objectives as the basis for contract law.

263. Gordon, Tentative Outline, supra note 41, at 20.
264. Id.
265. Kennedy, Private Law Adjudication, supra note 8, at 1717.
266. Gordon, supra note 1, at 1026.
This ideological critique evokes two responses. First, we can no longer believe in first principles or “suprahistorical norms” and accept the “historical contingency” of all policy objectives.\footnote{267} Nevertheless, the Article should not be vulnerable to the attack of ideological bias for merely identifying the policy objectives that seem to explain the legal decisions.

Characterizing the approach as individualistically and ideologically biased is misguided for another reason. Assuming the need for enforcing promises as nonideologically biased is accepted, the approach advocated considers individualism and “communitarian” visions, as different models of human behavior rather than as polar opposite biases. Parties who act to maximize their self-interest will manifest their assent to exchange in certain ways. In other situations, when considering the “relational norms of solidarity, reciprocity, and flexibility,”\footnote{268} those same parties will manifest exchange differently and perhaps less explicitly. Thus, the system is not biased ideologically but accommodates the differential settings in which parties contract.

\section*{F. Fundamental Contradiction in Modern Contract Theory}

Critical legal studies\footnote{269} scholars will criticize the suggested approach for failing to overcome the contradiction between “irreconcilable visions of humanity and society, and between radically different aspirations for our common future”\footnote{270} namely between altruism and individualism.\footnote{271} Efforts to reconcile these visions have failed.

Professor Kennedy contends that each of these conflicting visions\footnote{272} are reflected in “opposed modes for dealing with questions of the form in which legal solutions”\footnote{273} should be formulated. Individualism is compatible with strictly applied rules while altruism encourages resort to standards.\footnote{274}

The substantive visions differ in several ways. Individualism emphasizes self-reliance,\footnote{275} reflecting a belief that individuals have no obligation to “share or sacrifice” benefits derived from their ef-

\footnotesize{\begin{itemize}
\item \footnote{267} Id. at 1025, 1017.
\item \footnote{268} Gordon, Tentative Outline, supra note 41, at 21.
\item \footnote{269} For an overview of critical legal studies theory, see Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563 (1983); Note, Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 (1982).
\item \footnote{270} Kennedy, Private Law Adjudication, supra note 8, at 1685.
\item \footnote{271} Id.
\item \footnote{272} Id.
\item \footnote{273} Id.
\item \footnote{274} Id.
\item \footnote{275} Id. at 1713.
\end{itemize}}
Altruism, in contrast, advocates "sharing and sacrifice." These premises or "images" of society are reflected in differing views of "the proper definition of liability" and in contradictory views of an appropriate substantive liability rule. The premises also differed in the role envisioned for the courts. Individualists were ambivalent about the courts' role. They advocated a realm free of judicial interference in which individuals could act without "responsibility . . . for the effects [of their acts] on others;" yet, recognizing the need for "[s]ome level of protection of person and property," the individualists carved out a limited role for the judiciary to enforce voluntary agreements. The individualists were committed to a system of formalized abstract rules that could be administered mechanically and without unwarranted judicial interference.

Altrists embraced different and competing social values. They attacked the principles supporting the individualists' structure. They delegitimized classical individualism by exposing the "social contingency of decisions and policy choices" of the formalists. Claiming both "presumptive legitimacy" and neutrality for the classical system became impossible as did thinking of judicial decisions as anything other than imposing competing judicial agendas. Consequently, altruism and individualism began to enjoy a "parity in argumentative positions." Although both visions have supporters, both have failed to "generate a new set of principles or metaprinciples to replace late lamented concepts."

This Article contends that an assent-based liability theory can reconcile these conflicting portraits. Individualist and collectivist notions reflect incomplete accounts of how individuals conduct themselves on a real versus idealized basis. Some individuals are self-reliant, able to maximize their welfare, and able to explicitly signal the terms on which they will consider themselves better off. For these individuals, the classical rules grounded on self-reliance and self-protection are sensible and should be applied. For other individuals, the vision of a world of determined self-reliant, profit maximiz-

276. Id.
277. Id. at 1717.
278. Feinman, Critical Approaches, supra note 8, at 830.
279. Kennedy, Private Law Adjudication, supra note 8, at 1728.
280. Id. at 1713.
281. Id. at 1715.
282. Id. at 1717-22.
283. Gordon, supra note 1, at 1026.
284. Kennedy, Private Law Adjudication, supra note 8, at 1733.
285. Id.
286. Id.
287. Feinman, Critical Approaches, supra note 8, at 830.
288. Id. at 843.
ing individuals is incomplete. This vision neglects the varied and rich complexity of human existence in which some individuals are linked by "relational" norms of solidarity. In such cases, applying rules premised on a potentially inaccurate view of the world in which no barriers to, or explanations for dispensing with, orthodox formalities exist is not sensible. Instead, different rules that take account of this behavioral complexity should be applied.

The approach suggested in this Article applies such rules, postulating that when there are no persuasive barriers to explicitly reciprocal contracting because both parties are truly self-reliant and independent individuals, the courts apply rules premised on accurate assumptions of the lack of such barriers. When parties are linked together in a complex manner that creates barriers to explicitly reciprocal contracting, the courts properly apply promissory estoppel premised on a different, yet contextually accurate view, of human behavior.

Thus, courts have become sensitized to individualized human behavior in which some parties are self-reliant and others are dependent. In imposing liability in the promissory estoppel context, however, courts still uphold the basic individualist value that liability should depend on manifested assent. Courts, however, are more sensitive to the manner of manifesting such assent because of changing perceptions about social relations.

The proposed approach reconciles altruism and individualism, suggesting that these should be considered as different models of human behavior rather than as competing "aspirations." This debate is understandable if one realizes that the formal model ignored the complexity of human behavior and insisted on a model of human behavior in which all men were able to explicitly signal the terms on which they would be bound. At that level, the image of self-reliance reflects a value choice rather than a model of human behavior.

The collectivists reacting against the individualist model argued that "courts . . . examine the process of agreement, the terms of the contract, and its social and economic context to ensure that enforcement accords with social values." The collectivists openly advocated referring to social values in interpreting and enforcing contracts. The collectivists' greatest impetus to doing so, however, was the persistence of a model of human behavior that was still built on a notion of equally free individuals. The persistence of that individualist pattern and the inappropriateness of classical rules premised on that model for new situations prompted collectivists to re-

290. Kennedy, Private Law Adjudication, supra note 8, at 1685.
291. Feinman, Critical Approaches, supra note 8, at 842-43.
sort to social values to avoid the unfair and unacceptable results that followed from applying orthodox rules to situations not involving two self-reliant parties.

If, however, the complexity of human behavior is built into the rules, resorting to social values to curb the abuses of applying a unified model to nonunified situations may be unnecessary. Thus, in situations in which natural inhibitions to orthodox arrangements are not present, applying orthodox rules is sensible. In situations containing such barriers, promissory estoppel is appropriate. The system remains vulnerable to attack for its premise on the individualistic value of ascertaining assent and promoting exchange. However, the competing altruistic and distributive motives need not be invoked when the system accurately accounts for human complexity in relationships.

VII. THE PROPOSED APPROACH APPLIED TO WRONGLY DECIDED AND REASONED CASES

The benefits of the suggested approach are apparent when it is applied to two cases in which the court failed to adequately consider the relationship between the parties and the natural barriers to formalized contracting. Had the courts considered these factors, the results in the cases would have been more sensible.

In *Grams v. Melrose-Mindoro Joint School District No. 1* the plaintiff had been a teacher in the school system for eight years when the defendant school board fired her for lack of proper credentials. The plaintiff sued for breach of contract, relying in part on the doctrine of promissory estoppel. The court rejected the plaintiff's claim, finding her reliance to be unreasonable.

During the plaintiff's eight years as a teacher, the school board knowingly appointed her to teach various subjects in which she was not properly certified. Concurrently, the board gave her conflicting advice on the necessity of acquiring appropriate certification. In 1965, the superintendent notified the plaintiff of the need for further business machine training. In 1969, the board questioned the plaintiff about her lack of certification in the courses she was teaching. In 1971, the board alerted all teachers to keep their certifications current. The superintendent also warned the plaintiff about the difficulty of being recertified without commercial subject preparation. During the same eight year period the superintendent contra-

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293. 78 Wis. 2d 569, 254 N.W.2d 730 (1977).
294. *Id.* at 578, 254 N.W.2d at 735.
295. *Id.* at 579, 254 N.W.2d at 735.
296. *Id.* at 573, 254 N.W.2d at 732.
297. *Id.* at 574, 254 N.W.2d at 733.
dicted the board's warnings. In the summer of 1965, he expressed his satisfaction that the plaintiff was teaching commercial subjects, notwithstanding her noncertification because it relieved him of finding a replacement. In 1969, after the board questioned the plaintiff's noncertification in commercial courses, the superintendent told the plaintiff that "[the certification problem] was not her responsibility . . . ." After the board had warned all teachers to keep their certifications current, the superintendent advised the plaintiff "not to worry, he would take care of it."300

After considering the plaintiff's breach of contract claim, the court found that the July, 1964, warning to the plaintiff of the certification requirement "precluded a reasonable expectation . . . that she could continue to teach in areas in which she was not qualified." Thus her reliance on the superintendent's assurances was unreasonable.302

Under the proposed analysis, the court would first consider the relationship between the parties. The eight year employment relationship would suggest that disparities in status and an enmeshment in broader ties existed. This situation would create a rebuttable presumption that barriers existed to explicit reciprocal or to formalized contracting. Given the disparity and enmeshment, the court should have been more receptive to a promissory estoppel claim. The plaintiff was unlikely to insist that the superintendent's assurances be translated into an orthodox contract either because she did not realize the necessity for such formality to render the promise enforceable, or because she hesitated to jeopardize the ongoing relationship by insisting on technicalities.

The Grams case also evidences a plausible benefit to the promisor because the plaintiff's teaching of commercial courses relieved the board of finding other qualified teachers. The benefit to the board was reflected by the superintendent's statement that "he had headaches enough . . . without having to look for a commercial teacher . . . ."303

The presence of such a benefit to the promisor provides credible evidence that the defendant bargained for the noncertified teacher to continue teaching because it would relieve him of incurring expenses in finding a substitute. The plaintiff was induced to continue teaching by the defendant's promise that she had no cause to worry. Evidence of a bargain existed even if such intangible benefits to the

298. Id. at 573, 254 N.W.2d at 732.
299. Id. at 573, 254 N.W.2d at 733.
300. Id. at 574, 254 N.W.2d at 733.
301. Id. at 579, 254 N.W.2d at 735.
302. Id.
303. Id. at 573, 254 N.W.2d at 732; see also supra note 28.
promisor as reduced turnover would not be classified as consideration because no “identifiable exchange from the employee was specified.”

_Lige Dickson Co. v. Union Oil Co._, 306 is also an appropriate case for the analysis suggested in this Article. _Lige_ involved a thirty-seven year business relationship, during which the defendant supplied the plaintiff with certain oil based materials. During the nine year period preceding the lawsuit, the plaintiff purchased all of its asphalt requirements from the defendant. In 1971, after other suppliers had increased their prices, the plaintiff sought and obtained an oral guarantee 308 that the defendant would not raise its prices, at least for contracts on which the plaintiff had relied in making its own bids. When the defendant announced his intention to raise prices, notwithstanding his prior guarantee, the plaintiff sued on the oral guarantee.

The plaintiff alleged that the company had relied on the defendant’s oral promise by making bids and entering contracts that they would not have done otherwise. The defendant contended that the statute of frauds rendered the oral agreement unenforceable. 309 The plaintiff argued that the court should adopt section 217A of the Restatement (Second) of Contracts. 308 That section would have made the oral promise enforceable on the basis of detrimental reliance, despite the statute of frauds. Although the court recognized that the principle of reliance could be used as a basis for enforcing promises

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304. Farber & Matheson, _supra_ note 16, at 920.
306. _Id._ at 293, 635 P.2d at 103.
307. _Id._ at 294, 635 P.2d at 104.
308. _Id._ at 295, 635 P.2d at 105. **RESTATEMENT (SECOND) OF CONTRACTS** § 139 (1981) states:

Enforcement by Virtue of Action in Reliance

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

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

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

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

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

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.
that would otherwise fall within the statute of frauds, it refused to adopt section 217A,\(^{809}\)

Because the parties were involved in a significant financial transaction and the plaintiff was a general contractor, they may have been assumed to be on equal footing, making the case inappropriate for promissory estoppel recovery. The court, however, failed to consider the long-term relationship between the parties. Because of that enmeshment, the parties were likely to trust each other without perceiving the need to formalize their contract in writing. For that reason, promissory estoppel should have been available if the requisite benefit could have been shown.

**CONCLUSION**

This Article has identified certain factors useful in identifying when promissory estoppel claims will succeed or fail. The identification of these circumstances helps to demonstrate that both promissory estoppel and the bargain theory share unifying elemental criteria that place them both within an assent-based theory of enforceability; both are mere doctrinal methods for evidencing a consensual exchange. It postulates that under certain conditions, only explicit reciprocal bargaining or formalized contracting satisfies the elemental criteria for establishing assent. Under other conditions, when persuasive barriers to, or explanations for dispensing with, explicit reciprocal or formalized contracts exist and a plausible benefit to the promisor can be identified, only promissory estoppel is necessary to evidence the presence of assent. This Article identifies the factors useful in determining whether persuasive barriers to, or explanations for dispensing with, formalized bargaining exist. By suggesting that different circumstances call for the application of different “rules” to take account of how real people are likely to take account of and adjust to certain rules, the Article has suggested a regime of contract under which the legal decision maker takes into account assumptions about how real-world actors are likely to respond to bargain or promissory estoppel rules. The Article has responded to potential theoretical criticisms and in doing so has suggested that the theory has helped to bridge the fundamental contradiction between the image of contract as torn between (1) the autonomy principle and (2) a regime of social regulation.

309. 96 Wash. 2d at 300, 635 P.2d at 107.