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## A Feminist Economic Perspective on Contract Law: Promissory Estoppel as an Example

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A FEMINIST ECONOMIC PERSPECTIVE ON  
CONTRACT LAW: PROMISSORY ESTOPPEL AS  
AN EXAMPLE

*Orit Gan\**

ABSTRACT

*Economic analysis is a highly influential theoretical approach to contract law. At the same time, feminist analysis of contract law offers an important critical approach to the field. However, feminist economics, a prominent alternative approach to mainstream neo-classical economics drawing from both economic theory and feminist theory, has only been applied scarcely and sporadically to contract law. This Article seeks to bridge this gap and to apply the key features of feminist economics to an analysis of the doctrine of promissory estoppel. This Article uses promissory estoppel as an example to demonstrate a feminist economic analysis of contract law.*

TABLE OF CONTENTS

INTRODUCTION • 2

I. PROMISSORY ESTOPPEL • 6

    A. *The Doctrine of Promissory Estoppel* • 6

    B. *Promissory Estoppel Literature* • 8

    C. *Economic Analysis of Promissory Estoppel* • 12

II. FEMINIST ECONOMICS • 14

    A. *Care Work* • 16

    B. *Non-Market* • 17

    C. *Economic Man* • 18

    D. *Household Members* • 18

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- E. *Social Norms* • 19
- F. *Well-Being* • 20
- III. A FEMINIST ECONOMIC ANALYSIS OF PROMISSORY ESTOPPEL • 22
  - A. *Borelli v. Brusseau* • 23
  - B. *Valuing Care Work* • 23
  - C. *Enforcing Intra-Family Promises* • 25
  - D. *Love as Motivation to Contract* • 26
  - E. *Acknowledging Different Interests of Different Family Members* • 27
  - F. *Acknowledging Social Norms* • 28
  - G. *Furthering Distributive Justice* • 30
  - H. *Promissory Estoppel from a Feminist Economics Perspective* • 33
- IV. FEMINIST ECONOMICS ANALYSIS OF CONTRACT LAW • 40
  - A. *Other Contract Law Doctrines* • 40
  - B. *Core Values and Concepts* • 42
  - C. *Non-Binary Thinking* • 44
  - D. *Social Aspects* • 45
  - E. *Contracts Between Family Members* • 46
- CONCLUSION • 50

## INTRODUCTION

Economic analysis is a prominent theoretical approach to contract law.<sup>1</sup> At the same time, feminist analysis is an important critical approach to contract law.<sup>2</sup> However, contract law scholars have paid only

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1. For economic analysis of contract law, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 291 (2004); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 95 (9th ed. 2014); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 276 (6th ed. 2012); Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law*, in HANDBOOK OF LAW AND ECONOMICS 7 (A. Mitchell Polinsky & Steven Shvell eds., 2007).
  2. Hila Keren, *Feminism and Contract Law*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 406 (Robin West & Cynthia Grant Bowman eds., 2019); Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010) [hereinafter Threedy, *Dancing Around Gender*]; Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247 (1999); MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid: Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437 (2013); FEMINIST PERSPECTIVES ON

scarce attention to feminist economics.<sup>3</sup> This Article aims to fill this void. The integration of both feminist theory and economics contributes to contract law analysis beyond the application of each theory alone. Economic analysis of contract law infused with feminist insights contributes to the development of contract law doctrines and core values.<sup>4</sup>

Using promissory estoppel as an example, this Article argues that feminist economic analysis enriches contract law. The theoretical insights of feminist economics are applicable to promissory estoppel as well as to other doctrines such as unconscionability, good faith, interpretation, duress, and undue influence, as well as to core concepts, values, and principles of contract law such as autonomy, consent, and freedom of contract.

The doctrine of promissory estoppel has captured much scholarly attention.<sup>5</sup> Some scholars<sup>6</sup> view promissory estoppel as an insignificant and limited doctrine, a doctrine that is a mere substitute for the doctrine of consideration or a secondary doctrine of contract formation that deviates from the basic principles of contract law. Other scholars<sup>7</sup> view promissory estoppel as an important doctrine serving important functions, such as: making contract formation broader and more flexible; mitigating power imbalance between parties; strengthening the right to

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CONTRACT LAW (Linda Mulcahy & Sally Wheeler eds., 2005); Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545 (2006) (book review); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

3. For contract law scholarship from feminist economic perspectives, see, for example, Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337 (1995); Alice Belcher, *A Feminist Perspective on Contract Theories from Law and Economics*, 8 FEMINIST LEGAL STUD. 29 (2000); Adi Ayal, *The Economic and Feminist Approaches to Law: An Eternal Feud or a Misunderstanding Among Friends?*, 10 DEMOCRATIC CULTURE 11 (2005).
4. "Feminist economics is a field that includes both studies of gender roles in the economy from a liberatory perspective and critical work directed at biases in the economics discipline." Julie A. Nelson, *Feminist Economics*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 4512, 4512 (3d ed. 2018). For a detailed explanation of feminist economics see *infra* Part II.
5. Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47, 52 (2013).
6. See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1984); Joseph D. Weinstein, Comment, *Promissory Estoppel in Washington*, 55 WASH. L. REV. 795, 796 (1980); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 581 (1998).
7. See generally Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191 (1998).

contract; and promoting values—such as trust, cooperation, fairness, and justice.

This Article joins the latter scholars, arguing for the significance of promissory estoppel from a feminist economic perspective. Specifically, this Article shows how feminist economic analysis enriches and expands classic economic analysis of promissory estoppel.<sup>8</sup> According to feminist economics, promissory estoppel expands contract law beyond the bargain theory,<sup>9</sup> thus adding to the debate regarding the relation between the doctrine of consideration and the promissory estoppel doctrine.<sup>10</sup> In other words, a feminist economic analysis demonstrates how promissory estoppel complements the doctrine of consideration.

Take, for example, *Ricketts v. Scothorn*.<sup>11</sup> In this classic case, a grandfather promised his granddaughter that he would financially support her so that she would not have to work. On the basis of this promise, the granddaughter quit her job.<sup>12</sup> The grandfather indeed paid her the promised allowance; however, when he died, the executor of his will refused to continue paying the granddaughter.<sup>13</sup> The court enforced the grandfather's promise, stating that "having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."<sup>14</sup>

This case demonstrates the importance of promissory estoppel.<sup>15</sup> Enforcing the promise expands contract law beyond the bargain theory and beyond market transactions supported by consideration. Promissory estoppel in this case stretches contract law to include intra-family relations. Likewise, this case broadens contract law beyond efficiency and

8. For economic analysis of promissory estoppel, see *infra* Part I.C.

9. For the bargain theory, see 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 8.9 (Eric Mills Holmes ed., rev. ed. 1996); EDWARD ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.19 (3d ed. 2004).

10. For the relations between the doctrine of consideration and the promissory estoppel doctrine, see P. S. ATIYAH, CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT 45-61 (1971); P. S. Atiyah, *Consideration and Estoppel: The Thawing of the Ice*, 38 MOD. L. REV. 65 (1975); P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 777 (1979); Alex M. Johnson, Jr., *Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers*, 91 N.D. L. REV. 547 (2015).

11. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

12. *Ricketts*, 77 N.W. at 366.

13. *Ricketts*, 77 N.W. at 366.

14. *Ricketts*, 77 N.W. at 367.

15. See *infra* Part III.H.

utility maximization to incorporate promises motivated by love and caring for another family member. Furthermore, promissory estoppel opens up contract law to the influences of social norms, in this case of a certain lifestyle. Promissory estoppel reveals how contracts are situated within a given social context, in this case social class. In addition, this case shows that sometimes family members might have different interests and perspectives. Lastly, this case demonstrates the importance of gifts and donations.

As the brief analysis of *Ricketts* above demonstrates, feminist economics is relevant to contract law generally. Feminist economics contests dichotomies<sup>16</sup>: The inclusion of intra-family promises in contract law goes beyond commercial promises and thus refutes the family-market binary; the enforcement of gifts made for love goes beyond utility maximization and thus refutes the economic-emotion binary; the inclusion of social norms and social context in contract analysis inherently refutes the private-public binary. Feminist economics compels contract law to take into account the social context, aspects, and effects of contracts.<sup>17</sup> Specifically, feminist economics sheds light on gender norms and how the economy is affected by the social context of patriarchy, discrimination, and inequality. In other words, the dynamic between men and women is itself an important economic factor. Feminist economics renders promises between family members an integral part of contract law.<sup>18</sup> These are general contributions to contract law that go beyond promissory estoppel.<sup>19</sup>

This Article has four parts. After briefly explaining the doctrine of promissory estoppel and Section 90 of the Restatement (Second) of Contracts, Part I reviews the literature on this doctrine. First, it explores the literature stressing the doctrine's marginality, secondary place, and limited, narrow scope. Then it explores the literature emphasizing its importance, significance, and contribution to contract law. Part II briefly explains feminist economics and its core theoretical tenets and features. Based on the previous parts, Part III engages in a feminist economic analysis of promissory estoppel, contributing to the debate over whether promissory estoppel is important by joining the scholars in Part I who answer in the affirmative. Part IV goes beyond promissory estoppel and shows how feminist economics can enrich contract law general-

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16. Feminist economics critiques dichotomies and hierarchies in contract law, such as private-public and home-market. See *infra* Part IV.C.

17. See *infra* Part IV.D.

18. See *infra* Part IV.E.

19. *Infra* Part IV.

ly. This concluding part demonstrates that feminist economics is a valuable theory: It is relevant not only to promissory estoppel but also to other doctrines, core concepts, and values at the heart of contract law.

## I. PROMISSORY ESTOPPEL

### A. *The Doctrine of Promissory Estoppel*

Section 90 of the Restatement (Second) of Contracts provides that

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.<sup>20</sup>

Promissory estoppel has evolved as a mechanism to enforce non-bargained-for, relied-upon promises.<sup>21</sup> It is considered a secondary rule of enforceable promises and is viewed as a narrow and limited substitute for consideration.<sup>22</sup> While some scholars view promissory estoppel as a

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20. RESTATEMENT (SECOND) OF CONTRS. § 90 (AM. L. INST. 1981). For promissory estoppel under the UCC see, for example, Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988); Michael T. Gibson, *Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. L.J. 909 (1997). For promissory estoppel in civil law see, for example, David V. Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 695 (1998); Charles Calleros, *Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What Our Students Should Know About Enforcement of Promises in a Historical and International Context*, 13 CHI.-KENT J. INT'L & COMP. L. 83 (2013).

21. For the historic origins of promissory estoppel see, for example, Eric Alden, *Promissory Estoppel and the Origins of Contract Law*, 9 NE. U. L. REV. 1 (2017); Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425 (2007); Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111 (2005). For the development of promissory estoppel see Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996).

22. See, e.g., *Glitsos v. Kadish*, 418 P.2d 129, 131 (Ariz. Ct. App. 1966) (“The distinction, though narrow, is the difference between valid consideration on the one side, and estoppel on the other, which, when the ends of justice so dictate, is a substitute for consideration.”).

contract law doctrine,<sup>23</sup> according to other scholars, promissory estoppel goes beyond contractual liability.<sup>24</sup> Promissory estoppel is categorized as a contract, tort, or equitable doctrine and classified, accordingly, as creating promise-based, assent-based, reliance-based, or equity-based liability.<sup>25</sup>

The law requires that four elements be present in order to invoke the doctrine of promissory estoppel<sup>26</sup>:

- 1) There has to be a clear, definite, and unambiguous promise;
- 2) The promisor must have had reason to expect reliance on the promise;
- 3) The promise must have induced such reliance and a consequent detrimental change of position; and
- 4) Injustice can be avoided only by enforcement of the promise.<sup>27</sup>

Section 90 provides for a flexible remedy, “as justice requires.”<sup>28</sup> Indeed, some courts award reliance damages<sup>29</sup> and other courts awarded expectation damages.<sup>30</sup>

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23. For the relation between promissory estoppel and the parol evidence rule see, for example, Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Quest?*, 36 VAND. L. REV. 1383 (1983); David G. Epstein, Melinda Arbuckle & Kelly Flanagan, *Contract Law's Two "P.E.'s": Promissory Estoppel and the Parol Evidence Rule*, 62 BAYLOR L. REV. 397 (2010). For the relation between promissory estoppel and the statute of frauds see, for example, Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73 (2011); David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, *Reliance on Oral Promises: Statute of Frauds and "Promissory Estoppel,"* 42 TEX. TECH L. REV. 913 (2010); Henry F. Luepke, III, *Promissory Estoppel and the Statute of Frauds in Missouri*, 58 J. MO. B. 132 (2002).

24. Gan, *supra* note 5, at 56-64.

25. *Id.*

26. CORBIN, *supra* note 9, at § 8.9; FARNSWORTH, *supra* note 9, at § 2.19.

27. Orit Gan, *The Justice Element of Promissory Estoppel*, 89 ST. JOHN'S L. REV. 55 (2015). See also Gerald Griffin Reidy, Note, *Definite and Substantial Reliance: Remedying Injustice Under Section 90*, 67 FORDHAM L. REV. 1217 (1998) (reviewing the use of promissory estoppel to remedy injustice by enforcing relied-on promises).

28. Paul T. Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 IOWA L. REV. 47, 49 (1986).

29. Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

30. See, e.g., Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 135 (1987) (“[C]ourts routinely award expectation damages unless those damages are too speculative, indefinite, or otherwise unavailable under traditional contract rules.”);



### B. *Promissory Estoppel Literature*

The Restatement (Second) of Contracts adopted the bargain theory and primarily enforces promises supported by consideration.<sup>31</sup> However, promissory estoppel provides an alternative basis for enforcement of non-bargained-for relied-upon promises.<sup>32</sup> Promissory estoppel has evolved as a secondary rule of enforceable promises—a limited and narrow substitute for consideration. The main contract formation rule is based on consideration, while promissory estoppel functions as a backup rule for non-bargained-for promises.<sup>33</sup> The literature on promissory estoppel is rich and diverse, taking different views on the relationship between the doctrine of consideration and promissory estoppel.<sup>34</sup>

One view is that promissory estoppel is an insignificant and limited doctrine, a mere substitute for the doctrine of consideration and a secondary doctrine of contract formation that deviates from contract law principles.<sup>35</sup> Contract law scholar Charles Knapp describes promissory estoppel as “the new kid on the contracts block.”<sup>36</sup> A related view stresses the difference between the doctrine of consideration and promissory

W. David Rankin, *Concerning an Expectancy Based Remedial Theory of Promissory Estoppel*, 69 U. TORONTO FAC. L. REV. 116, 117 (2011) (“[N]umerous empirical and jurisprudential studies confirm the judiciary’s proclivity toward treating gratuitous promises as binding in certain circumstances, thereby protecting the expectation interest engendered by them.”); Adam Ship, *The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis*, 46 ALTA. L. REV. 77, 81 (2008) (“My conclusions disclose strong appellate judicial support in Canada, over the last 12 years, for an expectancy approach to estoppel.”).

31. RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) (“To constitute consideration, a performance or a return promise must be bargained for.”). For critique of the doctrine of consideration see, for example, Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165 (2010); Alan M. White, *Stop Teaching Consideration*, 20 NEV. L.J. 503 (2020).
32. For the relation between the doctrine of consideration and the promissory estoppel doctrine, see *supra* note 10.
33. See Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 661-64 (2016); Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1 (2016); Tory A. Weigand, *Promissory Estoppel’s Avoidance of Injustice and Measure of Damages: The Final Frontier*, 23 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2017).
34. Richard Michael Fischl, *Ideology and Argument Construction in Contract Law*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 283 (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).
35. Feinman, *supra* note 6, at 680; Weinstein, *supra* note 6, at 796; Hillman, *supra* note 6, at 581.
36. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1274 (1998).

estoppel.<sup>37</sup> Contract law scholar Grant Gilmore describes the relations between consideration and reliance as the relation between “matter and anti-matter,” “Restatement and anti-Restatement,” and “Contract and anti-Contract.”<sup>38</sup> Other scholars argue for a broad doctrine of consideration, which would include promissory estoppel cases.<sup>39</sup> According to another view, promissory estoppel is not a contract doctrine,<sup>40</sup> but rather a tort<sup>41</sup> or equity doctrine.<sup>42</sup>

There is a body of scholarship that takes still another view of promissory estoppel. According to these scholars, promissory estoppel is not insignificant,<sup>43</sup> but rather broad and important.<sup>44</sup> Scholars point to different reasons promissory estoppel is a significant doctrine of contract formation.

First, promissory estoppel is a favorable addition to the bargain theory.<sup>45</sup> Some scholars support broadening the notion of contract lia-

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37. Orvill C. Snyder, *Promissory Estoppel in New York*, 15 BROOK. L. REV. 27, 27-28 (1948).

38. GRANT GILMORE, *THE DEATH OF CONTRACT* 61 (1974).

39. Bruce MacDougall, *Consideration and Estoppel: Problem and Panacea*, 15 DALHOUSIE L.J. 265 (1992).

40. Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983). *But see* Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605 (1991); Gary Shapiro, Note, *C & K Engineering Contractors v. Amber Steel Co.: Promissory Estoppel and the Right to Trial by Jury in California*, 31 HASTINGS L.J. 697 (1980). For a relational approach, see, for example, Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992).

41. Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28 (1949). *See also* Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841 (2007); Susan M. Morgan, *A Comparative Analysis of the Doctrine of Promissory Estoppel in Australia, Great Britain and the United States*, 15 MELB. U. L. REV. 134 (1985); Andrew Robertson, *Situating Equitable Estoppel Within the Law of Obligations*, 19 SYDNEY L. REV. 32 (1997).

42. Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 277-84 (1996). *See also* William R. Collins, Comment, *The Enigma of Promissory Estoppel in New York*, 48 ALB. L. REV. 822 (1984).

43. Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010). *But see* Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1270 (1994).

44. Wan Izatul Asma Wan Talaat, *The Present Parameters of Promissory Estoppel and Its Changing Role in the English, Australian and Malaysian Contract Law*, 35 J. MALAYSIAN & COMP. L. 39 (2008) (analyzing how courts broaden the doctrine of promissory estoppel).

45. Gan, *supra* note 5, at 56.

bility under the doctrine of consideration.<sup>46</sup> Accordingly, contract formation is not limited by the bargain theory, and reliance is also a basis for enforcing promises. Other scholars claim the enforcement of reliance-based promises makes contract law less individualistic, abstract, and formalistic, and more flexible, contextual, and relational.<sup>47</sup> Section 90 uses the open-ended term “reliance” and provides for a flexible remedy—as justice requires.<sup>48</sup> Promissory estoppel, then, relaxes the formal rules of contract formation and provides that parties are estopped from denying the contract.

Second, promissory estoppel complements the bargain theory by addressing promises in non-bargain contexts.<sup>49</sup> Some scholars claim that promissory estoppel covers areas outside the scope of doctrine of consideration.<sup>50</sup> Promissory estoppel is an alternative to consideration, where enforcement is based not only on free choice, but also on reliance, justice, and other public policies. Promissory estoppel complicates bargain theory’s simplistic logic of free choice, according to which enforceability of contract is based on the parties’ choice to be obligated.<sup>51</sup> Enforcement of promises under promissory estoppel is based on reliance as an alternative to the doctrine of consideration.

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46. Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 522 (1996). See also Randy E. Barnett, *Foreword: Is Reliance Still Dead?*, 38 SAN DIEGO L. REV. 1 (2001). For Justice Cardozo’s broad doctrine of consideration that includes promissory estoppel promises, see Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005); Joshua P. Davis, *Cardozo’s Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993); Henry W. Humble, *Promissory Estoppel in the Law of Contracts*, 63 AM. L. REV. 33 (1929); Mike Townsend, *Cardozo’s Allegheny College Opinion: A Case Study in Law as an Art*, 33 HOUS. L. REV. 1103 (1996). For more broad notions of consideration, see P. S. ATIYAH, *ESSAYS ON CONTRACT* 238 (1990); C.M.A. McCauliff, *A Historical Approach to the Contractual Ties That Bind Parties Together*, 71 FORDHAM L. REV. 841, 864 (2002); Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 103-04 (2000).
47. See generally Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139 (1980).
48. Carolyn Edwards, *Promissory Estoppel and the Avoidance of Injustice*, 12 OKLA. CITY U. L. REV. 223 (1987).
49. Michael I. Swygert & Donald W. Smucker, *Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation*, 16 STETSON L. REV. 1 (1986); James Gordley, *Enforcing Promises*, 83 CALIF. L. REV. 547, 548 (1995).
50. Feinman, *supra* note 6, at 680.
51. Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998).

Third, promissory estoppel promotes efficiency.<sup>52</sup> It encourages cooperation, trust, and interdependence between the parties.<sup>53</sup> This results in reducing opportunistic and predatory behavior during negotiations.<sup>54</sup> In addition to promoting efficiency, promissory estoppel also promotes the fairness of contracts. It is an equitable tool to achieve justice when consideration is lacking or in the face of the misuse of formalities.<sup>55</sup>

Fourth, promissory estoppel enables courts to mitigate the power imbalance between parties and to monitor misuses of power.<sup>56</sup> It reflects a more paternalistic and protectionist contract law and greater intervention by the courts in contractual relations. For example, contract law scholar Juliet Kostritsky argues that promissory estoppel facilitates contractual relations where a power imbalance, due to the respective status or knowledge of the parties, could have prevented the transaction.<sup>57</sup>

Lastly, promissory estoppel expands and strengthens the right to contract.<sup>58</sup> “Promissory estoppel enables promisees to overcome obstacles to meeting the formalities of the doctrine of consideration and to contract nevertheless.”<sup>59</sup> Thus, promissory estoppel plays an important role in guaranteeing access to contract.

Feminist economics adds to this body of scholarship and highlights the importance of care, non-market interactions, and the influence of social norms (especially gender norms) on people’s choices and preferences.<sup>60</sup> Feminist economics provides a fresh perspective and enriches promissory estoppel scholarship. The feminist economic analysis in this Article seeks to make three primary contributions: First, based on this analysis, it argues that promissory estoppel is a broad and important doctrine and not an insignificant and secondary doctrine. Second, re-

52. For an economic analysis of promissory estoppel, see *infra* notes 61-73 and accompanying text.

53. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 942 (1985); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 823 (1941). See also John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37 (2008); Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1387 (1984).

54. Juliet P. Kostritsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 SMU L. REV. 1377 (2008).

55. Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647 (2009).

56. Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987).

57. *Id.* at 911-13.

58. Gan, *supra* note 5.

59. *Id.* at 79.

60. See *infra* Part III.

garding the relation between consideration and promissory estoppel, this analysis argues that the latter doctrine is a valuable supplement to the former. Third, this analysis challenges, expands, and enriches the classic economic analysis of promissory estoppel, which will be discussed in the next subpart. By adding a feminist perspective, this Article highlights the gender bias of mainstream economic analysis of promissory estoppel.

### C. *Economic Analysis of Promissory Estoppel*

According to mainstream law and economics, promises that benefit both parties are enforceable.<sup>61</sup> Courts enforce promises to promote efficient outcomes and refuse to enforce promises that fail to promote welfare maximization.<sup>62</sup> Thus, promissory estoppel, like consideration, is a screening mechanism to enforce value enhancing promises.<sup>63</sup> Promissory estoppel promotes optimal interactions between promisee and promisor. In other words, it makes both parties better off.<sup>64</sup>

As contract law scholars Charles Goetz and Robert Scott explain, “a promise may be enforceable to the extent that the promisee has incurred substantial costs, or conferred benefits, in reasonable reliance on the promise. Promissory estoppel under Section 90 of the Restatement of Contracts is the primary enforcement mechanism when action in reliance follows the promise.”<sup>65</sup> Promissory estoppel promotes efficiency by enforcing promises that caused costs to the promisee.

Law and economics scholar Richard Posner argues that a promise “induce[s] reliance that cost[s] the promisee heavily when it [is] broken, and such a cost can be avoided for the future by holding such a promisor liable for the promisee’s cost of having relied.”<sup>66</sup> The enforceability of promises depends on whether imposing liability creates incentives for future value maximizing conduct.<sup>67</sup> In a promissory estoppel case, a promise is enforceable to give parties incentives to behave efficiently. That is, both to induce the promisor to be careful in making a promise

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61. Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 532-33 (2002).

62. *See id.* at 538 n.37.

63. *Id.* at 566-67.

64. *Id.*

65. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1262 (1980).

66. POSNER, *supra* note 1, at 101.

67. *Id.*

and to take into account the cost that the promise has on the promisee, as well as to induce the promisee to rely on the promise.<sup>68</sup>

Another reason to enforce promises is to prevent opportunism.<sup>69</sup> Since the parties do not perform their duties under the contract simultaneously, the aim of contract law is to deter opportunistic behavior and to prevent promisors from taking advantage of promisees by making promises and then breaking them after reaping their benefits. Enforcing a promise under promissory estoppel deters opportunistic behavior of promisors by making them act upon their promises that the promisees reasonably relied on.

An additional reason to enforce promises is to allocate risks efficiently between the parties. The question is: How would the parties themselves have resolved the issue had they foreseen it? Should the promisor assume the risk for the broken promise because she induced reliance? Or should the promisee assume the risk since her reliance was unreasonable? In the first instance the promise would be enforced and in the second the promise would not be enforced. The question of whether to enforce the promise also asks how to allocate the risk between the parties.

Furthermore, promissory estoppel is efficient since it protects the promisee's investment.<sup>70</sup> Promissory estoppel encourages efficient pre-contractual investment by compensating for reliance during negotiations. Promissory estoppel polices opportunistic behavior by not allowing a promisor to benefit from the promisee's reliance then deny the promise and refrain from acting upon it. In such cases, the promise would be enforceable, in order to promote the efficient reliance of the promisee. Promissory estoppel promotes mutual trust, which also enhances mutual gains for both parties.<sup>71</sup>

According to contract law scholar Richard Craswell:

The legal doctrines governing offer and acceptance can be interpreted to prevent one party from withdrawing in just those cases where an enforceable commitment would have been

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68. For Posner's analysis of promissory estoppel, see Douglas G. Baird, *Unlikely Resurrection: Richard Posner, Promissory Estoppel, and the Death of Contract*, 86 U. CHI. L. REV. 1037 (2019).

69. Kostritsky, *supra* note 61, at 567.

70. Rebecca Stone & Alexander Stremitzer, *Promises, Reliance, and Psychological Lock-In* 49 J. LEGAL STUD. 33, 34-35 (2020) (finding that, in addition to deterring underinvestment, promissory estoppel reduces overreliance and overinvestment in negotiations).

71. Kostritsky, *supra* note 61, at 567.

necessary to induce an efficient level of reliance by the other party. In those cases, I argue, even the party who now seeks to withdraw would have wanted to be committed (if he or she had been asked that question at the time the other party had to rely), precisely in order to induce efficient reliance.<sup>72</sup>

Promissory estoppel then protects efficient reliance, which contract law scholar Avery Katz alludes to as well:

The efficiency of promissory estoppel in precontractual negotiations turns on the relative bargaining power of the parties *ex post*. If offerors have the bargaining power, then holding them responsible for lost reliance under the estoppel doctrine promotes optimal reliance. If offerees have the bargaining power, then optimal reliance requires them to bear the risk of loss.<sup>73</sup>

Economic analysis of promissory estoppel concentrates on market transactions and business negotiations. It also focuses on the parties and on efficiency and utility maximization. Feminist economics provides an alternative economic analysis of promissory estoppel, looking beyond the parties to social norms (especially gender norms), and focusing instead on non-market agreements: activities such as caring, relations between household members, and intra-family agreements. Feminist economics acknowledges motivations beyond gain enhancement. Before delving into a feminist economic analysis of promissory estoppel, the next Part explains the theoretical foundations of feminist economics.

## II. FEMINIST ECONOMICS

Feminist economics is a critical approach to mainstream neoliberal economics.<sup>74</sup> It exposes the gendered aspects, biases, dimensions, and

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72. Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 484 (1996) (exploring efficient reliance as an implicit economic rationale underlying courts' decisions in contract formation cases).

73. Avery Katz, *When Should an Offer Stick?: The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1277 (1996). See also Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 J. LEGAL STUD. 423, 430-39 (2001).

74. For feminist economics generally, see BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993); FEMINIST ECONOMICS TODAY BEYOND ECONOMIC MAN (Marianne A. Ferber & Julie A. Nel-

implications of the economy.<sup>75</sup> While mainstream economics maintains that gender is irrelevant, feminist economics suggests that gender relations are an important part of the economy.<sup>76</sup> Feminist economics exists in the intersection of economic theory and feminist theory, drawing from both of these worlds. It also combines economic and feminist methods and insights. Feminist economics is diverse, drawing from different schools within economics and from different schools within feminism. It is not the case that feminist economics is economics for women while mainstream economics is economics for men. Rather, feminist economics is inclusive economics that goes beyond androcentric mainstream economics.

By the 1990s, feminist economics had become widely recognized as an established subfield within economics.<sup>77</sup> To date, there is rich scholarship in this field. For example, *Feminist Economics* was founded in the

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son eds., 2003); Irene van Staveren, *Feminist Economics: Setting Out the Parameters*, in GENDER AND ECONOMICS 18 (Christine Bauhardt & Gülay Caglar eds., 2010); FEMINIST ECONOMICS (Drucilla Barker & Edith Kuiper eds., 2010); MUKESH ESWARAN, WHY GENDER MATTERS IN ECONOMICS (2014); JOYCE P. JACOBSEN, THE ECONOMICS OF GENDER (3d ed., 2007); COUNTING ON MARILYN WARING: NEW ADVANCES IN FEMINIST ECONOMICS (Bjørnholt, Margunn & Ailsa McKay eds., 2d ed., 2014); FRONTIERS IN THE ECONOMICS OF GENDER, (Francesca Bettio & Alina Verashchagina eds., 2008); INTRODUCING RACE AND GENDER INTO ECONOMICS (Robin L. Bartlett ed., 1997); MICHÈLE A. PUJOL, FEMINISM AND ANTI-FEMINISM IN EARLY ECONOMIC THOUGHT (1992); OUT OF THE MARGIN: FEMINIST PERSPECTIVES ON ECONOMICS (Susan Feiner et al., eds., 1995); MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988); THE ELGAR COMPANION TO FEMINIST ECONOMICS (Janice Peterson & Margaret Lewis eds., 1999); TOWARD A FEMINIST PHILOSOPHY OF ECONOMICS (Drucilla K. Barker & Edith Kuiper eds., 2003); Ann Mari May, *The Feminist Challenge to Economics*, 45 CHALLENGE 45 (2002).

For feminist critique of law and economics, see, for example, Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 ANN. REV. L. & SOC. SCIENCE 283 (2005); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993); Gillian K. Hadfield, *A Coordination Model of the Sexual Division of Labor*, 40 J. ECO. BEHAV. & ORG. 125 (1999); FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW AND SOCIETY (Martha Albertson Fineman & Terence Dougherty eds., 2005); LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES (Margaret Oppenheimer & Nicholas Mercuro eds., 2005).

75. Susan Himmelweit, *Feminist Economics: Why All Economists Should Be Feminist Economists*, in RETHINKING ECONOMICS: AN INTRODUCTION TO PLURALIST ECONOMICS 60, 61 (Liliann Fischer et al. eds., 2017).

76. *Id.* at 61.

77. Daniele Meulders, *Feminist Economics*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL STUDIES SCIENCES 5451, 5451 (Neil J. Smelser & Paul B. Baltes eds., 2001).



mid 1990s and is by now a prestigious journal. As economics scholar Cahal Moran notes:

Feminist economics is a key component of the movement for pluralism in economics and one that has, to some extent, been acknowledged by the mainstream of the profession. It seeks to highlight issues which affect women because (it claims) they have not traditionally been recognized in a field dominated by men.<sup>78</sup>

Two major themes of feminist economics are unpaid labor, mostly done by women, and discrimination women face in the economy.<sup>79</sup>

Like other schools of heterodox<sup>80</sup> economics, feminist economics challenges mainstream neoclassical economics. Though mainstream economics itself has evolved over the years, its male bias is still acute.<sup>81</sup> Feminist economics thus challenges the foundation of mainstream economics in the following ways.<sup>82</sup>

#### A. Care Work

Mainstream economics either ignores care work or analyzes care work as a commodity. Feminist economics highlights the differences between care work<sup>83</sup> and the production and manufacture of goods.<sup>84</sup> For example, care work involves a personal relationship between the care worker and the person cared for. Care work is also influenced by social norms.<sup>85</sup> Thus, feminist economics critiques mainstream economics for measuring productivity, supply, and demand of care work like any other commodity. Feminist economics goes beyond paid work and produc-

78. Cahal Moran, *Why Feminist Economics Is Necessary*, EXPLORING ECONOMICS: RETHINKING ECONOMICS (2020), <https://www.exploring-economics.org/en/discover/Why-feministeconomics-is-necessary/> [<https://perma.cc/72VU-AV4J>].

79. *Id.*

80. David Dequech, *Neoclassical, Mainstream, Orthodox, and Heterodox Economics*, 30 J. POST KEYNESIAN ECON. 279 (2007).

81. Himmelweit, *supra* note 75, at 62.

82. *Id.*

83. Care work is the hands-on services that children and some adults (like elderly or disabled individuals) require. These services are tailored specifically to individuals' needs, and involve tasks that others—who do not require care—can do by themselves. Care work can be both paid and unpaid.

84. Himmelweit, *supra* note 75, at 69.

85. *See infra* Part II.E.

tion and, unlike mainstream economics, focuses on care work.<sup>86</sup> Care work is mostly done by women, which results in inequalities in both employment and the family.<sup>87</sup> Thus, care work is gendered. Feminist economics asks questions such as: Who does the care work? (Private market entities? Public state entities? Family members? The community? Immigrant workers?) For whom and under what conditions? (How much are care workers paid?) What is good care work? How to measure the quality of care work? The analysis of care work found in feminist economics is relevant and applicable to housework and other types of unpaid work.<sup>88</sup> Feminist economics exposes the gendered nature of care work and housework and highlights their importance to the economy.

### B. *Non-Market*

Some mainstream economics theories ignore non-market activities.<sup>89</sup> For example, the GDP does not count domestic work.<sup>90</sup> Other mainstream economic theories apply the same economic rules and assumptions to non-market activities.<sup>91</sup> As people interact in different manners, feminist economics goes beyond the market to include families and communities. Feminist economics then questions who participates in the market? On what terms? Who has non-market obligations, such as housework and care work? Feminist economics claims that housework, which is most often women's work, is part of the economy.<sup>92</sup> While men also engage in such non-market activities, the fact is that they remain primarily carried out by women,<sup>93</sup> which underscores the gendered bias of classical economics' limited view of accounting on-

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86. Nancy Folbre, *Measuring Care: Gender, Empowerment, and the Care Economy*, 7 J. HUM. DEV. 183 (2006); Helen Mussell, *Who Dares to Care? (In the World of Finance)*, 24 FEMINIST ECON. 113 (2018); Rachel Connelly, Xiao-yuan Dong, Joyce Jacobsen & Yaohui Zhao, *The Care Economy in Post-Reform China: Feminist Research on Unpaid and Paid Work and Well-Being*, 24 FEMINIST ECON. 1 (2018).

87. Nancy Folbre, *The Care Penalty and Gender Inequality*, in OXFORD HANDBOOK WOMEN & ECONOMICS 749 (Susan L. Averett et al. eds., 2017).

88. Himmelweit, *supra* note 75, at 61-72.

89. Non-market activities include, for example, domestic work and housework (such as cleaning, cooking, and caring for children).

90. Himmelweit, *supra* note 75, at 64.

91. GARY S. BECKER, A TREATISE OF THE FAMILY 3-4 (1991); RICHARD A. POSNER, SEX AND REASON 85 (1992).

92. KATRINE MARÇAL, WHO COOKED ADAM SMITH'S DINNER? (Saskia Vogel trans., 2016); Gabrielle Meagher & Julie A. Nelson, *Survey Article: Feminism in the Dismal Science*, 12 J. POL. PHIL. 102 (2004).

93. See Himmelweit, *supra* note 75, at 63.

ly for the market. Moreover, the market and the home are interrelated. For example, housework obligations leave less time for employment or engagement in other market activities.

Though some mainstream economics theories address non-market activities,<sup>94</sup> feminist economics points specifically to the gendered nature of these activities and to their importance to the economy.

### C. *Economic Man*

Mainstream economics<sup>95</sup> holds the assumption of the individual economic man who is a selfish and rational utility maximizer as its model.<sup>96</sup> Though subject to heavy critique, this model remains influential in economic analysis.<sup>97</sup> This model is a reflection of hegemonic privileged men and excludes other men and women. Holding that people are not self-centered but rather interdependent, feminist economics goes beyond the model of the economic man.<sup>98</sup> It presents a fuller and richer model of both men's and women's interactions and autonomy.<sup>99</sup> It suggests that human beings are complex and not solely influenced by material factors.<sup>100</sup> People are more than just rational individuals. We cooperate. We are interdependent. We are part of a community or society. Our behavior is a response to both nonmaterial and material incentives. Feminist economics challenges the gendered bias of the economic man model and offers an alternative: a holistic vision of the economic actor, motivated by a variety of factors, and behaving in different forms and not only according to one model.<sup>101</sup>

### D. *Household Members*

While mainstream economics focuses on the household as a unit, feminist economics focuses on each family member and their different

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94. See BECKER, *supra* note 91; POSNER, *supra* note 91.

95. See generally Dequech, *supra* note 80, at 281-92.

96. Ulla Grapard, *Robinson Crusoe: The Quintessential Economic Man?*, in ROBINSON CRUSOE'S ECONOMIC MAN: A CONSTRUCTION AND DECONSTRUCTION 93 (Ulla Grapard & Gillian Hewitson eds., 2011).

97. *Id.* at 93-99.

98. Himmelweit, *supra* note 75, at 63.

99. See Stephanie Seguino, Thomas Stevens & Mark A. Lutz, *Gender and Cooperative Behavior: Economic Man Rides Alone*, 2 FEMINIST ECON. 1, 8 (1996).

100. *Id.*

101. *Id.*

interests or preferences.<sup>102</sup> These two views of the household are poignantly divergent; for example, individual income taxes (taxing individuals) are different from family income taxes (taxing the family unit rather than individuals), and the former usually benefit women more than the latter.<sup>103</sup> Feminist economics looks at the different gender roles women and men have in the family and the way resources are shared unequally in the household.<sup>104</sup> Rather than a simplistic view, feminist economics suggests a more complex view of the household.<sup>105</sup> Feminist economics exposes the gendered aspects of the household.

### E. *Social Norms*

Mainstream economics assumes that individuals are rational and thus that their decisions reflect their choices and preferences.<sup>106</sup> These preferences are held to be stable and unrelated to society.<sup>107</sup> Moreover, these preferences are taken as a given and are not questioned.<sup>108</sup> Feminist economics challenges these assumptions. Feminist economics stresses that people are not rational utility maximizers and that their preferences cannot be seen as preordained.<sup>109</sup> People's preferences are influenced by social norms and are not static but rather are constantly changing.<sup>110</sup> The individual is not separate from society. Rather, there are complex relations between the individual and society, where society affects the individual and vice versa. Feminist economics especially stresses the way in which gender norms shape women's and men's choices, preferences, and options.<sup>111</sup> In other words, social conditions of patriarchy, inequality, and discrimination influence how both women and men economically perform and function. Social norms might sometimes limit people's choices, and people's choices might change social norms.

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102. Himmelweit, *supra* note 75, at 66.

103. *Id.*

104. *See id.* at 65-66.

105. *See* Susan Himmelweit, Cristina Santos, Almudena Sevilla & Catherine Sofer, *Sharing of Resources Within the Family and the Economics of Household Decision-Making*, 75 J. MARRIAGE & FAM. 625 (2013).

106. Himmelweit, *supra* note 75, at 66.

107. *Id.*

108. *Id.*

109. *Id.* at 67.

110. *See* Rebecca Pearse & Raewyn Connell, *Gender Norms and the Economy: Insights from Social Research*, 22 FEMINIST ECON. 30 (2016); Himmelweit, *supra* note 75, at 67.

111. Himmelweit, *supra* note 75, at 67.

For example, the employment rate of mothers of young children is influenced by social attitudes and norms regarding employment and motherhood. At the same time, as more mothers of young children enter the workforce, these social attitudes and norms change.<sup>112</sup> Though other economic schools have also pointed to the importance of social norms,<sup>113</sup> the masculine model of economics is still dominant, and feminist economics places particular emphasis on the importance of gender norms to economic analysis.<sup>114</sup>

### F. *Well-Being*

According to feminist economics, well-being is not limited to monetary gains.<sup>115</sup> For example, living in a caring and equal society and living in a society with good health and education systems each increase the well-being of women and men and of individuals and society writ large.<sup>116</sup> Though other economic schools have advocated for broadening the analysis of well-being,<sup>117</sup> feminist economics in particular has challenged the gendered aspects of well-being.<sup>118</sup> It is not sufficient to account for women's well-being in addition to men's. Rather, it is critical to profoundly alter the very definition of well-being to include women's perspectives on the concept.

This Article has described mainstream economics in very broad, general strokes, and has not sought to account for differences between various economic theories. Similarly, this Article has portrayed only the most general tenets of feminist economics, without addressing the different approaches within feminist economics. Furthermore, though feminist economics has theoretical dimensions as well as political,<sup>119</sup> methodological,<sup>120</sup> pedagogical,<sup>121</sup> and epistemological<sup>122</sup> dimensions, this

112. *Id.* at 67-78.

113. *See, e.g.*, Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSP. 99-101 (1989).

114. Himmelweit, *supra* note 75.

115. Myra H. Strober, *Rethinking Economics Through a Feminist Lens*, 84 AM. ECON. REV. 143 (1994). *See generally* J. Allister McGregor & Nicky Pouw, *Towards an Economics of Wellbeing*, 41 CAMBRIDGE J. ECON. 1123 (2016).

116. Himmelweit, *supra* note 75, at 72.

117. *See, e.g.*, McGregor & Pouw, *supra* note 115.

118. Himmelweit, *supra* note 75, at 72.

119. *See, e.g.*, Astrid Agenjo-Calderón & Lina Gálvez-Muñoz, *Feminist Economics: Theoretical and Political Dimensions*, 78 AM. J. ECON. & SOCIO. 137, 138-9 (2019).

120. *See, e.g.*, Diana Strassmann, *Expanding the Methodological Boundaries of Economics*, 3 FEMINIST ECON., at i, vii-viii (1997); Diana Strassmann, *Feminist Economic Method-*

Article focuses exclusively on the theoretical. With that, alongside this absence of certain nuances, this Article provides a broad picture of the contrast between mainstream economics and feminist economics.

As noted, feminist economics is not the only heterodox economic school, and there are other approaches to economics that challenge mainstream economics. However, feminist economics is an important critique of the dominant approach to economics. Feminist economics documents the differences in well-being between men and women, advocates policies which will promote equity, and conducts research free from androcentric bias.<sup>123</sup>

Feminist economics, then, combines insights from both economics and feminist theory. The “feminist” in feminist economics means that feminist economics seeks to challenge mainstream economics from a holistic feminist perspective. Not only does feminist economics broaden mainstream economics to include women, but it also disputes the basis of mainstream economics. It challenges mainstream economics’ purported objectivity and neutrality and exposes the male biases and androcentricity of mainstream economics. It calls into question the theoretical foundations of mainstream economics and does not make do with merely including women, but rather insists on including gender and gender analysis in a profound, substantive manner. Feminist economics exposes the ways in which the entire economy is gendered.

The “economics” in feminist economics means that feminist economics exposes the economic nature of institutions (like family) that are viewed as existing outside of the economy. It challenges the limited and narrow scope of mainstream economics that ignores women’s work. It unveils the economics of women’s labor. This makes feminist economics a unique school of feminist analysis. Just as some feminist theories focus on identity, equality, sexuality, or power, feminist economics addresses the economics of gender.<sup>124</sup>

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*ologies*, 14 FEMINIST ECON. 1, 1-2 (2008); Sheba Tejani, *What’s Feminist About Feminist Economics?*, 26 J. ECON. METHODOLOGY 99 (2019).

121. See, e.g., Margaret Lewis & Kim Marie McGoldrick, *Moving Beyond the Masculine Neoclassical Classroom*, 7 FEMINIST ECON. 91 (2001); April Laskey Aerni, Robin L. Bartlett, Margaret Lewis, Kim Marie McGoldrick & Jean Shackelford, *Toward a Feminist Pedagogy in Economics*, 5 FEMINIST ECON. 29 (1999).

122. See, e.g., Janet Seiz, *Epistemology and the Tasks of Feminist Economics*, 1 FEMINIST ECON. 110 (1995).

123. Frances R. Woolley, *The Feminist Challenge to Neoclassical Economics*, 17 CAMBRIDGE J. ECON. 485 (1993).

124. See Nancy Fraser, *Feminism, Capitalism, and the Cunning of History*, 56 NEW LEFT REV. 97 (2009) (containing a feminist critique of capitalism).

Though other critical approaches to contract law, such as relational contract law for example, share some insights with feminist economics, they lack the aforementioned feminist and economic aspects. In other words, feminist economics, while not the only critical perspective on contract law, is unique in its ability to challenge the gendered aspects of contract law. Relational theory of contract law, to continue with the above example, addresses social aspects of contract law, but fails to address its gender bias and the economic impact of such bias. Relational theory likewise addresses economic imbalance of power between parties, but fails to address power dynamics that result from patriarchy. Thus, the perspectives on contract law found within feminist economics are valuable even in cases in which said perspectives overlap with other critical theories.

### III. A FEMINIST ECONOMIC ANALYSIS OF PROMISSORY ESTOPPEL

Formation of contract under the bargain theory focuses on market transactions. Classic contract law envisions rational parties who contract in order to maximize utility.<sup>125</sup> Promissory estoppel is an alternative route to formation that opens contract law to other non-market relations and to social policy considerations.<sup>126</sup> Applying the principles of feminist economics to promissory estoppel reveals how promissory estoppel broadens contract law: Formation of contract is not limited to consideration and to bargain, enforceable promises are not limited to the market sphere, and parties' motivations are not limited to wealth maximization. Rather, promissory estoppel promotes cooperation, trust, altruism, and caring; it integrates reliance, justice, fairness, and relationships into contracts; and it includes agreements between family members as an integral part of contract law.

Promissory estoppel also makes contract law more pluralistic and inclusive. Promissory estoppel broadens contract law to include women's interests and perspectives as an integral part of the economy. At the same time promissory estoppel challenges the gendered bias of economics under the doctrine of consideration by adding non-market activities.

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125. See POSNER, *supra* note 1.

126. Gan, *supra* note 5, at 48.

### A. *Borelli v. Brusseau*

In *Borelli v. Brusseau*,<sup>127</sup> a husband was very ill and wished to be cared for at home by his wife rather than by nurses in a hospital.<sup>128</sup> He promised to transfer some of his personal property to his wife in exchange for her care.<sup>129</sup> She performed her promised duties and took care of him until his death.<sup>130</sup> Yet, he did not carry out his end of the deal, and he instead left his property to his daughter in his will.<sup>131</sup> The court concluded there was no binding contract due to lack of consideration, ruling that “personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness, alleged in this case.”<sup>132</sup> The dissent held that the wife’s care work satisfied the required consideration, and thus an enforceable contract was made between the husband and wife.<sup>133</sup> Promissory estoppel was not discussed. However, the following application of feminist economic analysis shows why the court should have applied promissory estoppel in order to enforce the promise in this case.

### B. *Valuing Care Work*

The court’s decision in *Borelli* not only denies the wife’s right to receive the money promised to her, but also disregards and devalues her care work itself. It views her care work as part of her marital duties,<sup>134</sup> and thus not as something substantive or worthy of note. It is not something she might exchange for reciprocal value. According to the majority, the woman in this case did nothing more than act as a good, obedient wife.<sup>135</sup> Alternatively, the enforcement of the promise using promissory estoppel would give the care work value and importance. It would bestow high regard upon the labor of caring, and as a result, would award the wife the compensation promised for her care work. As

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127. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

128. *Borelli*, 16 Cal. Rptr. 2d at 17-18.

129. *Borelli*, 16 Cal. Rptr. 2d at 17-18.

130. *Borelli*, 16 Cal. Rptr. 2d at 18.

131. *Borelli*, 16 Cal. Rptr. 2d at 18.

132. *Borelli*, 16 Cal. Rptr. 2d at 20.

133. *Borelli*, 16 Cal. Rptr. 2d at 20, 25. This case is still good law. It is cited by *In re Marriage of Bonds*, 24 Cal. 4th 1, 25 (2000); *Estate of Stewart*, No. A148396, 2019 WL 1746687, at \*21 n.20 (Cal. Ct. App. Apr. 18, 2019).

134. *Borelli*, 16 Cal. Rptr. 2d at 19.

135. *See Borelli*, 16 Cal. Rptr. 2d at 19 (“[A] wife is obligated by the marriage contract to provide nursing-type care to an ill husband.”).



the dissent showed in this case,<sup>136</sup> the wife did something well beyond her marital duties.

It might seem that awarding the wife compensation devalues her care work in that it treats her primarily as a nurse, rather than as a wife. Doing care work for love, it might be argued, is morally superior to doing so for money. However, awarding the wife compensation for her role as a nurse does not undermine the moral value of her role as a loving wife. The wife, in this case, provided care work both out of love and with the anticipation that she would be fairly compensated. These motivations coexist and are not mutually exclusive. Commodification considerations are valuable considerations, but enforcing the promise in a case like this would neither commodify the wife's care work nor degrade it. By enforcing the promise, the court would validate the values both parties attached to the wife's care work. Enforcing the contract would not mean treating the wife's caring as a commodity provided with no emotions, or strictly as part of her professional duties. Awarding the wife the promised property would not mean she did not care for her husband or that she acted as a professional nurse.<sup>137</sup> Women's right to contract with their husbands or others (a right women earned in the 19th century)<sup>138</sup> is an important economic right that enhances women's autonomy. The contract in this case should be treated like any other marital agreement, which can be enforced without devaluing the love relations of the couple.

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136. *Borelli*, 16 Cal. Rptr. 2d at 24.

137. For a feminist economics analysis of care work done by professional nurses, see Valerie Adams & Rhonda Sharp, *Reciprocity in Caring Labor: Nurses' Work in Residential Aged Care in Australia*, 19 FEMINIST ECON. 100 (2013); Valerie Adams & Julie A. Nelson, *The Economics of Nursing: Articulating Care*, 15 FEMINIST ECON. 3 (2009); Julie A. Nelson & Nancy Folbre, *Why a Well-Paid Nurse Is a Better Nurse*, 24 NURSE ECON. 127 (2006); Lisa Dodson & Rebekah M. Zinzavage, *"It's Like a Family": Caring Labor, Exploitation, and Race in Nursing Homes*, 21 GENDER & SOC'Y 905 (2007).

For the commodification of housework, see Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

138. Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L.J. 42 (1986); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

### C. Enforcing Intra-Family Promises

The court's decision in *Borelli* excludes promises between spouses, since personal performance of marital duties does not qualify as consideration.<sup>139</sup> The court thus maintains the market-family dichotomy. This leaves intra-family promises outside the scope of contract law. Enforcing a promise under promissory estoppel broadens contract law beyond the market. Promises in the intra-family context should also be binding. As the dissent pointed out, had the wife been a professional nurse and not the husband's wife, her care work would qualify as consideration and his promise would have been enforceable.<sup>140</sup> People relate to one another in different ways, not only through the market. Consideration narrowly values only one such way and excludes all others. Promissory estoppel, on the other hand, supplements the doctrine of consideration and includes in its scope other relations, and thus broadens contract law.

It might appear that enforcing intra-family promises using promissory estoppel still maintains hierarchy. Commercial promises will be enforced under the doctrine of consideration, while familial promises will be enforced by a separate doctrine of promissory estoppel. In this view, consideration is the main doctrine of contract formation, while promissory estoppel remains a secondary doctrine. In other words, if consideration is the main entrance to the contract world, the wife (and other women) could use promissory estoppel as the back door to enter into the contract world.

However, having an alternative doctrine of contract formation does not necessarily mean that there will be a hierarchy. Consideration and promissory estoppel are, in fact, two equal doctrines. In some cases, both apply and promisees argue that the promise should be enforced under either doctrine.<sup>141</sup> Some scholars point out that both consideration and promissory estoppel serve the same screening goal: They both distinguish enforceable from unenforceable promises.<sup>142</sup> Other scholars call for uniting both doctrines into a single doctrine.<sup>143</sup> Having two formation doctrines side by side does not necessarily entail hierarchy: Both can be seen as main doors to the contract world.

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139. *Borelli*, 16 Cal. Rptr. 2d at 20.

140. *Borelli*, 16 Cal. Rptr. 2d at 23.

141. Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 352 (1969).

142. See, e.g., Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1991).

143. See, e.g., Farber & Matheson, *supra* note 53, at 905.

#### D. *Love as Motivation to Contract*

The court decision in *Borelli* saw the wife's care work as part of her marital duties and thus not subject to contract.<sup>144</sup> Promissory estoppel acknowledges the existence of relations other than market relations, recognizes different motivations for contracting other than utility maximization, and acknowledges that there are gains other than monetary ones.

The wife in this case was motivated by her love for her husband, but this motivation should not be left outside the scope of contract law.<sup>145</sup> She was not a selfish, rational, utility-maximizing individual; rather, their agreement reflects a relationship of trust, mutual respect, and interdependence. The wife acted in a manner that was based on her love for her husband, as well as for the sake of the money promised. Her example demonstrated that people act not only as rational wealth-maximizers, but also for other non-monetary reasons.

People are complex and behave out of more than one motivation. The court imposed a binary: The wife either contracted for money or acted on the basis of her marital duties. Promissory estoppel is an alternative rationale, which demonstrates that both are true in her case. Her love for her husband does not negate the fact that she deserves to be awarded the money promised to her. These motivations of love and the property promised are not mutually exclusive to one another: They can and often do live side by side. Rather than employing binary thinking according to which one either acts in the market sphere for selfish motivations or one acts in the family sphere for love, feminist economics provides a more complex—and humanly accurate—picture in which people may act for both reasons.<sup>146</sup> In other words, family members may act for economic considerations, and so too may commercial parties act for non-monetary considerations. In both contexts, people act on the basis of more than one motivation.

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144. *Borelli*, 16 Cal. Rptr. 2d at 21.

145. For incorporating values such as love and caring into contract law, see Linda Mulcahy, *The Limitations of Love and Altruism*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 1 (Linda Mulcahy & Sally Wheeler eds., 2005).

146. Nancy Folbre & Julie A. Nelson, *For Love or Money—or Both?*, 14 J. ECON. PERSPS. 123 (2000); Julie A. Nelson, *For Love or Money? Defining Relationships in Law and Life: Does Profit-Seeking Rule Out Love? Evidence (or Not) from Economics and Law*, 35 WASH. U. J.L. & POL'Y 69 (2011).

E. *Acknowledging Different Interests of Different Family Members*

*Borelli* also demonstrates that different family members often have different interests. The suit revealed a conflict of interests between the spouses: Both wanted the husband's property, and while the husband wished to be nursed by wife at home, she preferred that he would remain instead in the hospital.<sup>147</sup> The dissent hints at the fact that the wife contemplated divorcing her husband due to his health condition, but she ultimately chose instead to stay married to him and to take care of him until his death.<sup>148</sup> Their agreement amounted to a compromise between these different interests and preferences. Yet the court did not enforce this compromise,<sup>149</sup> valuing only the husband's interests and preferences.

Rather than automatically assuming domestic harmony, the law should directly address conflicts between spouses, as did the dissent.<sup>150</sup> In this vein, the dissent respected the compromise the couple reached. The imposed view of automatically supposed harmony obscures the power dynamics in this family: The wife performed her promise and cared for her husband, while the husband did not perform his end of the deal, though he benefited from his wife's care work. The harmony, in this case, is actually simply the rule of the stronger party, and is thus a false harmony.

The majority in *Borelli* perpetuated this grave imbalance. Because the majority automatically assumed the existence of unified, shared familial interests, it was unable to see the wife's separate interests. The dissent, however, would have mitigated this disparity by recognizing the conflict of interests between the parties, enforcing the compromise they reached, and awarding the wife the promised property. The dissent balanced the different interests between two contracting parties and sought to correct the uneven distribution caused by the husband's breach of his promise. As noted earlier, the household is not a unit but rather is composed of different members who may have conflicting interests.<sup>151</sup> The dissent in *Borelli* shows that contract law can be a tool to resolve this conflict of interests.

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147. *Borelli*, 16 Cal. Rptr. 2d at 17.

148. *Borelli*, 16 Cal. Rptr. 2d at 24.

149. *Borelli*, 16 Cal. Rptr. 2d at 20.

150. *Borelli*, 16 Cal. Rptr. 2d at 22.

151. *See supra* Part II.D.

### F. *Acknowledging Social Norms*

The case of *Borelli v. Brusseau* demonstrates that social norms—and especially gender norms—influence the parties' contract. The power dynamics between the spouses necessarily shape their agreement. The husband had more money than the wife,<sup>152</sup> such that he could purchase the wife's nursing and care work. She acted as a dutiful wife, cared for her husband, and looked after him until he died. In order to understand their agreement, we need to look at the social background. Gender roles and social expectations shaped their agreement. The wife's decision to care for her husband was influenced by social norms and expectations of married women.

The contract is not an island isolated from its surroundings. A contract is rooted in its social context. Entering the oral agreement was not simply the result of the wife's calculation and analysis of costs and benefits, but also derived from the societal gender role of a wife. It is no coincidence that it is the wife taking care of her husband and not the other way around.

Furthermore, one has to consider the power dynamics between men and women. Gender relations within the family are the background for the agreement between wife and husband. With that, even if it were a husband taking care of his wife, the promise should still be enforced under the doctrine of promissory estoppel. Care work, which is mostly done by women, is undervalued and should receive economic and social appreciation, whether done by women or men.<sup>153</sup>

It seems that the court was influenced by gender roles in marriage. According to the majority, the wife simply performed her marital duties.<sup>154</sup> Promissory estoppel demonstrates alternative social norms according to which care work is valuable and, even when done with love, deserves compensation. The dissent pointed to the old precedents upon which the majority relied in order to stress that this ruling was based on archaic notions regarding marriage.<sup>155</sup> Social norms have changed and these updated norms should apply to the parties' agreement. Today, spouses enter contracts with one another and make marital and other

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152. *Borelli*, 16 Cal. Rptr. 2d at 17.

153. See Cary C. Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (highlighting how Ruth Bader Ginsburg advanced anti-stereotyping theory to promote equality for women by first advocating the theory in sex discrimination cases where men were the plaintiffs).

154. *Borelli*, 16 Cal. Rptr. at 19.

155. *Borelli*, 16 Cal. Rptr. at 24.

agreements. In fact, the couple in *Borelli* signed a prenuptial agreement.<sup>156</sup>

The dissent used the Clintons' marriage to stress how the majority's concept of marriage is outdated.<sup>157</sup> According to the dissent, "To contend in 1993 that such a contract is without consideration means that if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her."<sup>158</sup> The Clinton example exposes the gender bias of the majority. The care that is expected of the wife seems odd when applied to President Clinton. Though the majority uses gender neutral language, the dissent's role reversal (Secretary Clinton needs President Clinton's care) reveals that the majority's ruling is based on social roles and social expectations that apply to women but not to men. According to the dissent, care work, whether done by women or men, qualifies as consideration.<sup>159</sup>

The majority stressed that marital contracts are different from other contracts since there is public interest in marriage.<sup>160</sup> However, the majority failed to consider the influences of society on the marital contract. According to the majority, each spouse has a duty to care for the other spouse.<sup>161</sup> The majority's gender-neutral statement disregards both gender roles in marriage and social perceptions of husbands and wives, and the resultant expectations from each group.

*Borelli* might appear to be a modification of contract case. According to this analysis, the husband and wife had a marriage agreement obligating the wife to take care of her husband. The wife wanted to modify this agreement to include the husband's obligation to transfer the property to her. Since this is a duress case in which the wife wanted to extort extra compensation beyond the original agreed upon compensation, the modified agreement is unenforceable. There should be no consideration for this contract modification. The wife's care work must be seen as her obligation under the original contract, and she did not provide new consideration for the modified contract. Therefore, under this perspective, this contract is not enforceable.

However, it should be noted that even under this interpretation of the case, one still needs to look at social norms in order to determine the

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156. *Borelli*, 16 Cal. Rptr. at 17.

157. *Borelli*, 16 Cal. Rptr. at 24.

158. *Borelli*, 16 Cal. Rptr. at 24.

159. *Borelli*, 16 Cal. Rptr. at 24.

160. *Borelli*, 16 Cal. Rptr. at 19 ("It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation.").

161. *Borelli*, 16 Cal. Rptr. at 20.

spouses' obligations to one another under the marriage contract—that is, the original contract. The contract modification reading of the case is also based on societal conceptions of marital contract.

This case demonstrates that marriage is a social institution, one that changes over time. Marriage has many meanings: It is a coverture, a status, a contract; it is about love, it is about money; it is a relation between two people, it is a relation between two families, it is the creation of a new family; it once referred only to heterosexual couples but now includes same-sex couples. More meanings could be added to this list, but even this abbreviated litany highlights the dynamic, pluralist, and complex notion of marriage. Feminist economics urges contract law to take social context into account.<sup>162</sup> Furthermore, even though *Borelli* is a 1993 case, societal and gender-social context remains as relevant today as it was over twenty-five years ago.<sup>163</sup>

### G. Furthering Distributive Justice

Not enforcing a promise has distributive implications. As the dissent pointed out, the husband and wife in *Borelli* made an agreement.<sup>164</sup> The wife performed her part of the agreement while husband did not perform his. The majority failed to correct this imbalance. This left the husband with the care from which he benefitted as a result of the agreement, even as he did not deliver the property promised to the wife. Promissory estoppel would enable the court to intervene and restore the equilibrium. Enforcing the promise using promissory estoppel would advance distributive justice.<sup>165</sup> It would enable weaker parties to enforce promises made to them. It would prevent stronger parties from denying their promise after benefitting from it. As caring is considered feminine in our society and is mostly done by women,<sup>166</sup> enforcing the husband's promise in a case like this one would promote equality between women and men. In other words, the line between enforceable and unenforceable promises is gendered and not neutral. Promissory estoppel expands the borders of contract law, making the law itself more inclusive.

It might seem that applying contract law to family agreements is harmful to women. According to this view, regulating family through

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162. See *supra* Part II.E.

163. An example of changes in the marriage institution is its recent inclusion of same-sex marriage. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

164. *Borelli*, 16 Cal. Rptr., at 20.

165. Gan, *supra* note 27.

166. Folbre, *supra* note 87.

cold, formal, rigid economic rules of contract law might disadvantage women, and thus it is better to leave the family outside the realm of contract law. The family should remain a place where love—rather than contracts—rules. While this is a valid concern, it should be noted that the justice element of promissory estoppel makes contract law less cold and rigid, and thus explicitly protects weaker parties, such as women, from misuse of contract law. The justice element may be used to apply public policy considerations that will guarantee contract law will not be used to harm women. Moreover, this case demonstrates the harm of *excluding* intra-family promises from contract law. It highlights the distributive implications of regarding the family in exclusively non-contractual terms. As family law scholar Jill Hasday observes, the law regulates economic exchange between intimates:

The relevant legal question is not, and has never been, whether intimates will exchange economic assets; it is when they will do so, how, why, in what forms, and to what ends. Economic exchange is not foreign to intimate relations, either as a matter of first principles or as a positive matter of legal regulation.<sup>167</sup>

Furthermore, the failure to intervene in family matters is not an act of neutrality, but rather is one that actively maintains the status quo. Non-intervention and non-redistribution mean that family is left outside the law, to be governed by the privileged party, usually men. As *Borelli* demonstrates, the decision not to enforce the husband's promise means that the husband gets to break his promise and still get the care he was promised. The privileged and richer party reaps the contract's benefits, while the underprivileged, poorer party gets nothing in exchange for her care labor. More generally, contract law shaped by the insights of feminist economics will seek to benefit, rather than harm, both women and men.

According to the dissent in *Borelli*, the promise was enforceable under the doctrine of consideration.<sup>168</sup> However, this does not mean there is no need for promissory estoppel in such cases nor does it render promissory estoppel insignificant. Promissory estoppel is a different route of enforcement; unlike consideration, it is based on reliance and justice. The fact that in some cases a promise could be enforced based

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167. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005).

168. *Borelli*, 16 Cal. Rptr. at 25.



on either doctrine does not mean promissory estoppel is redundant; there are many other cases in which no consideration is present and promissory estoppel becomes the only way to enforce a promise.<sup>169</sup> In the same vein, having a broad notion of consideration means that many promissory estoppel cases will be included, but that some will still be excluded. Thus, in some cases, enforceability of promises will still depend on promissory estoppel only. Furthermore, applying promissory estoppel shuns the binary thinking (for example, the market-family dichotomy) of the doctrine of consideration and thus avoids the risk of commodifying care work. Promissory estoppel provides a complex and nuanced approach to contract formation rather than a hierarchical one. Though the end result is the same, enforcing the promise because care work qualifies as consideration is different than enforcing the promise because of the promisee's reliance.

It might seem that *Borelli* raises family law issues rather than contract law issues. In other words, this legal conflict should be resolved by applying laws of inheritance and succession instead of contract law. However, this legal dispute is about a breach of promise.<sup>170</sup> The parties to this legal suit are a promisor and a promisee, not the wife and the daughter. The wife's argument is that her late husband's promise should be honored, and that she, not the daughter, is the rightful owner and that the deceased's promise should overrule the will. Framing this case as an inheritance case takes the promise, which is the basis of the case, out of the picture.

The above feminist economic analysis criticizes the court's decision in *Borelli* and calls for the enforcement of the husband's promise in this case. Denying that a contract was made in this case results in distributive injustice. The majority opinion maintains a strong divide between the market and the family, and between rational wealth maximization and altruistic care work. Not enforcing the promise in *Borelli* disregards intra-familial promises and care work.

Applying promissory estoppel would respect such promises. It would expand contract law to these promises, though they are outside the scope of the market. It will not only advance distributive justice and equity but will also refute traditional gender roles in marriage. Including intra-family promises in contract law will broaden formation of contract and refute binary thinking and the market-home hierarchy. The next

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169. For example, gratuitous promises are enforced using promissory estoppel. *See infra* notes 182-84.

170. *Borelli*, 16 Cal. Rptr. at 17.

subpart will go beyond the *Borelli* example to discuss a general feminist economic analysis of promissory estoppel.

#### H. *Promissory Estoppel from a Feminist Economics Perspective*

The contribution of feminist economics to the doctrine of promissory estoppel is apparent in other cases. Recall the *Ricketts* case, whose facts were given in the introduction.<sup>171</sup> Like *Borelli*, this case shows the importance of broadening contract law beyond the market, and enforcing promises in spite of lack of consideration. Both of these cases include agreements between family members in contract law.<sup>172</sup> The bargain theory leaves such promises outside of the world of contract; however, promissory estoppel enables family members to manage their relations using contracts. Furthermore, these cases expand contract law beyond efficiency considerations and utility maximization. Parties are not only players in the market, but they are also family members. Market transactions are important, but so are gifts and care work; commercial relations are important, but so are family relations; economic considerations and motivations are important, but so are love and caring.

In *Ricketts* (like in *Borelli*) family members treated each other with love and care. Their contracts reflect caring and devotion to one another. At the same time, *Ricketts* (like *Borelli*) reflects that different family members might have different interests. The executor, who represented the deceased's interests, maintained that the promise should not be enforced; the granddaughter, who quit her job in reliance on her grandfather's promise, had the opposite interest.<sup>173</sup> Though relations between family members are much closer than market relations, family members too have differences of opinions. Contract law might be a tool to manage these differences by reaching compromises. Finally, *Ricketts* demonstrates the importance of social background. The grandfather's promise was based on his statement that none of his grandchildren work.<sup>174</sup> Thus, his promise reflects his class, and his perception of work and lifestyle. The granddaughter immediately quit her job<sup>175</sup> and retained the lifestyle she could now afford thanks to her grandfather. This social context is important in order to understand the contract, the grandfather's promise, and the granddaughter's reaction to his promise.

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171. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

172. See also, e.g., *Harvey v. Dow*, 962 A.2d 322 (Me. 2008).

173. *Ricketts*, 77 N.W. at 366.

174. *Ricketts*, 77 N.W. at 366.

175. *Ricketts*, 77 N.W. at 366.

As these examples show, promissory estoppel is an important doctrine. Promissory estoppel goes beyond commercial agreements to also include promises made in the family setting. Promissory estoppel opens the possibility of enforcing promises between family members and not only between two parties conducting business together. It is sometimes difficult to meet the requirements of the doctrine of consideration. Promissory estoppel provides a route to enforce such promises in the non-market setting. This broadens the boundaries of contract law and relaxes the market-home binary. It treats family agreements as an integral part of contract law.

Promissory estoppel cases in the family context show that the household is not a singular unit, but rather that different household members may have different interests, perspectives, and preferences. These different views might lead to a legal conflict between family members. If the family is not a singular unit, it makes sense to talk about contracts between family members. Contract is the way in which family members might choose to manage their conflicts and disagreements. Contracts may be used to enforce compromises between family members. Promissory estoppel, then, is the main formation rule for contracts in the family setting.

Promissory estoppel cases cover a variety of contractual relations, and not only intra-family relations. Some of these cases deal with promises made during market activities<sup>176</sup> such as employment,<sup>177</sup> construction deals,<sup>178</sup> insurance,<sup>179</sup> franchise,<sup>180</sup> and loans.<sup>181</sup> However, other cases

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176. Annabelle P. Harris, *The Doctrine of Promissory Estoppel in an Arm's Length Commercial Transaction in Tennessee: A Primer*, 49 U. MEM. L. REV. 813, 823 (2019); Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 449-50 (1987); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 946 (1997); Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 333 (2002).

177. See generally Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1 (1999); Cortlan H. Maddux, Comment, *EMPLOYERS BEWARE! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Joanna C. Kloet, Comment, *Using Promissory Estoppel to Preserve Traditional Contract Principles and Protect Employee Rights*, 2005 MICH. ST. L. REV. 1235 (2005); Robert A. Hillman, *Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L. REV. 1341 (2015).

178. See generally Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169, 1205 (1997); Kai-Niklas A. Schneider, *Maryland's Application of Promissory Estoppel in Construction Industry Bidding Disputes: Eliminating Further Confusion*, 30 U. BALT.

deal with charity,<sup>182</sup> donations,<sup>183</sup> and gifts.<sup>184</sup> The analysis of feminist economics is not limited to intra-family settings and is relevant to these promissory estoppel cases as well.

Take, for example, *King v. Trustees of Boston University*.<sup>185</sup> Dr. Martin Luther King Jr., an alumnus of Boston University, promised in a

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- L. REV. 171 (2000); Janine McPeters Murphy, Note, *Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases*, 63 N.C. L. REV. 387 (1985); Dorothy Hemmer Bishop, Comment, *The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel*, 34 EMORY L.J. 421 (1985).
179. See, e.g., *Prudential Ins. Co. of Am. v. Clark*, 456 F.2d 932 (5th Cir. 1972); *Marker v. Preferred Life Ins. Co.*, 506 P.2d 1163 (Kan. 1973); *Green v. Helmcamp Ins. Agency*, 499 S.W.2d 730 (Tex. App. 1973).
180. See, e.g., *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69 (2d Cir. 1984); *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 616 P.2d 644 (Wash. 1980). See generally Gregory M. Duhl, *Red Owl's Legacy*, 87 MARQ. L. REV. 297 (2003); Robert A. Hillman, *Contract: Precedent in Contract Cases and the Importance(?) of the Whole Story*, 87 TEMP. L. REV. 759, 761-63 (2015); Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007); William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010).
181. Amy B. Parker, *Mending Broken Promises: Allowing Homeowners to Pursue Claims of Promissory Estoppel Against Lenders When Denied Loan Modifications*, 47 NEW ENG. L. REV. 985 (2013).
182. See, e.g., *Danby v. Osteopathic Hosp. Ass'n*, 104 A.2d 903 (Del. 1954); *Maryland Nat'l Bank v. United Jewish Appeal Fed'n*, 407 A.2d 1130 (Md. 1979); *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989); *Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 215 N.W.2d 750 (Mich. Ct. App. 1974).
183. See, e.g., *Estate of Bucci v. Sandoval*, 488 P.2d 216 (Colo. App. 1971); Greiner v. Greiner, 293 P. 759 (Kan. 1930); see also, Sabine Tsuruda, *Contract, Power, and the Value of Donative Promises*, 69 S.C. L. REV. 479, 490-99 (2017); Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 23-31 (1979); William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 PENN ST. L. REV. 477 (2015).
184. See, e.g., Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: I*, 50 MICH. L. REV. 639, 640 (1952); Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 855 (1997); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 39 (1992); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411 (1977); Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 11 (2004); Alex M. Johnson Jr., *Irrevocable Gift Promises and Promises Inducing Reliance: A Mandate for the Return of the Seal in Contract Law*, 98 NEB. L. REV. 926 (2019); Stéphane Sérafin, *Gifts and Contracts: A Comparison with Quebec Civil Law*, UBC L. Rev. (forthcoming) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3600192](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600192)).
185. *King v. Trs. of Bos. Univ.*, 647 N.E.2d 1196 (Mass. 1995).

note to transfer title to his papers to Boston University.<sup>186</sup> His wife, the administrator of his estate, challenged the University's claim.<sup>187</sup> The court nevertheless ruled that "Dr. King made a promise to give absolute title to his papers to BU in a letter signed by him . . . and that the promise to give the papers was enforceable as a charitable pledge supported by consideration or reliance."<sup>188</sup> Though the court did not adopt the standard of Section 90 of the Restatement (Second) of Contracts, it did rule based on the elements of promise and reasonable reliance.<sup>189</sup>

The feminist economic analysis in this Article supports the enforcement of the note in this case. Like in the former cases, doing so expands contract law beyond the market. It enforces promises in non-commercial contexts: donations, charities, and gifts, in addition to families. Furthermore, it demonstrates that people act not just as rational utility maximizers. Here, the gift to the University was not based on profits or enhancing benefits to King, but rather on a wish that the papers would be used for academic research.<sup>190</sup>

This case also demonstrates the importance of social context. The promise to the University was based on the relations of an alumnus to his university. The University wanted its library to hold the papers of its famous alumnus and King wanted his writings to be archived and to be the subject of historical and other academic studies.<sup>191</sup> Like family relations, these relations reflect a richer world of relationships not limited to commercial bargains. Race is also part of the social context. King was approached by Morehouse College, his undergraduate alma mater.<sup>192</sup> He was concerned that he would be criticized for preferring Boston University to a Black institution in the South.<sup>193</sup> Racial considerations played a part in his decision whether to give his papers to Boston University or to Morehouse College.

Lastly, this case demonstrates that family is not a singular unit but rather consists of individuals with different perspectives, interests, and preferences. Dr. King and his wife did not see the gift to Boston University the same way: While he wrote a note stating his wishes to donate his papers to the University, after his death, his wife did not wish to deliver

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186. *King*, 647 N.E.2d at 1198-99.

187. *King*, 647 N.E.2d at 1198.

188. *King*, 647 N.E.2d at 1199.

189. *King*, 647 N.E.2d at 1200-03.

190. *King*, 647 N.E.2d at 1199.

191. *King*, 647 N.E.2d at 1199.

192. *King*, 647 N.E.2d at 1198.

193. *King*, 647 N.E.2d at 1198.

the papers to the University. Enforcing<sup>194</sup> the non-bargained-for promise in this case enriches contract law by broadening it and including within its scope promises in contexts of donations and gifts. The donor-donee relations are significant and it is thus important that contract law applies to these relations in cases where the promisor withdraws his or her promise.

Feminist economics is relevant even to commercial promissory estoppel cases. Take, for example, *Quake Construction, Inc. v. American Airlines, Inc.*<sup>195</sup> In this case, a subcontractor sued the contractor for failing to reach an agreement following a letter of intent. Mayor Harold Washington, the first Black mayor of Chicago, sought to open up public projects to minority businesses. The subcontractor was such a minority owned business.<sup>196</sup> Following a bid for the expansion of the O'Hare Airport the subcontractor was told it has been awarded the contract for the project. Though a letter of intent was sent no contract was signed. After the subcontractor participated in a preconstruction meeting for the project it was told that it would not take part in the project. The subcontractor sued for breach of contract. In this promissory estoppel case one needs to look at the political and racial context of the negotiations for construction work at the O'Hare Airport.<sup>197</sup> This important background includes the political agenda of promoting minority businesses in Chicago. As in the previous cases, the promise and the reliance on the promise in this case are rooted in social context.

The same applies also to promissory estoppel in the employment context. Take, for example, the famous *Feinberg v. Pfeiffer Co.*<sup>198</sup> In that case, the employer made a promise to an employee to pay her a retirement pension for life.<sup>199</sup> She retired, relying on this promise.<sup>200</sup> The court awarded her promised pension based on promissory estoppel.<sup>201</sup> Like the aforementioned cases, the relations between the parties provide important background to the case. In particular, gender norms in the job market provide important social context. Gender influences wom-

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194. *King*, 647 N.E.2d at 1203.

195. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990 (Ill. 1990).

196. *Quake Constr.*, 565 N.E.2d at 990; see Judith L. Maute, *Race Politics, O'Hare Airport Expansion, and Promissory Estoppel: The More Things Change, the More They Stay the Same*, 69 HASTINGS L.J. 119 (2017).

197. See Maute, *supra* note 196, at 122-29 (putting *Quake Constr.* in a political and historical context).

198. *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959).

199. *Feinberg*, 322 S.W.2d at 165-65.

200. *Feinberg*, 322 S.W.2d at 166.

201. *Feinberg*, 322 S.W.2d at 168-69.

en's decisions to work (rather than stay at home), what kind of work they do (as the job market is segregated), their employment conditions and terms (as employment discrimination still prevails), their retirement, and so on.<sup>202</sup>

This sample of promissory estoppel cases highlights the diversity of relations between parties. Parties interrelate with each other in different settings and they are motivated by factors other than utility maximization. For example, cases involving charity and donations demonstrate that people wish to donate to good causes and to benefit people they care about.<sup>203</sup> People are not only selfish and rational but also act for altruistic and caring reasons.<sup>204</sup> Promissory estoppel paves the way to include these motivations and promises within the scope of contract law. Enforcing such promises using contract law awards them the respect and value they deserve.

Broadening contract law to include non-bargained-for promises and non-commercial promises does not mean all promises will be enforced under promissory estoppel. Some promises will not satisfy Section 90's elements and thus will not be enforced.<sup>205</sup> Other promises will not be enforceable because the parties did not wish to be legally bound. Even a significant doctrine of promissory estoppel still leaves some promises outside of the contract world. In addition, claiming promissory estoppel is an important doctrine does not mean it is flawless. It is both an important doctrine and one that might be challenged.

Promissory estoppel's justice element opens contract law to social values and public policy considerations, such as balancing power dynamics and promoting distributive justice. This derives from the view that parties and society are interrelated because every contract is formed in a specific society. Society influences the contract and the contract is influenced by society. Justice and reliance are open ended concepts and

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202. For example, the decision states that “[i]t is a matter of common knowledge that it is virtually impossible for a woman of that age to find satisfactory employment, much less a position comparable to that which plaintiff enjoyed at the time of her retirement.” *Feinberg*, 322 S.W.2d at 169.

203. *See supra* notes 182-84.

204. For including emotions in contract law specifically and in law generally, see Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829 (2018); Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427 (2016); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007); Kathy Abrams & Hila Keren, *Legal Hopes: Enhancing Resilience Through the External Cultivation of Positive Emotions*, 64 N. IR. LEGAL Q. 111 (2013).

205. *See supra* note 26 and accompanying text.

applying them should include a contextual analysis of both the relationship between the parties and the social circumstances surrounding the contract.

From a feminist economic standpoint, the gender dynamics between parties are crucial to understanding agreements. Specifically, the social context of patriarchy, discrimination, and inequality is important when women enter into contracts. Promissory estoppel incorporates this context to the legal analysis of contracts by considering both intra-party and inter-party relationships. Such context enhances contract law by looking beyond the traditional economic market and thereby making contract formation more flexible. Promissory estoppel thus expands contract law's boundaries and makes them more inclusive. As described above, the value of promissory estoppel therefore rests in its ability to supplement to the doctrine of consideration.

The above also shows the difference between mainstream economic analysis and feminist economic analysis. Mainstream economics focuses on market transactions: It is concerned with efficiency, assumes parties are rational utility maximizers, and supports the status quo.<sup>206</sup> On the other hand, feminist economics focuses on family and other social settings: It looks at the social context (and primarily the gendered social context) of the contract, assumes parties are motivated by love and care as well as by personal gains, and seeks to promote gender equality and redistribution. Feminist economics not only broadens economic analysis (i.e., by providing a broader definition of well-being or utility) but also constitutes a profound transformation of economic analysis itself. Feminist analysis enriches economics by challenging its male bias and opening economics to include women's perspectives.

Other scholars have stressed the importance of promissory estoppel for a variety of reasons, and on the basis of a number of theories.<sup>207</sup> This Article adds to this scholarship a fresh analysis from a feminist economic perspective. In other words, the above feminist economic analysis joins together with other theories and can be used to provide additional support to and evidence for the importance of promissory estoppel. Feminist economics has general applications to contract law beyond the doctrine of promissory estoppel,<sup>208</sup> as elaborated in the next part.

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206. See *supra* Part I.C.

207. See *supra* notes 43-59 and accompanying text.

208. See Lua Kamál Yuille, *Toward a Heterodox Property Law and Economics*, 2 TEX. A&M L. REV. 489, 498 (2015) (containing a feminist economic analysis of property law); Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1 (1996) (containing a feminist economic analysis of family law).



#### IV. FEMINIST ECONOMICS ANALYSIS OF CONTRACT LAW

Feminist economics is a heterodox economic theory. Feminist economics means more than just “add feminism and stir.”<sup>209</sup> Rather, it fundamentally challenges the gendered foundations of mainstream economics.<sup>210</sup> The combination of both economic theory and feminist theory results in an integrated theory that is more powerful than the sum of its parts. Feminist economics analysis enriches contract law, as the following demonstrates. The main features of feminist economics are relevant to contract law more generally and are not limited to the doctrine of promissory estoppel.

##### A. Other Contract Law Doctrines

The doctrine of promissory estoppel was provided in this Article as one example, but the above insights are relevant to other doctrines as well. For instance, interpretation of contract should take into account the interconnectedness between the parties and society. This social context is important for understanding the contract’s meaning.<sup>211</sup> In other words, feminist economics joins other scholarship in supporting contextual interpretation. Take for example the question of what the term “sandwich” means in a given contract. Does it include a burrito? An answer to this question is not a matter of the dictionary definition of a sandwich, but rather must stem from an engagement with cultural, ethnic, racial, and class aspects.<sup>212</sup>

Another doctrine that is contextual is unconscionability. The famous case of *Walker-Thomas*<sup>213</sup> illustrates the importance of gender, class, and race when analyzing predatory business practices and the relationship between the parties and the contract.<sup>214</sup> In *Walker-Thomas* the

209. See generally SANDRA HARDING, *Just Add Women and Stir?*, in MISSING LINKS: GENDER EQUITY IN SCIENCE AND TECHNOLOGY FOR DEVELOPMENT 296 (1995) (adding women without substantive change is problematic).

210. Nelson, *supra* note 4.

211. See, e.g., CATHERINE MITCHELL, INTERPRETATION OF CONTRACTS 54 (2d ed. 2019) (discussing contextual interpretation).

212. Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 57-59 (2008).

213. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

214. Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 63 (1995); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 305-10 (1994); Blake D. Morant, *Law, Literature, and*

parties were a retail furniture store and a poor Black woman.<sup>215</sup> According to its installment contract, Walker-Thomas retained title in all of her furniture purchases until the total of all the monthly payments made equaled the stated value of an item. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item. The imbalance of power between the parties and the misuse of it by Walker-Thomas is an important background to the court's unconscionability analysis. This case demonstrates the predatory practices faced by poor Black women. Feminist economics, then, exposes the gendered economic aspects of the unconscionability doctrine.

Damages for breach of contract are also gendered. For example, damages for a deformed nose as a result of plastic surgery<sup>216</sup> were awarded within a context of gendered notions of beauty and looks. In *Sullivan v. O'Connor*, the plaintiff, a professional entertainer, underwent an operation to shorten her nose. Afterwards, she sued, claiming the operation had worsened her appearance.<sup>217</sup> In its decision, the court described her nose before and after the operation. It awarded her damages for pain and suffering, mental distress, and worsening her conditions, even though she did not show she suffered loss of employment. Thus the damages award was intended to reflect the loss of her looks as a woman, not the effect on her as a professional.

Unconscionability and good faith doctrines integrate into contract law values other than efficiency. These doctrines highlight parties' cooperation, interdependence, trust, and caring. They portray parties as more than rational utility maximizers. Instead of a simplistic, narrow account of the parties, these doctrines allow a richer, more complex and fuller view of the parties. Also, these doctrines integrate into contract law social values and public policy.<sup>218</sup> For example, these doctrines can battle discrimination practices and promote equality. If parties are part of soci-

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*Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5-6 (1989); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 108-09 (1998) [hereinafter Morant, *The Teachings of Dr. King*]; see also Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 925-36 (1997); Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 98-99 (1994).

215. *Walker-Thomas*, 350 F.2d at 447.

216. *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973).

217. *Sullivan*, 296 N.E.2d at 184-85.

218. Hila Keren, "We Insist! Freedom Now": *Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 179-83 (2005); Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 365-67 (2015).

ety and contract is a social tool, then these values are important factors of contract law. While mainstream law and economics explains these doctrines on the basis of efficiency, feminist economics enriches this explanation beyond efficiency.

Social context is also important to the doctrines of duress and undue influence. Especially in the family context, the story behind these legal claims is a story of patriarchy, power dynamics between women and men, social norms, and gender roles. For example, threats made by husbands against their wives while negotiating a prenuptial agreement are based on social gender power structures.<sup>219</sup> Another example is pressures husbands place upon their wives to sign as a surety for the husband's business debt.<sup>220</sup> In a related vein, the doctrine of undue influence covers pressures resulting from discrimination against LGBTQ individuals.<sup>221</sup>

### B. Core Values and Concepts

Feminist economics provides an alternative analysis to contract law. It gives values such as cooperation, interdependence, relations, trust, care, fairness, and justice central places in contract law, and goes well beyond narrow concepts such as wealth maximization and efficiency. It gives a fresh account of basic concepts like consent,<sup>222</sup> freedom of contract,<sup>223</sup> and autonomy.<sup>224</sup> These concepts should be reframed to include

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219. Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 209-10 (2013).

220. BELINDA FEHLBERG, SEXUALLY TRANSMITTED DEBT: SURETY EXPERIENCE AND ENGLISH LAW (1997); Rosemary Auchmuty, *Men Behaving Badly: An Analysis of English Undue Influence Cases*, 11 SOC. & LEGAL STUD. 257, 265-66 (2002).

221. *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 543 (Cal. Ct. App. 1966).

222. For contractual consent, see generally NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS, 5-48 (2019) (discussing what it means to consent); see also Brian Bix, *Contracts*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 251 (Franklin G. Miller & Alan Wertheimer eds., 2009) (exploring many of the issues relating to consent in contract law); Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 618-26 (2017) (offering a model of consent); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 70-73 (2012) (examining consent in contract law).

223. See Hila Keren, *Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity*, 2016 CAN. J. COMP. & CONTEMP. L. 339 (2016); see also Hila Keren, *In the Land of Choice: Privatized Reality and Contractual Vulnerability*, in PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE 60 (Martha Albertson Fineman, Ulrika Andersson & Titti Mattsson eds., 2017).

social norms and expectations. Parties' choices and preferences cannot be analyzed without taking into account social context, such as social status, position, background, and circumstances. Specifically, gender dynamics operating under a system of patriarchy constitute an important social context. Feminist economics, then, challenges the standard concept of consent, given that people are differently situated in society, have diverse opportunities and choices, and face unique limitations and constraints to their agency and autonomy. Parties' preferences are not stable and fixed, but are rather the result of ever-changing social norms and contexts. As I argue elsewhere:

Consent is not binary, but exists along a spectrum. In between full and free consent, on one end, and no consent, on the other, lie hypothetical consent and implied consent, as well as partial, questionable, and intermediate consent . . . . Consent is nuanced and contextual and depends on circumstances; it varies in different types of contracts, and is in part determined by the type of relationship between contracting parties . . . . Consent is influenced not only by the relationships between the parties, but also by larger cultural and social context. Consent is socially situated: the consenting party's position in society (gender, race, class) shapes his or her consent.<sup>225</sup>

Feminist insights on the variety of contractual relations, the different preferences and interests of parties, and the importance of care provide a more complex picture of the world of contract. Thus, one needs to situate contracts in the social context of discrimination and inequality and relations of class, race, and gender. Rather than a simplistic and reductive notion of consent, feminist economics provides complex and nuanced concepts of freedom and autonomy. As Kathryn Abrams explains, autonomy is gendered.<sup>226</sup>

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224. See generally HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 3 (2017).

225. Gan, *supra* note 222, at 660.

226. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 813-22 (1999).

### C. *Non-Binary Thinking*

Feminist economics critiques binary thinking and hierarchies in contract law, such as those drawn between market and home. As demonstrated, contract law is not limited to market transactions, as people relate to one another in different forms and in different settings. People interact with one another in communities and in families, not only through the market. These are important relations to the parties themselves, as well as to the economy. Therefore, contract law should account for these agreements too. This not only reveals how the boundaries of contract law are set in a gendered way but also how contract law could be more inclusive. Feminist economics refutes simplistic ideas about parties and their motivations as solely rational utility maximizers. It provides, instead, a more nuanced model of parties' relations and preferences and of the complex interaction between the self and society, as well as that between the contract and the social background. Contract law doctrines are not only procedural but also reflect and promote values such as justice, fairness, efficiency, autonomy. In other words, contract law goes beyond procedure to advance moral values. As discussed above, promissory estoppel not only distinguishes enforceable promises from unenforceable promises but also strengthens the right to contract. It protects weaker promisees and mitigates power imbalances between the parties in addition to the doctrine of formation of contract. Other binaries that should be relaxed are those of objective-subjective, and of form-substance.<sup>227</sup> As will be further discussed in the next subpart, contract law is not simply private, but has social aspects as well.

Non-binary thinking in contract law is more nuanced and reflects the complexity of contractual situations. Rather than black and white dichotomies, contract law should include shades of gray. Furthermore, binaries are oftentimes hierarchal in that they not only separate two options, but frequently situate one option as superior to the other. In other words, not only do such binaries stress the difference between private and public—or the market and the home—but also enable a preference of the former over the latter. Such binaries establish an exclusionary form of contract law. Rather than dichotomize between one (private) or the other (public), it is critical to acknowledge that the two are interrelated in many subtle ways.

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227. For binary thinking in contract law, see generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1039-65, 1066-94 (1985).

#### D. *Social Aspects*

Feminist economics highlights the interconnectedness of contract and society and the interrelation between the private and the public. According to feminist economics, parties are influenced by society and their contracting is shaped by social context.<sup>228</sup> The contract is shaped by social norms, by the parties' respective social statuses, and circumstances. Ignoring this background will necessarily limit the contract analysis. In order to fully understand a contract, one needs to look at the social context that exists beyond the specific language of the contract. Specifically, one needs to take into account gender roles, gender stereotypes, and power dynamics.<sup>229</sup> As Debora Threedy shows, the Arthur Murray cases are based on gendered notions of widows.<sup>230</sup> One also needs to consider inequalities and discrimination on the basis of sex, class and sexual orientation. Doing so would result in a fuller, more complex analysis that goes beyond binaries. Contract law, although considered private law, has important social aspects. Feminist economics supports contextual contract law.<sup>231</sup>

Consent, a basic concept of contract law, is also socially constructed. As I have argued elsewhere:

Consent is undoubtedly connected to the will, choices, and intentions of the parties, but it is also molded by public policy considerations that go beyond the parties' interactions. As such, consent is dynamic, its nature changing over time as the result of broader social changes . . . . In this light, consent must be viewed not only as a decision based on full information and reached without coercion, but also one which is socially and culturally situated. Similarly, consent is not only a matter of dynamics between contracting parties, but also a

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228. See *supra* Part II.E.

229. See Threedy, *Dancing Around Gender*, *supra* note 2.

230. See *id.* at 761 (arguing that the Arthur Murray cases portray women litigants as vulnerable elderly widows in need of the paternalistic defense of the law).

231. For contextual contract law, see Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607 (2010). See also Larry A. DiMatteo & Blake D. Morant, *Contracts in Context and Contracts as Context*, 45 WAKE FOREST L. REV. 549, 550-51 (2010); Morant, *The Teachings of Dr. King*, *supra* note 214, at 70; Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH. L. REV. 1287 (2013). For legal context generally, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

product of external societal circumstances, pressures, constraints, morals, norms, conventions, and understandings that go beyond the parties' own relationships . . . . Contract law contains an inherent element of public considerations, which clearly renders consent as a social construct with public dimensions greater than the scope of a personal decision based on the contracting parties' will and choices. Consent is not only an individualistic process, formed in a vacuum between the contracting parties' will, autonomy, interests, and preferences. Consent is necessarily formed under social circumstances.<sup>232</sup>

Consent is gendered and formed within the context of patriarchy.

#### E. *Contracts Between Family Members*

If the household is treated as a singular unit, it makes no sense to talk about contracts between family members. However, feminist economics views the household as a group of individuals with different interests and preferences that might sometimes conflict. Therefore, contract law should include intra-family contracts. This opens contract law to more nuanced relations, and more agreements. It stretches contract law beyond the market and beyond pure commercial or economic agreements. More people will benefit from contract law; more relations will be covered by contract law.<sup>233</sup> Conflicts in the family might be resolved using contracts. And at the same time, incorporating family values can influence contract law. Both institutions might benefit from the existence of intra-family contracts. Contract law should not be limited to commercial agreements. As Hanoch Dagan explains, "spousal contracts operate, of course, in a different contract sphere than commercial ones, but they perform a similar empowering service, and are thus no less (or more) central to the idea of contract in law."<sup>234</sup> Furthermore,

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232. Gan, *supra* note 222, at 652.

233. See Neil G. Williams, *What to Do When There's No "I Do": A Model for Answering Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1043 (1995) (arguing that promissory estoppel should be used to award damages for breach of promise to marry); see generally Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191 (2013).

234. Hanoch Dagan, *Intimate Contracts and Choice Theory*, 7 EUROPEAN CONT. L. & THEORY 1 (forthcoming 2021).

contract law will enable a plurality of family arrangements.<sup>235</sup> Each family will be able to use contract law in order to shape the family setting as they see fit. Rather than one standard for all families, each family will choose the relational model that best suits them.

There are arguments against applying contract law in the family setting. Family relations are unique, it could be argued, and thus cannot be thought of in contractual terms. Others could claim that family is about relations of love and not about economic relations. Furthermore, it might be posited that the involvement of economic values could harm family members. Commodification concerns and concerns regarding the reduction of intra-family relations to an economic exchange are not only frequently inaccurate, but may, in fact, result in injustice. This is not to say such critique is not valuable, nor that commodification isn't a genuine concern. However, it is clear that contract law can be stretched to include intra-family contracts, while still safeguarding against alienation.<sup>236</sup> Feminist economics will make contract law more relational and strengthen the trust, cooperation, and interdependence between the parties. Contract law applied to intra-family agreement is not rigid and formalistic, entailing a focus on efficiency only, but rather is a version of contract law that connects parties to each other.<sup>237</sup>

Take, for example, the hypothetical issue of baby selling. Landes and Posner proposed a market for babies based on a mainstream eco-

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235. See generally Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 (2016).

236. For contract law's alienation, see generally Robert Batey, *Alienation by Contract in Paris Trout*, 35 S. TEX. L. REV. 289 (1994).

237. There is rich literature addressing contracts between family members. See MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015); YEHEZKEL MARGALIT, *THE JEWISH FAMILY: BETWEEN FAMILY LAW AND CONTRACT LAW* (2018); YEHEZKEL MARGALIT, *DETERMINING LEGAL PARENTAGE: BETWEEN FAMILY LAW AND CONTRACT LAW* 10 (2019); Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 225-27 (2011); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 37-54 (1998); Virginia Held, *Non-Contractual Society: A Feminist View*, 13 CAN. J. PHIL. 111, 136-137 (1987); Hila Keren, *Can Separate Be Equal: Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19, 25-26 (2005); Robert A. Pollak, *Commentary, Comment on Mary Anne Case's Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 261, 261-262 (2011); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1231 (1998); Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 58-60 (1991).



conomic analysis.<sup>238</sup> Their analysis uses supply and demand, and the costs and benefits considerations of such market.<sup>239</sup> However, feminist economics would take into account the values of caring for children, their humanity, commodification concerns, the parents-children relations and the social harms to society, as well as the racial and class aspects of such a market regime.<sup>240</sup>

More broadly, Richard Posner, for example, assumes preferences, rational choice, and a free market in his economic analysis of sexuality.<sup>241</sup> Feminist economics, on the other hand, places sexuality within a larger social context, such as that of power dynamics between men and women.<sup>242</sup> As these examples demonstrate, feminist economics is not a rigid application of economic principles, but rather is an economics aware of social concerns, including commodification and other moral public policy and fairness concerns. Feminist economics goes beyond rationality and efficiency and is sensitive to feminist and other social considerations. Thus, applying feminist economics analysis to the family does not raise genuine concerns of alienation and commodification as would the application of mainstream economics to the same sphere.

As shown by *Borelli*, decisions regarding what promises to enforce are gendered. In other words, setting the boundaries of contract law is not gender neutral. The decision to leave family outside contract law's reach results in distributive injustice. It has devastating economic consequences for women, often leaving them without the promised exchange or other recourse. Recall that in *Borelli* the husband's promise was not enforced and the wife did not get the property that he promised her.<sup>243</sup> Women's inability to use contract law to further their economic interests hurts them financially. Women's poverty is an important concern. Contracts with family members can provide women with some financial support. In the past, women could not own property or contract at all, thus leaving them dependent on their fathers or husbands.<sup>244</sup> Furthermore, applying contract law in the family setting does not mean that

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238. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

239. *Id.* at 329.

240. For a critique of baby selling, see Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1925-28 (1987).

241. POSNER, *supra* note 91; *see also* BECKER, *supra* note 91.

242. For a feminist critique of Posner, see Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO.L.J. 2413 (1993). *See also* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995).

243. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (1993).

244. *See Chused, supra* note 138, at 48-49.

everything in the family is a matter of contract. Some things are outside the realm of contract law. For example, baby selling is prohibited for commodification reasons.<sup>245</sup> At the same time, applying contract law in the family setting includes applying doctrines that protect vulnerable family members (usually women), such as unconscionability<sup>246</sup> and good faith.<sup>247</sup> These contract doctrines ensure that family values and family members are not hurt by rigid contract law, but rather that contract law applied in the family sphere is relational, flexible, just, fair, protectionist, and contextual.

All of the above makes contract law broader and more inclusive. It goes beyond the market and efficiency to incorporate diverse relations, interests, and preferences. It promotes a variety of values and includes a wide range of different parties. It is sensitive to commodification, alienation, inequality, and discrimination. In other words, feminist economics does not only enrich the literature of promissory estoppel but contract law scholarship in general, as well.

Feminist economics joins other theories in stressing the aforementioned insights. It is not the only theory to challenge formal liberal contract law; relational theory of contract and other critical theories such as feminist theory and critical race theory do so as well. For example, Ian R. MacNeil has criticized the individualistic nature of classic contract law and pointed to the relational and social aspects of contract law.<sup>248</sup> However, MacNeil failed to account for power dynamics between men and women. Feminist economics' use of both economics and feminist insights provides a new perspective on contract law. In other words, feminist economics is an important theoretical tool with which to analyze contract law, even if some of its conclusions echo those of other theories. Furthermore, as demonstrated above, feminist economics enriches contract law, making it more inclusive, pluralistic, contextual, egalitarian, and just. Since economic analysis of contract law is immensely important, it is critical to integrate feminist insights into its core. As economics scholar Susan Himmelweit concludes, "feminist

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245. Another example of commodification in family law is the practice of women offering money to their husbands in exchange for a *gett* (Jewish decree of divorce) that the husband would otherwise refuse to agree to. See Orit Gan, *Trading the Gett: Between Contractual Right and Inalienability*, 32 BAR ILAN L. STUD. 797 (2020) (Isr.).

246. RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

247. RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981).

248. For relational theory, see, for example, IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); see also *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001).

economics is not just another school of economics—and certainly not as economics just for women—but is simply better economics.”<sup>249</sup> Therefore, feminist economics provides a better theoretical analysis of contract law.

CONCLUSION

Economic analysis is a highly influential theoretical approach to contract law. At the same time, feminist analysis of contract law offers an important critical approach to the field. However, feminist economics has only been applied scarcely and sporadically to contract law. This Article seeks to bridge this gap, and to apply the key features of feminist economics to an analysis of the doctrine of promissory estoppel. This Article uses promissory estoppel as an example to demonstrate a feminist economic analysis of contract law. This Article enriches the diverse literature of promissory estoppel by adding to it a feminist economic perspective. Based on analyses put forward by feminist economics, this Article joins other scholarship in exploring the importance and significance of this doctrine. Specifically, it enriches the economic analysis of promissory estoppel, and it adds to the literature concerning the relation between the doctrine of consideration and the doctrine of promissory estoppel, arguing that the latter is a valuable and important supplement to the former. This Article concludes by arguing that feminist economics is applicable to contract law generally. Feminist economics is a valuable theory—relevant not only to promissory estoppel but to other doctrines, core concepts, and values at the heart of contract law.<sup>5</sup>

249. Himmelweit, *supra* note 75, at 73.