

# Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?

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*This article examines the role culture plays in contract law. It demonstrates that even in contract law, the branch of law most committed to the ideal of individual autonomy, law's reliance on culture makes compulsion by the law an unavoidable outcome. The concept of culture is applied to contract law in two principal ways. First, it attempts to explain the rise of objectivism in late nineteenth-century contract law as a manifestation of some central experiences prevalent in modern culture. Second, it analyzes the role played by culture within the context of some of the central doctrines of contract law, namely, the doctrines on the formation and interpretation of contracts.*

This article considers contract law from the perspective of the concept of culture. It applies the concept of culture to contract law in two principal ways. First, it attempts to explain the rise of objectivism in late nineteenth-century

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## I. CONTRACT LAW AND CULTURE

To a great extent, contract law of the early twenty-first century has its roots in the nineteenth century. Nineteenth-century contract law was paradigmatic of the shape of modern law as well as of modern culture and modern conscience in general. It was during the course of the nineteenth century that one general theory of contract, aimed at governing *all* the various types of contracts, first evolved,<sup>1</sup> and indeed, this move to subject all contracts to the reign of one "universal" theory is decidedly modernist in nature.<sup>2</sup>

The general theory of contract assigns no role whatsoever to culture in determining the contractual relationship and in shaping the expectations of the parties. Its protagonist is the "economic man," a self-interested individual whose attitude toward the world is one of instrumental rationality. This figure is the carbon-copy of the model individual of modernity, described as "a highly abstract entity ... stripped bare of its history, gender, class, achievements, values, passions, and beliefs;"<sup>3</sup> "a self that [does not] occup[y] any particular historical, social or cultural milieu;"<sup>4</sup> a person who lives in "profound loneliness," "belong[ing] to nowhere and no time in particular."<sup>5</sup>

Furthermore, breach of contract is conceived under the general theory of contract in utilitarian, as opposed to deontological, terms and, therefore, as something not condemnable in and of itself. This is analogous to the kinds of attachments established and maintained by modern "selves" with one another:

Any attachments or relationships that such a self has, it has only as contingent possessions. Such possessions are items that can, if the price

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1 Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Grant Gilmore, *The Death of Contract* (1974); Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 160 (1977) (Chapter VI).

2 Cf. Jean-Francois Lyotard et al., *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington & Brian Massumi trans., 1991) (1979).

3 Michael Luntley, *Reason, Truth and Self* 151 (1995).

4 *Id.* at 152.

5 *Id.* at 173.

is right, be detached and exchanged for replacements. At the extreme, such an abstract self is so dislocated from its traditions of history and culture that it becomes an inveterate trader; all its attachments and relationships become commodities to be exchanged should the market offer the right price and the option of a bargain elsewhere.<sup>6</sup>

Modern man, therefore, much like the economic man of the general contract theory,

loses nothing intrinsic to itself if it trades one attachment for another, for the modern self never really belongs in any one relationship or situation as opposed to any other. The modern self is the ultimate displaced person who stays only long enough to satisfy his or her desires. Once satisfied, and once a better offer is available elsewhere, the modern self moves on without a trace of betrayal to those others ... that it leaves behind. For the modern self, betrayal can be, at best, no more than a worry that one miscalculated the benefits accruing to a particular relationship.<sup>7</sup>

In contradistinction to the approach of general theory of contract and of most contract law scholarship of both the nineteenth and the twentieth centuries, culture was brought to the center stage of the contract process by Stewart Macaulay and Ian Macneil. In his groundbreaking 1963 article, Macaulay showed that for many business people, the culture of their business community combined with their local culture is not merely one *more* source, but the *primary* source of reference in conducting their business relationships, whereas their contract and contract law regimes play a secondary, if not residual, role in guiding their business conduct.<sup>8</sup>

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6 *Id.* at 173. See also Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *Law in the Domains of Culture* 21, 28 (Austin Sarat & Thomas R. Kearns eds., 1998).

7 Luntley, *supra* note 3, at 173-74.

8 Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963) [hereinafter Macaulay, *Non-Contractual Relations*]. See also Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 *Law & Soc'y Rev.* 507 (1977) [hereinafter Macaulay, *Elegant Models*]; Stewart Macaulay, *Crime and Custom in Business Society*, 22 *J.L. & Soc'y* 248 (1995); Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 *Wis. L. Rev.* 75; Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 *Brit. J.L. & Soc'y* 45, 45-48, 59-60 (1975).

In *The Many Futures of Contracts*,<sup>9</sup> one of the most significant contributions to twentieth-century contract law scholarship, and in his later writings,<sup>10</sup> Macneil introduced the concept of "relational contract" and showed how *all* contracts, relational as well as discrete, are formed within rich webs of cultural meanings and that in the course of the performance of contracts, culture constantly flows into the relations of the parties and shapes their expectations as well as their sense of appropriateness. "Ignoring the always present role of the social matrix in contract," wrote Macneil, "is akin to ignoring the role of DNA in the interaction of parts of a living body. Without the social matrix all else in contract is not only meaningless, but completely inexplicable."<sup>11</sup> Thus Macneil, much like Macaulay, saw culture, and not contract, as the primary normative source in determining the conduct of contracting parties. "[P]romises are inescapably but fragments of any contractual relation or even transaction, no matter how discrete,"<sup>12</sup> he wrote. "[M]ore commonly it is the promise which is the gap-filler while the 'great sea of custom' ... forms the main structure of contract."<sup>13</sup>

## II. OBJECTIVISM AND CONTRACT LAW

### A. Formation of the Contract as a Procedure for Transition between Categories

One of the major functions any culture performs is the establishment of categories of social relations and of normative regimes to govern these social relations. "[S]ymbolic boundaries ... constitute the essence of cultural order. Symbolic boundaries separate realms, creating the contexts in which meaningful thought and action can take place."<sup>14</sup> In addition to forming

9 Ian Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974).

10 Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978); Ian Macneil, *The New Social Contract* (1980) [hereinafter Macneil, *New Social Contract*]; Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. Rev. 340 (1983); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483; *The Relational Theory of Contract: Selected Works of Ian Macneil* (David Campbell ed., 2001).

11 Macneil, *supra* note 9, at 710-11.

12 Macneil, *New Social Contract*, *supra* note 10, at 9.

13 Macneil, *supra* note 9, at 731. See also Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. Rev. 565.

14 Robert Wuthnow et al., *Cultural Analysis: The Work of Peter L. Berger, Mary Douglas, Michel Foucault, and Jürgen Habermas* 260 (1984). See also Richard A.

categories of social relations, another important role of culture is to establish *procedures of transition* from one category of relations to another. In Western culture, for example, sending flowers is a recognized procedure for entering into a dating relationship. A job interview is a procedure for entering into an employer-employee relationship. And review by an academic committee is a procedure for becoming a tenured professor.<sup>15</sup>

In modern culture, the category of the non-legal and the category of the legal are commonly regarded as two distinct normative categories of social relations.<sup>16</sup> The one category of social relations is deemed to exist between individuals under the governance of daily culture and the other category under the governance of the law. (As is well-known, at least since the Realist writings of the 1920s and 1930s, this view has been shown to have only partial validity, since all social relations are conducted within the realm of categories of meanings that are initially constituted by the law.<sup>17</sup> The distinction between the realm of the non-legal and that of the legal is, therefore, always murky, and in any case, the relationship between the two realms is always reciprocal and extremely complex.) The distinction between the daily and the legal is applicable also in the particular context of promise making. We tend to think

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Shweder, *Anthropology's Romantic Rebellion against the Enlightenment, or There's More to Thinking than Reason and Evidence*, in *Culture Theory* 27 (Richard A. Shweder & Robert A. Levine eds., 1984); Roy G. D'Andrade, *Cultural Meaning Systems*, in *Culture Theory*, *supra*, at 88; Roy G. D'Andrade, *Some Propositions About the Relations Between Culture and Human Cognition*, in *Cultural Psychology* 65 (James W. Stigler et al. eds., 1990); Robert Wuthnow, *Meaning and Moral Order* 12, 50-52, 69-71 (1987); Peter Berger, *The Sacred Canopy* 19-22 (1967); Jonathan Culler, *Ferdinand de Saussure* 96-129 (1976) (Chapter 4: Semiology: The Saussurian Legacy); Terence Hawkes, *Structuralism and Semiotics* at ch. 2 (1977).

- 15 At times, however, the given culture may prevent individuals from moving from one category of relations to another. Thus, in some cultures, no procedures exist for a man to socialize with women other than his wife and sisters, and even a man and a woman intended to marry are not provided with means for getting to know one another, or even meeting each other, prior to their marriage.
- 16 Compare this to Jewish law, under which a distinction between the non-legal and the legal does not exist and all conduct is perceived to be governed by legal norms. See Aaron Kirschenbaum, *Equity in Jewish Law — Halakhic Perspectives in Law* (1991); Aaron Kirschenbaum, *Equity in Jewish Law — Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (1991).
- 17 For contemporary expressions of this point, see Robert Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984); Duncan Kennedy, *Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity* 83 (1993) (Chapter 3: The Stakes of Law, or Hale and Foucault!); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *Law in Everyday Life* 21 (Austin Sarat & Thomas R. Kearns eds., 1993).

that some relations involving promisors and promisees (e.g., cases of social promises, gentleman's agreement, etc.) are governed by daily culture and are sanctioned by social enforcement mechanisms, while others — i.e., contracts — are governed by the law and are sanctioned by the enforcement mechanisms of the state.

One of the major functions of contract law is to establish procedures for the formation of contracts. These procedures regulate the transition of individuals from the normative regime of freedom from contractual liability to that of mutual contractual bindingness. As such, they exemplify the importance of procedures for the transition between categories of social relations and of the way in which such procedures operate.<sup>18</sup>

Contract law rules that condition the legal force of promises on the promisor's use of a distinct form, such as a seal or a written and signed document, are rigid, formal procedures for the transition from social relations that are not governed by contract law to relations that are governed thereby. Such procedures play, in Fuller's words, "the channeling function of form," namely, "a legal framework [that] offers channels for the legally effective expression of intention."<sup>19</sup> However, nowadays, the procedure for moving into the relation of contractual bindingness is, in most cases, fairly flexible and informal.<sup>20</sup> Under contemporary Anglo-American contract law, most contracts are binding even if they are made without using any special form, i.e., orally or by way of conduct. Indeed, it seems that at least in quantitative terms, most contracts are today made by these means.<sup>21</sup>

## **B. Formation and Interpretation of Contracts: From Subjectivism to Objectivism**

As in many other areas of contract law, contract law rules on the formation of contracts under whose regime we currently live are, to a great extent, a product of the nineteenth century. For most of that century, contract law in both the United States and England was governed by the subjective "will theory." Under this theory, the creation of contracts requires a "meeting

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18 Likewise, performance of contract is recognized in Anglo-American law as a major procedure transferring rights in resources between individuals. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 270, 297-98 (1986).

19 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, (1941).

20 A.W.B. Simpson, *A History of the Common Law of Contract* 88-90 (1975). *See also* Frederick E. Crane, *The Magic of the Private Seal*, 15 Colum. L. Rev. 24 (1915).

21 For the argument that the requirement of consideration serves as a procedural requirement in contract law, see Fuller, *supra* note 19.

of the minds" of the contracting parties. Therefore, whatever the outward appearances of the conduct of the parties, if the parties are not, in fact, in agreement, no contract is made. In other words, any factor showing lack of consent on the part of at least one of the contracting parties was deemed fatal to the formation of the contract.<sup>22</sup>

However, in the final decades of the nineteenth century, a radical shift transpired as contract law switched from a subjective theory to an objective one. Then, over the course of the twentieth century, the objective approach evolved into one of the most entrenched dogmas of contract law.

Under the objective theory, whenever a reasonable person in the position of promisee could have understood the conduct of the promisor to have reflected the intention to create a contract, the promisor will be held responsible to that effect, even if in fact, the promisor did not actually intend to enter into a contract. Likewise, in a dispute between contracting parties as to the proper interpretation of a contract, the contract will be interpreted in accordance with the meaning given by the party whose understanding of the contract would be that of a reasonable person in the position of the two contracting parties. In contract law, "we ask, not what this man meant," wrote Holmes, "but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."<sup>23</sup> This is so "[f]or each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense."<sup>24</sup>

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22 A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 *Law Q. Rev.* 247, 265, 267 (1975). It is not clear whether the will theory itself was a product of the nineteenth century or of earlier periods. Horwitz, *supra* note 1, Atiyah, *supra* note 1, Gilmore, *supra* note 1, and Simpson, *supra*, argue that the will theory developed and crystallized over the course of the nineteenth century. In contrast, Hamburger argues that it has developed gradually in English law since the second half of the sixteenth century. Philip Hamburger, *The Development of the Nineteenth-Century Consensus Theory of Contract*, 7 *Law & Hist. Rev.* 241 (1989).

23 Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *Harv. L. Rev.* 417, 417 (1899).

24 *Id.* at 419. See also the famous words of Judge Learned Hand in *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911):

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held ... .

It is difficult to think of a change more radical and of more far-reaching implications in contract law doctrine than the shift from subjectivism to objectivism. It is hard to think of a shift more counter-intuitive within the context of the prevailing trends of nineteenth-century contract law. Yet the process by which the shift took place, as well as the conditions that made it possible, is, to a great extent, still obscure. Indeed, there is no single article or book wholly dedicated to a discussion of this shift. Legal historians usually deal with it briefly and only in passing.<sup>25</sup>

The move away from subjectivism toward objectivism in contract law has been presented as the manifestation in the law of the shift from an ethos of individualism and self-reliance to one of responsibility, both private and collective, toward others;<sup>26</sup> as a functional response on the part of the law to the societal interests of economic growth;<sup>27</sup> as a move in the law from

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25 Atiyah's *The Rise and Fall of Freedom of Contract*, *supra* note 1, is a striking example of this phenomenon. In this monumental work on contract history over the last three centuries, the discussion of the demise of subjectivism and the rise of objectivism is bifurcated and remarkably brief.

Also, it is not clear whether the rise of the objective theory was the result of the ripening of gradual and slow processes whose seeds had been planted in early nineteenth-century contract law, as is claimed by Simpson (Simpson, *supra* note 22, at 269: "There was nothing innovatory in this, and the clash between the devotees of real and those of apparent or communicated intention can be seen in many cases.") and by Atiyah (Atiyah, *supra* note 1, at 459: "This 'objective' approach to the formation and interpretation of contracts was clearly established throughout this period [1770-1870] ... even at the time during which the 'will theory' of contractual obligation was at its strongest ... . At the very same time that the Courts were insisting that contracts should be construed so as to give effect to the intention of the parties, they were also adopting rules which often precluded a search for any real intent."), or a sudden, unexpected shift, as implied by Horwitz, who portrays Holmes as the pivotal figure in the shift in American law. According to Horwitz, Holmes was "obsessed with the issue of subjective versus objective legal standards," Morton J. Horwitz, *The Transformation of American Law 1870-1960*, at 111 (1992), and "the necessity and desirability of establishing objective rules of law" was the "single, overriding, and repetitive theme running through [his] writing." *Id.* Holmes wrote that "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." Oliver Wendell Holmes, *The Common Law* (M. DeWolf Howe ed., 1963) (1881). See also Patrick S. Atiyah, *Holmes and the Theory of Contract*, in *Essays on Contract* 56, 57 (1986).

26 Horwitz, *supra* note 1, at 35, 36; Gilmore, *supra* note 1, at 40; Atiyah, *supra* note 1.

27 Horwitz, *supra* note 1, at 36.



rights-based jurisprudence to utilitarian jurisprudence;<sup>28</sup> as a shift in the law from a jurisprudence focusing on particular factual cases to one aimed at designing general rules for the facilitation of planning and for the promotion of certainty and predictability;<sup>29</sup> as part of a transition process in the law from cause-based liability to fault-based liability;<sup>30</sup> and as a transition from the insecurity engendered by the conditioning of legal effect on inaccessible internal knowledge to the security emanating from giving effect to conduct.<sup>31</sup>

In what follows, I propose yet another explanation for the rise of objectivism in nineteenth-century contract law. This explanation regards the shift to objectivism as rooted in some of the most fundamental and pervasive cultural traits of modern existence.

### C. The Rise of Objectivism in Contract Law and the Centrality of Trust in Modern Culture

The transition from subjectivism to objectivism in contract law was part of profound and wide-ranging processes that took place in the law in the final decades of the nineteenth century and have continued throughout all of the twentieth century. The essence of these processes has been the rise of "reliance-based liability at the expense of consensual liability."<sup>32</sup> In addition to the rise of the objective approach in contract law, these processes are manifested in the substantial expansion of the tort of negligence, which, in many cases, may be said to rest on a breach of representation of safety; to be manifested in the rise of the tort of negligent misrepresentation; in the rise of promissory estoppel as a central basis of contractual liability in American law; in the rise of the doctrine of promissory estoppel in English law; in the expansion of the doctrine of estoppel in Anglo-American law;<sup>33</sup> in the resurgence of the doctrine of good faith in American law in recent decades,

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28 *Id.*; Atiyah, *supra* note 1, at 432; William W. Fisher et al., *American Legal Realism* 77 (1993).

29 Horwitz, *supra* note 1, at 35; Gilmore, *supra* note 1, at 42; Atiyah, *supra* note 1, at 459.

30 Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 *Yale L.J.* 169, 204 (1917); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 *Cal. L. Rev.* 1127-1131-32 (1994); Atiyah, *supra* note 1, at 501-05, 771-79. *See also* Anthony T. Kronman & Richard Posner, *The Economics of Contract Law* 4-5 (1979); Barnett, *supra* note 18, at 274.

31 Barnett, *supra* note 18, at 273.

32 Atiyah, *supra* note 1, at 777.

33 *See generally id.* at 771-79.

after a century of practical neglect;<sup>34</sup> and in the phrasing of the "expectation interest," exclusively created by the instrument of contract and exclusively protected by contract law, in terms of reasonable reliance.<sup>35</sup>

I propose an explanation for these processes that focuses on the sociological concept of trust. This explanation draws on the writings of a group of sociologists who argue that trust is one of the most basic experiences of the modern individual. My explanation is a modest one, and yet, I think it is a powerful explanation. It is grounded in the claim that the culture that judges and lawyers internalize in their daily lives determines, in subtle but effective ways, the options available to them in making decisions in the law and in developing the law. This explanation does not negate the role of reflective, conscious legal deliberation in law. Still, it is premised on the claim that to act in law is to act within a cultural system, so that a good deal of what transpires in law is done on the non-reflective and non-conscious level. The rise of objectivism in law since the late nineteenth century exemplifies the truth of this claim.

Sociologists writing on trust argue that day-to-day functioning in the modern era is characterized by numerous occasions of dependence on the functioning of other people and of institutions who present themselves, explicitly or implicitly, as supposed to conduct their affairs in certain ways. Trust is extended to these people and institutions any time that an individual acts in reliance on that representation.

The essence of trust, therefore, is reliance upon the representation that a reasonable expectation will be fulfilled.<sup>36</sup> It is based on "the appearance

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34 E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666 (1963); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968).

35 Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 60 (1936) ("If we take into account 'gains prevented' by reliance, that is, losses involved in foregoing the opportunity to enter into contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched."); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 Yale L.J. 404, 408-09, 412 (1981). For a critique of the conceptualization of Fuller and Perdue, see Daniel Friedmann, *The Performance Interest in Contract Law*, 111 Law Q. Rev. 628 (1995).

36 Anthony Giddens, *The Consequences of Modernity* 33, 34, 84, 92, 97-98, 100-01 (1990); Barbara A. Misztal, *Trust in Modern Societies* 12 (1996). See also Niklas Luhmann, *Trust and Power* 39 (1973).

that 'every thing seems in proper order'.<sup>37</sup> It allows us to "literally stake our lives on the expectation that others will do what they are 'supposed' to do"<sup>38</sup> and to undertake "a risky course of action on the confident expectation that all persons involved in the action will act competently and dutifully."<sup>39</sup>

Trust is inversely related to information. The need to extend trust arises only in instances in which actual information is lacking. "Trust begins where knowledge ends ... . Trust is a functional equivalent of knowledge for basing the expectancies underwriting social action."<sup>40</sup> "There would be no need to trust anyone whose activities were continually visible and whose thought processes were transparent, or to trust any system whose workings were wholly known and understood."<sup>41</sup>

Trust is bred, therefore, through a combination of the need to rely upon representations made by other people and by institutions, on the one hand, and the lack of actual knowledge as to the extent to which these representations will, in fact, be fulfilled, on the other hand. The need to rely upon others in conditions of lack of actual information leaves the individual with no choice but to act in trust that the reliance will, indeed, prove to be justified.

Several characteristics of modernity make trust a basic experience of life in this era. The complexity of modern life renders it impossible for individuals to harness all the vast resources and knowledge necessary for their proper functioning. This, in turn, makes it necessary for them to depend upon the conduct of numerous strangers, both individuals and institutions, who present themselves as supposed to act in certain ways. However, reality dictates that such reliance take place without the benefit of actual knowledge as to whether these individuals and institutions are both capable and willing to conduct their affairs in the way that they present themselves.<sup>42</sup>

Indeed, each and every one of us extends trust on dozens, if not hundreds, of occasions every day. We extend trust when we walk into an elevator (we trust the technicians to have periodically checked the strength of the

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37 J. David Lewis & Andrew J. Weigert, *Trust as Social Reality*, 63 Soc. Forces 967, 974 (1985).

38 J. David Lewis & Andrew J. Weigert, *Social Atomism, Holism, and Trust*, 26 Soc. Q. 455, 460 (1985).

39 Lewis & Weigert, *supra* note 37, at 971.

40 Lewis & Weigert, *supra* note 38, at 462-63.

41 Giddens, *supra* note 36, at 33, 88. *See also* Luhmann, *supra* note 36, at 32; Lewis & Weigert, *supra* note 37, at 969; Misztal, *supra* note 36, at 18.

42 Giddens, *supra* note 36, at 80, 112, 118; Lewis & Weigert, *supra* note 38, at 459; Lewis & Weigert, *supra* note 37, at 973; Misztal, *supra* note 36, at 24-25.

cables carrying the elevator); when we go on board an airplane (we trust the technicians in Seattle to have tightly connected the engines to the wings); when we go through an intersection on a green light (we trust the computer programmers to have programmed the traffic lights system so as to signal red in all other directions); when we pay interest on our loans (most people have neither the necessary knowledge for checking these computations nor the resources to purchase such knowledge, so they have no choice but to trust and pay); when we pay our telephone bills, our electricity bills, and our water bills (we have no means of supervising the measurements taken by the utility companies); when we order a meal in a restaurant (in most restaurants, there is a wall separating the dining area from the kitchen, and the diners are forced to trust the owner to maintain appropriate hygiene in the kitchen).<sup>43</sup>

It is my claim that the rise of the objective approach in contract law, as part of the rise of reliance-based liability in twentieth-century law in general, is a product of the prevalence of the experience of trust in modern life.

The daily practices in which individuals partake are an important source of the meanings that are embedded in their minds. "[T]he 'ideas' of a human

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43 See George Orwell, *Down and Out in Paris and London* (1933), *reprinted in* 1 George Orwell, *The Complete Works of George Orwell* 78-79 (1986):

In the kitchen the dirt was worse. It is not a figure of speech, it is a statement of fact to say that a French cook will spit in the soup ... . He is an artist, but his art is not cleanliness. To a certain extent he is even dirty because he is an artist, for food, to look smart, needs dirty treatment. When a steak, for instance, is brought up for the head cook's inspection, he does not handle it with a fork. He picks it up in his fingers and slaps it down, runs his thumb round the dish and licks it to taste the gravy, runs it round and licks it again, then steps back and contemplates the piece of meat like an artist judging a picture, then presses it lovingly into place with his fat, pink fingers, every one of which he has licked a hundred times that morning. When he is satisfied, he takes a cloth and wipes his fingerprints from the dish, and hands it to the waiter. And the waiter, of course, dips *his* fingers into the gravy — his nasty, greasy fingers which he is for ever running through his brilliantined hair. Whenever one pays more than, say, ten francs for a dish of meat in Paris, one may be certain that it has been fingered in this manner. In very chip restaurants it is different; there, the same trouble is not taken over the food, and it is just forked out of the pan and flung onto a plate, without handling. Roughly speaking, the more one pays for food, the more sweat and spittle one is obliged to eat with it.

Orwell concludes the book with the following lines:

Still, I can point to one or two things I have definitely learned by being hard up. I shall never ... enjoy a meal at a smart restaurant. That is a beginning.  
*Id.* at 215-16.

subject exist in his actions,"<sup>44</sup> writes Althusser, "the existence of ... ideas ... is material."<sup>45</sup> "Kneel down, move your lips in prayer, and you will believe."<sup>46</sup>

However, the relationship between practices and meanings is circular: practices create meanings, which, in turn, create practices, and so on. Our thought categories participate in the production of the world, writes Bourdieu, "but only within the limits of their correspondence with preexisting structures."<sup>47</sup> "[They] are produced according to schemas adapted to the structures of the world which produce them" (and, therefore, they "confirm the establishing order").<sup>48</sup> Likewise, the habitus, according to Bourdieu, is a "product of history,"<sup>49</sup> "objectively adjusted to the particular conditions in which it is constituted,"<sup>50</sup> that "engenders all the thoughts, all the perceptions, and all the actions consistent with those conditions, and no others."<sup>51</sup>

As meaning is, to a great extent, a product of the practices in which the individual takes part, it is preserved, to a great extent, in the unconscious layers of the individual's mind.<sup>52</sup>

It is my argument that the connection between the prevalence of the practice of trust in conditions of modernity and the prevalence of reliance-based liability in twentieth-century law exemplifies the way in which practices shape mind categories. Judges and lawyers who take part in dozens, or even hundreds, of practices of trust every day could not but have developed, even if unconsciously and unreflectively, legal doctrines that extensively protect the reliance interest.

Moreover, there is a special connection between the phenomenon of trust and that of contract-making.

In an era in which the wholly executory contract is the paradigmatic contract, contract-making is entirely future-oriented. Contracting parties enjoy the assurance that if necessary, the enforcement mechanisms of

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44 Louis Althusser, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in *Lenin and Philosophy and Other Essays* 127, 168 (Ben Brewster trans., 1971) (1969).

45 *Id.* at 169.

46 *Id.* at 168.

47 Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 805 (1987).

48 *Id.*

49 Pierre Bourdieu, *Outline of a Theory of Practice* 82 (Richard Nice trans., 1977) (1972).

50 *Id.* at 95.

51 *Id.* See also *id.* at 189-90.

52 *Id.* at 72, 79.

the state<sup>53</sup> and/or social enforcement mechanisms<sup>54</sup> will work for them to be put in the particular future condition envisioned under their contract.<sup>55</sup> The instrument of contract enables, therefore, "presentation":<sup>56</sup> Contracting parties may "deal with the future as if it were in the present,"<sup>57</sup> or put differently, "[a] future exchange is transformed into a present exchange."<sup>58</sup>

Trust, like contract-making, is future-oriented. "[T]o trust is to act as if the uncertain future actions of others were indeed certain."<sup>59</sup> "In trusting, one engages in action as though there were only certain possibilities in the future."<sup>60</sup> Contract-making, therefore, is a *functional equivalent* of trust. In cases of actual knowledge regarding the extent to which a certain individual can and will keep her word, neither contract nor trust is necessary. In cases in which such knowledge is absent and the circumstances exist for making a contract, a contract may ensue. (Indeed, the archetypical case in which the instrument of contract will be employed is that of parties who, prior to the making of their contract, were complete strangers.<sup>61</sup>) In cases — most prevalent in conditions of modernity — in which neither actual knowledge nor the accessibility necessary for the making of a contract exists (e.g., in the relationship between an elevator rider and the technicians in charge of ensuring the strength of the cable), an individual will have no choice but to act while extending trust.<sup>62</sup>

The fact that contract-making serves as a functional equivalent of trust provides an additional explanation for the rise of the objective approach

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53 Fuller & Perdue, *supra* note 35, at 59 ("A promise has present value, why? Because the law enforces it.").

54 Macaulay, *Non-Contractual Relations*, *supra* note 8; Anthony Kronman, *Contract Law and the State of Nature*, 1 J.L. Econ. & Org. 5 (1985).

55 See Charles Fried, *Contract as Promise* 11 (1981) ("A promise invokes trust in my future actions, not merely in my present sincerity.").

56 "Presentation" is a term coined by Macneil in *New Social Contract*, *supra* note 10.

57 Macneil, *New Social Contract*, *supra* note 10, at 19.

58 Fried, *supra* note 55, at 13-14. See also Macneil, *supra* note 9, at 715, 719; Fuller & Perdue, *supra* note 35, at 63 ("society views the expectancy as a present value").

59 Lewis & Weigert, *supra* note 37, at 971. See also Misztal, *supra* note 36, at 17, 18, 24.

60 Luhmann, *supra* note 36, at 20. See also *id.* at 15.

61 Macneil, *supra* note 9.

62 See also Kronman, *supra* note 35, at 411 ("trust ... is closely related to the concept of reliance"). See also the connection between lying, breach of contract, and erosion of trust. To breach a contract is to make a lie in the future, see A.I. Melden, *Rights and Persons* (1977); Fried, *supra* note 55, at 9, 16-17 ("[E]very lie threatens general trust which is essential to society; therefore, lying threatens society."); Lewis & Weigert, *supra* note 37, at 978.

in contract law. It would be reasonable to expect judges and lawyers who are extensively involved in practices of trust in their daily lives to carry over the logic of these practices into other practices, such as those of contract-making, that play a similar role in the lives of individuals living in conditions of modernity. Our dispositions and thought categories comprise a matrix that "makes possible the achievement of infinitely diversified tasks, thanks to analogical transfers of schemes permitting the solution of similarly shaped problems."<sup>63</sup> If it is by virtue of the logic of trust that one is entitled to rely upon those expectations that a reasonable person would have developed in the particular circumstances and if the role of trust is similar to that of contract-making, it is no wonder that rules directed at the protection of reasonable expectations arose within the realm of contract law doctrine.

### III. CONTRACT LAW, CULTURE, AND COMPULSION

#### A. The Incorporation of Culture into Contract Law

In what follows, I will discuss the role played by culture in contract law doctrine on the formation and interpretation of contracts.

When we consider the relationship between contract law and culture, we usually think of peripheral doctrines such as usage of trade. However, the role played by culture in contract law is, in fact, far more central. Many contract law doctrines are premised on the importation of culture for determining the rights and obligations of contracting parties.

For example, according to the "either" rule of the *Hadley v. Baxendale*<sup>64</sup> doctrine, a party in breach of contract must compensate the injured party for damages that, at the time of the making of the contract, could have been viewed by both parties as damages that would arise "naturally, i.e., in the usual course of things, from such breach."<sup>65</sup> Application of this rule is premised on the assumption that the two contracting parties acted within the context of the same cultural environment and share the same cultural knowledge as to the typical consequences of breach of contracts of the given kind. Contracting parties are assumed to have implicitly agreed that for the price paid by the promisee, the promisor will compensate the promisee for

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63 Bourdieu, *supra* note 47, at 83.

64 *Hadley v. Baxendale*, 9 Ex. Ch. 341 (1854).

65 *Id.*

losses perceived in the culture to which the parties belong as typically resulting from breach of a contract of the parties' type.

Likewise, contract law's reliance on a cultural environment that is presumed to be shared by the two contracting parties is evident in many cases in which the courts apply the doctrine of misrepresentation by non-disclosure in the course of pre-contractual negotiations. It is fairly rare for this doctrine to be applied to the benefit of the seller; rather, it usually is applied to the benefit of the disappointed buyer. Such application is aimed at protecting the typical assumptions of the buyer as to the qualities of the subject-matter of her contract that are not explicitly warranted by the seller in the contract. Application of the doctrine in this way is premised on the assumption that buyer and seller conducted their negotiations within the context of the same cultural environment and share the same cultural knowledge as to the implicit expectations typically held by buyers with regard to the qualities of objects of the kind sold under the contract.

## B. Contract Law and Compulsion

Contract law doctrines on the formation of contracts and the interpretation of contracts tap heavily on culture to determine the respective liability of contracting parties. In fact, these doctrines import culture into the contractual relations. In discussing these doctrines, the question I will pose is what happens to contract law when its reliance on culture is fully realized and is brought to the foreground? I shall argue that one important implication of such a move is the realization that at times, even contract law, the ultimate law of consensus, involves compulsion.

When we think about compulsion by the law, what usually comes to mind is criminal law. Of all the branches of law, it is in this context that "judges deal pain and death."<sup>66</sup> Of all the branches of law, contract law is *the* antithesis of criminal law. "Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy."<sup>67</sup> Autonomy is "self-mastery." "[M]astery over one's self, and one's self not being subservient to others."<sup>68</sup> It is a situation in which "my life and decisions ... depend on myself, not on external forces of whatever kind."<sup>69</sup>

However, quite some time has passed since contract law scholars

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66 Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1609 (1986).

67 Fuller, *supra* note 19, at 806.

68 Richard Lindley, *Autonomy* 7 (1986).

69 Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 131 (1969). *See also* Fried, *supra* note 55, at 2.



abandoned the nineteenth-century image of their field as a sphere of almost uninhibited voluntariness. The decline of freedom of contract is a recurring theme in twentieth-century contract law. This is usually attributed to the dramatic expansion of mandatory legislation that restricts the liberty of contracting parties to determine the contents of their contracts or attributed to the rise of contracts of adhesion in which one contracting party is the sole author of the contract and the other party is in a "take-it-or-leave-it" position.

Furthermore, in the 1920s and 1930s, a group of realist legal scholars challenged the view that contract law plays the role of a neutral enforcement mechanism made available by the state to contracting parties to sanction their choices. These scholars argued that contract law is public law in the sense that *all* of its doctrines embody value and policy choices regarding the allocation of powers amongst individuals. "[I]n enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes," wrote Cohen in a classical article, "[E]nforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy."<sup>70</sup> These scholars may be viewed as amongst the forerunners of Critical Legal Studies ("CLS") scholars, who, since the 1980s, have emphasized the role played by the law in allocating powers to individuals and, in so doing, in structuring social practices and instilling the lives of individuals with meaning.<sup>71</sup> These scholars may also be viewed as amongst the forerunners of liberal political theorists, who, since the 1980s, have argued that liberalism is not a neutral political theory.<sup>72</sup>

Awareness of the decline of freedom of contract and of the non-neutrality of contract law does not negate, however, the existence of a sphere in which contract law may still bring about its major declared purpose, namely, the sanctioning of choices made by individuals.<sup>73</sup> Indeed, it would be ridiculous to

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70 Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933). See also Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603 (1943); Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465 (1988); Fisher et al., *supra* note 28, at 76-129; Clare Dalton, *An Essay on the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997 (1985).

71 Gordon, *supra* note 17; Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195 (1987); Kennedy, *supra* note 17.

72 Joseph Raz, *The Morality of Freedom* (1986); William A. Galston, *Liberal Purposes* (1991); Stephen Macedo, *Liberal Virtues* (1990).

73 Of course, these choices are not bred in the minds of individuals in atomistic

deny contract law's still important role in that sphere. In this article, however, I discuss a particular case in which the application of contract law involves *compulsion*. This is the case of contract law doctrines on the formation of contracts and on the interpretation of contracts. I shall argue that in some cases, these doctrines in fact involve the subordination of contracting parties to contractual liabilities not undertaken by them. It would be absurd to claim that contract law systematically involves compulsion.<sup>74</sup> But the compulsion I wish to discuss is not the accidental outcome of some peripheral contract law doctrine. Interestingly enough, it is situated at the very foundation of twentieth-century contract law.

### C. Four Assumptions

Application of the objective approach to the process of contract-formation and to the interpretation of contracts is premised on four implicit assumptions.

First, there is the assumption that the contracting parties actually knew or could have known the contents of contract law rules on the formation of contracts at the time that they made their contract/entered into their particular contract.

Second, an assumption is made that contract law rules on the formation of contracts provide clear and unequivocal solutions to *all* possible factual situations in which a claim is made regarding the making of a contract.

Third is the assumption that when they gave meaning to the contents of their contract, the contracting parties shared the same cultural environment.

Fourth, the assumption is made that the shared cultural environment of the parties provides an unequivocal means of attributing meaning to the contents of contracts.

Indeed, on the basis of these four assumptions the objective approach

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isolation from the culture in which they live. On the contrary, culture plays an important role in creating the repertoire of choices for individuals and in structuring their decisions within the context of this repertoire. But theorists of culture tend to underestimate, if not completely overlook, the extent to which people act, at times reflectively, manipulatively, etc. For a strong argument on the extent to which culture structures decisions made by individuals in the marketplace, see Jean Baudrillard, *Selected Writings* (Mark Poster ed., Jacques Mourrain trans., 1988). For a literary presentation of the argument, see Georges Perec, *Les Choses* (1962).

<sup>74</sup> I am referring here to *blatant* compulsion. Of course, Hale's masterpieces on the subject have taught us that compulsion is widespread and that its various manifestations are a matter of degree. On the (narrow) category of "compulsory contracts," see Atiyah, *supra* note 1, at 742-54.

is often rationalized along the lines of the notion of fault.<sup>75</sup> Both contract law rules on the formation of contracts and culture are perceived under the objective approach as an instrument for coordinated action and communication — as though they were a roadway or a scaffold — that each party is under obligation to use carefully, i.e., in a manner that seeks to avoid harming the other party.

However, each of the four assumptions is problematic in its own way.

#### **D. The Objective Approach and the Question of the Acquaintance of Laypersons with Contract Law Rules**

##### *1. Two Cases*

(a) *The Ravinai Case*.<sup>76</sup> It was a Thursday evening. Hava Ravinai, an elderly woman, and her husband Jacob, at that time eighty-two years old, were in their apartment in Tel Aviv. Mrs. Ravinai owned a plot of land. The couple had recently been approached by several real-estate agents to try to interest them in selling the land. Mrs. Ravinai had persistently rejected these offers. Her husband, on the other hand, was very much in favor of the sale; he tried to persuade his wife that since the couple had no children and given the heavy annual property tax levied on the land, it was not worthwhile for the couple to keep the land. On this Thursday evening, two people appeared at the Ravinai residence: a real estate agent and a representative of Man Shaked Ltd., a construction company. The two men had come with the aim of closing a deal with Mrs. Ravinai. Mrs. Ravinai was passive for most of the evening, while her husband conducted the negotiations on her behalf. Eventually, the representative of Man Shaked drafted a preliminary agreement referring to the sale of the land. Mrs. Ravinai signed the document. The Man Shaked representative, however, lacking the legal authority to bind the company, did not sign. The agreement stipulated explicitly that a contract between the parties would be signed one week later. Mrs. Ravinai was offered a check for a small sum as an advance payment, which she accepted. The next morning, however, she resolved to withdraw from the deal and notified Man Shaked of her decision. The company claimed that a binding contract had been made by the parties, and it initiated enforcement proceedings. Both the trial court and, on appeal, the Israeli Supreme Court held that the preliminary agreement constituted a binding contract and awarded the company specific performance. *Ravinai v. Man Shaked* is a landmark case in Israeli contract law.<sup>77</sup>

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<sup>75</sup> See text accompanying *supra* note 30.

<sup>76</sup> C.A. 158/77, *Ravinai v. Man Shaked Ltd.*, 33(2) P.D. 281.

<sup>77</sup> Incidentally, many of the above facts cannot be retrieved directly from the opinion

I surveyed 581 students from several academic departments at Tel Aviv University and asked them whether a contract for the sale of land is binding when only the seller signs it or whether in order for such contractual liability to arise, it is essential that both seller and buyer sign the contract. Five-hundred and fifty of the respondents (94.67%) said that for a sale of land contract to be binding, it is essential that both seller and buyer sign it. Only thirty-one respondents (5.33%) shared the courts' view that it is sufficient that only the seller sign.

I then provided 343 students with the facts of the *Ravinai* case, together with a copy of the preliminary agreement signed by Mrs. Ravinai. I asked them whether they thought a binding contract had been made by the parties in this case. One-hundred and ninety-one of the respondents (55.68%) said that no contract had been made, explaining that for a contract to be binding, both parties have to sign it. One-hundred and fifty-two respondents (44.32%) maintained that a contract had been made in this case. Some respondents said that they did not know how to resolve the matter.

(b) *The Botkovsky Case*.<sup>78</sup> Jacob Botkovsky was an experienced businessman, as were the managers of Gat Ltd., a construction company. Botkovsky owned a plot of land. For some time, the parties had been negotiating the sale of Botkovsky's land to Gat. One afternoon, the parties met at Botkovsky's office. During the course of this meeting, Botkovsky took two sheets of paper and wrote, on each one, the major terms of the deal agreed to by the parties. Neither Botkovsky nor the managers of Gat signed either of the two documents. Botkovsky handed one copy to Gat's representatives and kept the other for himself. The parties agreed to meet again the following day in order to sign a contract to be prepared by Botkovsky's lawyer. The parties then made a toast with wine. A few hours later, having consulted with his lawyer, Botkovsky decided to withdraw from the deal. Gat initiated enforcement proceedings. The trial court denied Gat's claim for specific performance, holding that this was not the way business people consummate complex, large-scale transactions for the sale of land. On appeal, the Supreme Court reversed the decision, holding that a binding contract had been made by the parties. The Court argued that the fact that the parties had not signed the documents should not necessarily be interpreted as indication of a lack of determination on their part to enter into a binding agreement. Rather, the Court argued, one may deduce the

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of the Supreme Court. One can become acquainted with them only by looking at the trial court file.

78 C.A. 692/86, *Botkovsky v. Gat*, 44(1) P.D. 57.

parties' intent to be bound by considering the overall circumstances of their interaction. *Botkovsky v. Gat* is another landmark case in Israeli contract law.

I asked the same 581 Tel Aviv University students whether when two parties negotiate a contract for the sale of land, the seller can withdraw from the negotiations prior to the signing of a contract or whether the seller will be bound even before signing the contract. Two-hundred and ninety-one of the respondents (50.08%) shared the Supreme Court's view that a seller can be bound even before signing the contract. Two-hundred and ninety of the respondents (49.92%) said that as long as the seller has not signed a contract, she is free to withdraw from the negotiations.

I provided 335 students with the facts of the *Botkovsky* case. I then asked them whether they thought a binding contract had been made between the parties. Two-hundred and thirty-five of the respondents (70.15%) said that no contract had been made, most of them explaining that for a binding contract for the sale of land to be made, the parties have to sign it. Only 100 respondents (29.85%) said that a binding contract had been made. Some respondents said that they did not know how to resolve the matter.<sup>79</sup>

## 2. Contract-Making as a Script

The objective approach is premised on the assumption that the contracting parties actually knew or could have known the contents of contract law rules on the formation of contracts when they entered into their own contract. However, in many cases, this assumption is, in fact, false. Very often, a gap exists between the way in which the layperson perceives the contract-making process and the way in which the law perceives it. To understand the source of this gap, we need to focus on the notion of the *script*.

Contract-making is a cultural model. A cultural model is a presupposed, taken-for-granted model of the world that is inter-subjectively shared by the members of a given social group as a result of their socialization within that group. Cultural models play an enormous role in framing people's conduct and in providing them with a meaning for the world and with an understanding of the way in which the world works.<sup>80</sup>

An important type of cultural model is the script. A script is a standardized sequence of events that fills in our understanding of frequently occurring

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79 I am grateful to my friends Hanoach Dagan, Ilana Dayan-Orbach, Noah Halevy, Asher Maoz, Sagit More, and Ronen Shamir for their assistance in conducting the survey in their classes.

80 Dorothy Holland & Naomi Quinn, *Cultural Models in Language and Thought* (1987).

experiences. A well-known example of a script is the "restaurant script" that guides the conduct of a customer through the series of interactions required to get a meal at a restaurant.<sup>81</sup>

### 3. *Expert Scripts, Lay Scripts, and Compulsion*

The objective approach to contract-making is premised on the assumption that laypersons negotiate with each other in accordance with the contract-making script of contract law with which they are fully acquainted. As part of its endeavor to fulfill its promise of legal certainty, not only does modern law suppress the fact that competing cultural systems exist within the bounds of its domain; indeed, modern law persistently disregards the troublesome question of the extent to which the citizenry of the state is familiar with its contents. Modern law operates upon the tacit assumption that whatever transpires in the law is immediately transmitted to all citizens of the state and is immediately comprehended by them and familiar to them.

The script known to laypersons regarding contract-making reflects cultural knowledge that prevails as part of the common sense<sup>82</sup> shared by members of the community, or communities, to which these people belong. In contrast, the contract-making script held by judges and lawyers is an expert cultural model, i.e., it is shared only by members of a specialized group of professionals.<sup>83</sup> This latter contract-making script reflects the unique and intricate internal logic of the law, i.e., the categories, distinctions, and concepts that have been created and developed by the judiciary in the process of adjudicating contract-making cases.

"[P]rivate actors can contract, even if their knowledge of the law is scant, if they know the social rules of contracting," writes Eisenberg. "The empirical evidence strongly suggests that private actors often do just that."<sup>84</sup> But a gap may emerge, argues Eisenberg, between the way the layperson understands her conduct and the meaning attributed to that conduct by the law:

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81 Roger Schank & Robert Abelson, *Scripts, Plans, Goals and Understanding* 36-68 (1977); Holland & Quinn, *supra* note 80. See also Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *Stan. L. Rev.* 39 (1994); Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 *U. Chi. L. Rev.* 1213 (1994).

82 Clifford Geertz, *Common Sense as a Cultural System*, in *Local Knowledge* 73 (1983); Roland Barthes, *Dominici, or the Triumph of Literature*, in *Mythologies* 43 (Annette Lavers trans., 1972) (1957); Menachem Mautner, *Common Sense, Legitimacy, Coercion: Judges as Narrators*, 7 *Plilim* 11 (1998) (Hebrew).

83 On experts' knowledge, see Fred Inglis, *Cultural Studies* at chs. 1, 2 (1993).

84 Eisenberg, *supra* note 30, at 1144-45.

Federal and state reporters document countless cases involving parties who apparently did not know contract law ... . The very fact that lawyers must attend graduate school for three years, then serve a de facto apprenticeship of several more years, and thereafter take continuing-legal-education courses and keep abreast of the professional literature, evidences that nonlawyers often cannot reasonably be taken to know the law.<sup>85</sup>

Similarly, Macaulay writes that "a number of studies indicate that most people know very little about the contents of most legal norms."<sup>86</sup> Indeed, one of Macaulay and Macneil's major contributions to contract law scholarship is that they have exposed the substantial gap that exists between the way in which the contract process is perceived by laypersons, including business persons, on the one hand, and the way in which it is perceived by the law and by legal actors such as law professors, judges, and lawyers, on the other hand.

In light of the basic goal of contract law to serve as an instrument for the implementation of choices made by individuals, a problem arises for contract law whenever a discrepancy exists between the contract-making script held by laypersons and the professional contract-making script applied to them by the courts. This discrepancy may lead to negotiating parties being subject to contractual liabilities that they did not undertake: parties who participated in pre-contractual negotiations and who regard themselves as still contractually unbound would, nonetheless, be held contractually liable and be subject to contractual obligations contrary to their actual intent. As shown by the results of the surveys I conducted following the *Ravinai* and *Botkovsky* decisions,<sup>87</sup> it may be argued that a wide discrepancy exists between the way in which the contract-making process is perceived by laypersons in Israel and how it is perceived by Israeli law.

Likewise, it may plausibly be argued that neither Mrs. *Ravinai* nor Mr. *Botkovsky* intended to be contractually bound at the early stage in which the Court found them to have made a contract. The ramifications of this are that both Mrs. *Ravinai* and Mr. *Botkovsky* were compelled by the Court to part with their assets.

Indeed, in resolving the *Ravinai* and *Botkovsky* cases, the Supreme Court invoked unique legal ways of reasoning and employed unique legal rules, presumably unfamiliar to the layperson. For instance, in the *Ravinai* case, the Court relied on a provision of the Israeli Land Law that mandates that

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85 *Id.*

86 Macaulay, *Elegant Models*, *supra* note 8, at 520-21.

87 See text accompanying *supra* notes 76-79.

the obligations of sellers of land be specified in writing.<sup>88</sup> This provision is clearly paternalistic. It is intended to protect sellers from hasty commitments. The Court, however, in a sharp departure from the objective of this provision, deduced from it that for contracting parties to be bound, it is sufficient for only the seller, without the buyer, to sign a written preliminary agreement (as was the case in *Ravinai*). However, as is shown by my surveys, in invoking this analysis, the Court reached a conclusion that conflicts with the understanding of many laypersons as to the prerequisites for making binding contracts for the sale of land, namely, that both seller and buyer, and not only the seller, must sign a written document.

Likewise, in reaching its conclusion in the *Botkovsky* case that for a contract for the sale of land to be binding, it is sufficient for the seller to prepare a written document, without signing it, the Court relied upon a previous, extraordinary case that was borrowed from the realm of the law of wills. This case involved a young woman who had committed suicide, prior to which, she had written several notes. In one of these notes, she had explained that the reason for her act was the abusive conduct of her husband; in another note, she requested that her husband not receive any share in her property; and in a third note, which she entitled "Will," she requested that her property be distributed amongst her brothers and her mother. None of these notes was signed by the woman. Under Israeli law, for a will to be valid, the testator must sign it. In reaching the conclusion that the notes amounted to a valid will, one of the judges argued that there is nothing sacred in the signature and that when its function is probative, it may be substituted with other means of proof.<sup>89</sup> Clearly, laypersons could not have been familiar either with this case or with its particular analysis of the role played by the signature vis-à-vis legal documents. Indeed, as shown by my surveys, in invoking this analysis in the *Botkovsky* case, the Court reached a conclusion that conflicts with the understanding of many laypersons regarding the prerequisites for making binding contracts for the sale of land, namely, that the seller must not only make a written document, but must also sign it.

Thus, it may be argued that instead of applying a "thick description"<sup>90</sup> to

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88 Land Law, 1969, § 8, 23 L.S.I. 283, 284 (1968-69).

89 For a discussion of the case, see Celia Wasserstein-Fassberg, *Form and Formalism: A Case Study*, 31 Am. J. Comp. L. 627 (1983).

90 Clifford Geertz, *The Interpretation of Cultures* 3 (1973) (Chapter 1: Thick Description: Toward an Interpretive Theory of Culture). See also Martha Minow & Todd Rakoff, *Is the "Reasonable Person" a Reasonable Standard in a Multicultural World?*, in 2 *Everyday Practices and Trouble Cases* (Fundamental Issues in Law and Society) 40, 41, 44 (Austin Sarat et al. eds., 1998).



the interactions observed by them — as mandated by the most fundamental logic of contract law — the judges in the *Ravinai* and *Botkovsky* cases acted in a legally ethnocentric, non-contextual, and, therefore, coercive manner.

#### 4. Lawyers as Translators

We often refer to lawyers as translators, i.e., people who are located on the frontier between daily culture and legal culture and who are capable of phrasing stories that are born in daily culture in terms of the culture of the law.<sup>91</sup> In contractual transactions that are complex and infrequent, the parties often expect to be accompanied on their passage from daily culture to legal culture by a lawyer, i.e., the parties expect their contractual liability to arise only on the basis of a written contract drafted by a lawyer. Moreover, if we consider such issues as title verification and tax liabilities, there are good paternalistic grounds for mandating that at least in some contractual transactions (e.g., contracts for the sale of real property), no contractual liability arises without the involvement of a lawyer. As the *Ravinai* and *Botkovsky* cases suggest, however, by imposing contractual liability at an early stage in the contract-making process, the Supreme Court has frustrated the parties' option to benefit from the expertise of a lawyer.

#### 5. One-Shotters and Repeat Players

Moreover, the tendency of the Court to establish contractual liability in the early stage in which a preliminary agreement is drafted favors repeat-players — i.e., parties experienced in conducting their affairs in accordance with the requirements of the law — over one-shotters, who do not have the benefit of such experience.<sup>92</sup> Indeed, when reading the *Ravinai* opinion, one gets the distinct impression that Mrs. Ravinai fell victim to the superior acquaintance with the law enjoyed by both the Man Shaked representative and the real-estate agent who made her unilaterally sign the preliminary agreement.

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91 James Boyd White, *Justice as Translation* (1990); Bourdieu, *supra* note 47.

92 Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974). An "ideal type" repeat player is "a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests." *Id.* at 98. An "ideal type" one-shotter is "a unit whose claims are too large (relative to his size) or too small (relative to the cost of remedies) to be managed routinely and rationally." *Id.*

### 6. *The Ambiguity of Contract Law*

An assumption of the objective approach is that contract law rules on the formation of contracts provide clear and unequivocal solutions to *all* possible factual situations in which a claim is made regarding whether a contract has been made. However, since contract law does not condition contractual liability on the use of rigid forms, such as a seal or a signed document in writing, in many cases, the law fails to provide one, unequivocal response to the question of whether a contract has been made in the circumstances of a particular case. Compulsion by contract law, by way of subordinating negotiating parties to contractual liability not chosen by them, is, therefore, unavoidable.

## **E. Application of the Objective Approach in Multicultural Situations: Whose Culture?**

### *1. The Problem*

The objective approach is premised on the assumption that in giving meaning to the contents of their contract, the contracting parties have shared the same cultural environment. In fact, however, it is often the case that each of the two contracting parties comes from a different cultural community. This is particularly so in the era of advanced communications and travel, when it is easier than ever to interact with geographically remote partners. In cases of this type a multicultural situation exists, i.e., each party is located in a different culture, and in entering into the contract, each party acts on the basis of assumptions and perceptions of the world that are prevalent within the context of its own culture. In cases of this type, a court's adoption of the assumptions and perceptions prevalent in any one of the two relevant and competing cultures necessarily involves cultural compulsion followed by contractual compulsion of the other party.<sup>93</sup>

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93 The problems inherent to interactions between parties coming from distinct cultural communities are most tragically manifested in the parallel context of some rape cases, where a man and a woman attribute different meanings to their interaction. On the cultural defense in criminal law, see Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293 (1986); Diana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053 (1994); Note, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 Dick. L. Rev. 141 (1994).

## 2. Three Cases

(a) *The Frigaliment Case*. In *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,<sup>94</sup> a New York sales corporation entered into two contracts with a Swiss corporation for the sale of "US Fresh Frozen Chicken." The Swiss buyer argued that the shipments made were in breach of the contract: "chicken" means a young chicken suitable for broiling and frying, but it had received from the seller stewing chicken or "fowl." The seller argued that "chicken" means any bird of that genus that meets contract specifications on weight and quality, including what the buyer called "stewing chicken." The court ruled that the buyer bore the burden of showing that "chicken" was used by the parties in their contracts in the narrower rather than in the broader sense, and the buyer had failed to meet this burden.

Reading the opinion in the *Frigaliment* case, one gets the impression that the term "chicken" has different meanings in the United States and in Switzerland. Indeed, it is Corbin's conclusion concerning this case that "chicken has no single objective meaning"<sup>95</sup> and, therefore, it is possible that "both parties ... may have been equally reasonable"<sup>96</sup> in their respective interpretations of the contract. If this were the case, then by applying the American understanding of the term "chicken," the court subjected the Swiss buyer to a meaning not prevalent within its own cultural environment and, thereby, to receiving contract goods not chosen by it.

(b) *The Serradell Case*. In *Serradell v. Hartford Accident & Indemnity Co.*,<sup>97</sup> Hartford issued a group accident insurance policy to Alaska U.S.A. Federal Credit Union of the city of Bethel. Hartford then solicited credit union members from Bethel and the surrounding villages to enroll in their plan by mail. The policy and the insurance brochure provided, among other things, for payment of death benefit to the insured's benefactors in the event "your spouse under age 70" died as a result of a covered accident.

Serradell was part Italian and part Yupik Eskimo. In 1977, he and Bertha Tikiun, a Yupik Eskimo, moved in together. Serradell and Tikiun lived in a small Native village. They never legally married. They had two children and lived together up until Tikiun's death in 1989 due to an accident.

Serradell had enrolled in the group insurance policy. He also had enrolled in Hartford's family plan for an additional monthly premium. In the enrollment application form, he had printed the name of Bertha Tikiun

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94 190 F. Supp. 116 (S.D.N.Y. 1960).

95 Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161 (1965).

96 *Id.*

97 843 P.2d 639 (Alaska 1992).

as well as the names of his two children. The Certificate of Insurance issued to Serradell defined "covered persons" as including, among others, Serradell's "spouse," i.e., "your spouse unless (a) you and your spouse are legally separated or divorced."

Following Tikiun's death, Serradell applied to Hartford for \$50,000 in accidental death benefits under the group accident insurance plan. Hartford denied Serradell's claim on the basis that Tikiun had not been Serradell's spouse under the policy because she and Serradell had never been legally married. Serradell's main argument was that Native Alaskans have a unique culture and that Hartford had failed to consider their unique lifestyle and how they define family and spouse.

The Superior Court of Alaska dismissed Serradell's claim.

The Supreme Court of Alaska confirmed. Chief Justice Rabinowitz wrote: "Our precedents establish that insurance contracts are to be constructed so as to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms."<sup>98</sup> He then held that there was no ambiguity in the use of the term "spouse" in the insurance documents as intending to refer to a legal relationship. Thus no layperson could expect the policy to be reasonably interpreted as providing coverage for Tikiun's death, concluded Rabinowitz.

I find Chief Justice Rabinowitz' reasoning flawed. Granted, the definition of the term "spouse" in the Certificate of Insurance issued to Serradell by Hartford explicitly ruled out cases in which marriage had legally existed and was subsequently dissolved. However, the definition does not positively determine that a legally binding marriage needs to exist for the term to apply. It may well be argued therefore that Serradell was reasonable in assuming, according to the perceptions prevalent in his culture, that Bertha Tikiun would be regarded as his "spouse" for the purpose of the coverage purchased by him from Hartford. If this were the case, then by giving the term "spouse" the meaning claimed by Hartford, the Superior Court subjected Serradell to too narrow a meaning relative to the meaning prevalent in Serradell's culture. That is, the court denied Serradell the contractual choice made by him (as well as the fruits of the insurance premiums paid by him to Hartford).

(c) *The Tucker Case*. In *Tucker v. Forty-Five Twenty-Five, Inc.*,<sup>99</sup> Richard Tucker, internationally renowned opera singer and cantor, was hired by the Eden Rock Hotel to conduct the 1964 Passover *seder* at the hotel. A standard

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98 *Id.* at 641.

99 199 So. 2d 522 (Fla. 1967).

form contract was executed by the parties with the following typewritten provision: "If second Seder service to be held, same price as first night."

The hotel advertised nationally that Tucker would conduct two *seders*. Tucker performed the *seder* service on the first night of the holiday and, at its conclusion, was informed that there would be no second *seder*. Tucker sued for breach of contract and tortious damage to his reputation. The trial judge concluded that the contract entered into by the parties provided that Tucker would perform one *seder*. The appellate court affirmed this determination. It first noted that Passover is celebrated for seven days in Israel and for eight days elsewhere; therefore, those living outside of Israel conduct two *seders*. However, noted the court, "The Reform Jews in America today ... observe but one Seder." Also, "while Tucker may have been Orthodox in his observance, the Eden Rock Hotel had traditionally followed the Reform view and had only one Seder in each year prior to 1964."<sup>100</sup>

Obviously, Tucker and the Eden Rock Hotel had two different cultural understandings as to the celebration of the Passover holiday. Had the parties not included in their contract the aforementioned typewritten provision, how could a court adopt either one of the two meanings held by the parties without effecting cultural compulsion (and, following that, contractual compulsion) on the other party?

#### **F. One Meaning within the Same Culture?**

In cases in which the two contracting parties are assumed to inhabit the same cultural environment, one of the premises of the objective approach is that this cultural environment provides a single common meaning to the parties' contract. It is common knowledge, however, that in many cases, a culture can fail to provide one, ready-made "right" interpretation to a factual situation, but, rather, offers a range of alternatives, all of which are possible and differ only in the combination of considerations comprising each set and in the relative weight given to the various considerations applying within the context of each particular set. It is possible, therefore, that at times, contract law will impose upon a contracting party a particular interpretation of a contract that differs from her *bona fide* interpretation.

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100 *Id.* at 524.

## G. The Complexity of the Human Condition and the Simplicity of the Law

There is an additional reason why the objective rules of contract law on the formation of contracts may involve compulsion. This reason is derived from the existence of a gap between the complexity of the human condition, on the one hand, and the simplistic, reductionist manner in which the law (in general, not just contract law) perceives the human condition, on the other.

Typical of the human condition is the desire for more than one thing at the same time. It is also typical to both want and not want the same thing at the same time. In contrast, the logic of the law (at least as we know it) is usually binary.<sup>101</sup> The law usually applies one of two competing, mutually exclusive categories, each one unqualified and unambiguous. In translating and classifying a complex human situation into one coherent and simplistic category, the law cannot but make its encounter with human beings tragic and coercive.

The rules of contract law on the formation of contracts are a case in point. The binary logic of the law guides it to perceive every contract-making process as resulting in either contractual liability for the parties or not.<sup>102</sup> This logic makes it difficult for the law to be responsive to wavering, unresolved contracting parties. In some cases, negotiating parties have a firm opinion as to whether they want to consummate a deal or retreat from it. But in many other cases, the parties are torn between considerations weighing for and against the deal. Thus, in reading the *Ravinai* case, one cannot avoid the impression that Mrs. Ravinai was torn between the will to part with her land and the conflicting will to preserve it and that over the course of the negotiations that took place at her residence, she bounced back and forth between these two options. Any attempt to categorize situations such as hers into one of the bound/not bound categories of contract law can only result in compulsion.

## CONCLUSION

This article has examined the role culture plays in the law in cases in which a legal doctrine imports culture into the law and draws on it for allocating entitlements to individuals. It has demonstrated that even in contract law,

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101 White, *supra* note 90, at 64-65.

102 Doctrines such as good faith in negotiations (*culpa in contrahendo*) and promissory estoppel tend to mitigate the binary logic of contract law.

the branch of law most committed to the ideal of individual autonomy, law's reliance on culture makes compulsion by the law an unavoidable outcome. This article is therefore a reminder of some of the consequences of the law's reliance upon culture in general. In light of the findings presented in this article, it is no wonder that modern law tends to conceal the existence of various cultural systems within its jurisdiction, the fact that it draws on culture when allocating entitlements, and the repercussions of its intervention in culture.

