

# HEINONLINE

Citation:

Eli Bukspan, Trust and the Triangle Expectation Model  
Twenty-First Century Contract Law, 11 DePaul Bus. &  
L.J. 379, 416 (2013)

Content downloaded/printed from [HeinOnline](#)

Thu Aug 17 11:33:47 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

# Trust and the Triangle Expectation Model in Twenty-First Century Contract Law

*Eli Bukspan\**

## CONTENTS

I. INTRODUCTION.....	380
II. TRUST .....	382
A. <i>Basis for Interrelationships and Contracting</i> .....	382
B. <i>Intent, Promise, Expectation, and Interpersonal Trust         in Contract Law</i> .....	387
C. <i>Contract Law's Influence (as a Legal Institution) on         Interpersonal Trust (as a Social Convention)</i> .....	393
III. TRIANGLE-OF-EXPECTATION MODEL .....	399
IV. PUBLIC POLICY, THE PRINCIPLE OF GOOD FAITH, AND THE OBJECTIVE THEORY OF CONTRACTUAL AGREEMENT .....	404
A. <i>Public Policy</i> .....	404
B. <i>Principle of Good Faith</i> .....	407
1. <i>During Negotiation</i> .....	408
2. <i>Vis-à-Vis Contractual Performance and the             Triangle of Expectations</i> .....	411
C. <i>Objective Theory of Contractual Assent</i> .....	412
V. CONCLUSION .....	415

## ABSTRACT

*The concept of trust best explains the true nature of contract law and is found in key contract-law doctrines, such as good faith and public policy. By identifying contractual expectation with the idea of trust and by considering the actual expectations of the contracting parties, as well as the ideal expectations of the public, this Article develops the triangle-of-expectations model—the most coherent account of contract law today. This model, conceptually different than classic contract theory, also contributes to stability, certainty, and the contracting parties' ability to rely on each other as well as on the contrac-*

---

\* Senior Lecturer, Interdisciplinary Center – Herzliya. S.J.D., Harvard Law School; LL.B. Tel-Aviv University; Network Fellow, Edmond J. Safra Center for Ethics – Harvard University. Thanks to Menachem Mautner and Lawrence Mitchell for their invaluable advice, to Amy Cohen for her assistance in the research, and to Michele Manspeizer.

*tual institution. Most importantly, it also explains the complex economic, social, and communal interactions that modern contract law is asked to face—many of which are no longer based on freedom of contractual choice.*

## I. INTRODUCTION

The question below is from a test for pre-law students:

Which type of law governs all but one of the following activities?

Wake up from cell phone alarm, make coffee in an electric pot, leave rented apartment, pay for a day pass and ride the subway, clock in at work, finish work, go to a movie with tickets ordered online, stop at an all-night pharmacy to pick up medicine paid for by health insurance, take a subway ride home, set alarm on cell phone, and go to sleep.

- a. Equity
- b. Criminal
- c. Contract
- d. Family

As the test question above shows, contractual interaction is so common and dominant in daily life that it is likely the most significant and widely-used legal act.<sup>1</sup> It goes without saying, therefore, that understanding the essence of contract law and its implications on specific interactions, as well as its broader implications on society at large, is of greatest relevance and significance in the modern era. In the past, contract law focused on regulating the contracting parties' voluntary interactions according to the will theory. But today contract law regulates an array of much broader and more complex economic, social, and public interactions, many of which are not based on the parties' mutual intent and freedom of contractual choice in its classical sense. Hence, today, this classic theory no longer explains the contractual institution vis-à-vis the rising power of the corporate world and the popularity of mass contracts—with banks, employers, pension funds, cellular companies, hotels, etc.—signed by most on a regular basis without even reading, and certainly without negotiating or having the power to negotiate, the terms and conditions of these contracts.<sup>2</sup>

---

1. Contract law addresses a variety of legal interactions ranging from simple, such as buying a cup of coffee, to complicated and sophisticated transactions, such as buying an apartment, organizations' bylaws, or corporate mergers. Without always recognizing it, many of our activities are impacted by contracts almost every hour of the day, such as taking a taxi to work—arranged by contract with the transport provider—using credit cards to pay for the fare—used pursuant to a contract with the issuing bank—and so on. Most people in our modern society are involved in numerous contractual acts daily.

2. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.7 (3d ed. 2004); see Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179 (2005); see also

This Article takes up the challenges found in modern contract law and offers a new, unified approach. In addition to examining the new social and business reality discussed above, the suggested theory takes into account both the rising position of basic doctrines in contract law, such as principles of good faith and public policy that have been significantly developed and introduced into contract law, and the considerations of fairness and paternalism,<sup>3</sup> which appear to clash with the autonomous exercise of individual will.<sup>4</sup> This mission is especially challenging considering that contractual interaction is fundamental, widespread, and diverse, and bears on social values to a great extent.<sup>5</sup>

With this in mind, this Article advances the concept of trust as the central, social foundation for modern contract law. This idea is grounded in the link between trust and expectation—both implicit in contractual interactions. Moreover, expectation is analyzed in this Article with a broader perspective than before. One of this Article's main contributions is the claim that a systematic study of the various contractual doctrines shows—contrary to the conventional view—a concern not only for expectations of the promisee but also for those of the promisor and the public. Accordingly, this Article suggests a three-dimensional perspective, termed the “triangle of expectations.”

The triangle of expectations also provides an explanation for the occasional subordination of contract law, which allegedly planned to protect the subjective will of the parties, to objectivity tests, which emphasize the *reasonableness* of the parties' will, and to constitutional principles that must be obeyed within contractual interaction as well. In this sense, the proposed model also serves to construct *desirable* interpersonal expectations, emphasizes the societal essence of the contractual institution, and affords additional understanding of the grow-

---

James Gordley, *Contract*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* (Peter Cane & Mark Tushnet eds., 2003).

3. FARNSWORTH, *supra* note 2, § 7.17 (b) (“The concept of *good faith* has, in a relatively few decades, become one of the peculiarly American cornerstones of our common law of contracts.”). “Occasionally . . . a court will decide that this interest in party autonomy is outweighed by some other interest and will refuse to enforce the agreement or some part of it.” *Id.* § 5.1.

4. *Cf.* FARNSWORTH, *supra* note 2, § 1.7.

5. *Cf.* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1753 (2000) (“In contrast to the formal reasoning of classical contract law, modern contract law reasoning is substantive. That is, modern contract law seeks to justify doctrines on the basis of social propositions.”).

ing affinity of contract law to human rights<sup>6</sup> and of the tendency to weaken the distinction between public and private law.<sup>7</sup>

This Article continues as follows. Part II probes the idea of trust and its conceptual affinity to the law of contracts. It shows how the idea of trust corresponds to the inner logic of the contractual institution, including its implicit elements of promise, mutuality, and cooperation, and also embodies basic and primary normative, social, economic, and personal advantages even with respect to the doctrine of will. This part also questions whether contract law, as a legal institution, can have a bearing on the idea of trust as a social convention. Part III is devoted to developing the triangle of expectations as a model that includes the idea of trust in the modern law of contracts. Part IV inquires into contract doctrines, obeying the triangle-of-expectations model: particularly invalid contracts, rules of good faith, and contractual formation. This Article concludes by summarizing and emphasizing its themes.

## II. TRUST

### A. *Basis for Interrelationships and Contracting*

The idea of interpersonal trust has personal, social, moral, psychological, and utilitarian advantages that are consistent with common sense<sup>8</sup> and easily relatable. Thus, it comes as no surprise that interpersonal trust has been adopted into many fields, particularly social and economic fields.<sup>9</sup> From a *social* perspective, trust is understood as

6. See, e.g., 2 CONSTITUTIONALISATION OF PRIVATE LAW (Tom Barkhuysen & Siewert D. Lindenbergh eds., 2006); HUMAN RIGHTS AND PRIVATE LAW: PRIVACY AS AUTONOMY (Katja S. Ziegler ed., 2007); HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jörg Fedtke eds., 2007); HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds., 2001); THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM (Ardrás Sajó & Renáta Uitz eds., 2005).

7. Cf. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

8. Julian B. Rotter, *Interpersonal Trust, Trustworthiness, and Gullibility*, 35 AM. PSYCHOL. 1, 1 (1980) ("Common sense tells us that interpersonal trust is an important variable affecting human relationships at all levels.")

9. The broad applicability and fundamental importance of the idea of trust can be illustrated anecdotally by the following statement from a popular swimming instruction manual: "Asked what the single most important factor is in learning to swim, most people would reply 'Confidence'. A sense of trust—what we have called being at home in the water—provides the foundation for us to do whatever else might come naturally in the water." STEVEN SHAW & ARMAND D'ANGOUR, *THE ART OF SWIMMING: IN A NEW DIRECTION WITH THE ALEXANDER TECHNIQUE* 89 (1988).

a vital element in the relationship between people.<sup>10</sup> Mutual trust is a tool that is used to avoid *economic* pitfalls.<sup>11</sup> More specifically, interpersonal trust promotes cooperation and contributes to economic performance in large organizations.<sup>12</sup>

By the same token, trust is a central component in *psychology* and is used to understand the development or lack thereof of healthy personalities.<sup>13</sup> This centrality of trust to humans—in everything related to maintaining the existence and quality of socioeconomic and collective life—necessarily suggests it should be reflected in law as well, especially in contract law, a basic institution for interpersonal social interactions. The sense of interpersonal trust—confidence that the desired expectation arising out of the other's promise will be fulfilled—is essential in contractual deliberations.

Just as the contractual institution can gain much from the existence of interpersonal trust as a cultural phenomenon, so too it can be a powerful stimuli for instilling a culture of trust, thereby contributing to stability and predictability—important foundations in the legal system in general and contract law in particular. Since culture is defined as a product of a vast number of choices made by millions of people,<sup>14</sup> routine contractual encounters can be viewed as a component of overall cultural identity that is influenced by contract law's declarative and coercive functions. However, the close connection between the idea of trust and the institution of contracts is grounded in more than their shared goals. Other considerations are at play as well.

*First*, expectation, which serves as a central axis in defining the idea of trust, is defined as an individual's assessment, in a manner affecting her actions and reliance on another person's or group's actions, sepa-

10. The importance of trust derives from the fact that “[m]en are social animals . . . because so few of their needs can be satisfied except by coordinated and co-operative action.” S. I. BENN & R. S. PETERS, *SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE* 279 (1959).

11. Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFF.* 343, 357 (1972); see also KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 23 (1974) (“Trust is . . . extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people's word.”).

12. Rafael La Porta et al., *Trust in Large Organizations*, 87 *AM. ECON. REV.* 333, 336–37 (1997); see also FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 338 (1995).

13. See ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 96–97 (1968). The connection between psychological insights and the law of contract is based not only on the term expectation—which is, after all, a term from the psychological sphere—but also on scientific ideas regarding how decisions are formed. See Eisenberg, *supra* note 5, at 1780–81; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS.* S251 (1986) (discussing Eisenberg's comments on the premise of non-rationality, based on the studies of Amos Tversky and Daniel Kahneman).

14. James Q. Wilson, *Human Remedies for Social Disorders*, *PUB. INT.*, Mar. 1998, at 25, 35 (“Cultures grow up out of the countless small choices of millions of people.”).

rate from her ability to oversee that activity.<sup>15</sup> Because this definition flows from individual measurement or expectation of another's actions, it is a small jump to link the ideas of trust and expectation—the central interest protected today by contract law—with the *a priori* position of trust within the framework of contract law.<sup>16</sup> This insight is reflected, for instance, in the growing support for the remedy of specific performance in American contract law<sup>17</sup> and in protecting the parties' reasonable expectations of each other through use of the good faith principle—expectations that were established in the wake of contractual promises.

Moreover, there is a deeper and more complex tie between contract law and trust than the one implied by the link between promise and trust. Contract law regulates fulfillment of promises, grapples with surprise circumstances, which may arise during the course of contractual performance, and remedies impropriety or offenses against basic social norms. In these situations as well, contract law primarily views the idea of trust through principles of good faith and social policy, and works to realize a culture of interpersonal trust. In sum, expectation

---

15. Diego Gambetta, *Can We Trust Trust?*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* (Diego Gambetta ed., 1988); see FUKUYAMA, *supra* note 12, at 26 (“Trust is the *expectation* that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of that community.”) (emphasis added) (suggesting the triangle of expectations and the expectations of the public); *THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS* 632 (James F. Childress & John Macquarrie eds., 1986) (“In its broad sense, trust is the *expectation* that the other will act in accord with his or her public presentation of self; in its narrow sense, it is the *expectation* that the other will act morally.”) (emphasis added); see also FUKUYAMA, *supra* note 12, at 366 n.6 (“It is not sufficient that members of the community expect regular behavior. There are many societies in which there is the expectation that other people will regularly cheat their fellows; behavior is regular but dishonest, and leads to a deficit of trust.”) (discussing the interest in more than neutral expectations). For another definition, also grounded in the term “expectation,” see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1745–46 (2001) (“Scholars sometimes use the term ‘trust’ in different ways to mean different things. In this Article, we use the word ‘trust’ to describe behavior with the three following characteristics. First, trust involves at least two actors—the actor who trusts and the actor who is trusted. Second, the trusting actor must deliberately make herself vulnerable to the trusted actor in circumstances in which the trusted actor could benefit from taking advantage of the trusting actor’s vulnerability. Third, the trusting actor must make herself vulnerable in the belief or expectation that the trusted actor will in fact behave ‘trustworthily’—that is, refrain from exploiting the trusting actor’s vulnerability.”) (footnotes omitted).

16. See *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1981); see also *id.* § 344 (enumerating the interests protected by contract law). While the reliance interest and the restitution interest—the interest in avoiding unjust enrichment—are protected in other legal provisions as well, such as tort law and the laws of unjust enrichment, the unique feature of the system of contract law is the protection of the expectation interest.

17. See, e.g., Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); M. T. Van Hecke, *Changing Emphasis in Specific Performance*, 40 N.C. L. REV. 1 (1961); see also Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 134 (1991).

acts as a shared and enduring idea of trust and the institution of contracts, marking their close connection.

*Second*, the idea of trust is consistent with other conventional rationales for the law of contract, i.e., maximizing utility, facilitating personal planning, allowing trade and market functioning, protecting reasonable expectations and reliance, bolstering autonomy and individual liberty, and establishing the moral force implicit in contractual promise. The idea of trust appears to be implicit in these rationales, effectively making their realization possible.<sup>18</sup>

Trust is a simple idea, consistent with common sense.<sup>19</sup> The idea of trust does not focus on specific ethical or distributive concerns. Rather, it is primarily a matter of creating conditions that favor fulfillment of reasonable expectations. The principle of trust requires altruistic concerns not only for the other but also for her expectations, which stem from the original promise and the meeting of the parties' wills. As such, the idea of interpersonal trust is a basis for autonomy.<sup>20</sup> Realization of reasonable expectations makes it possible to realize self-interest. It operates to ensure confidence, certainty, stability, and interpersonal harmony, all necessary ingredients of a legal system.

*Third*, relationships based upon will are built at the start of pre-contractual negotiations and continue through the formation and ensuing performance. They are the most typical and familiar type of relationships related to social and economic matters, giving rise to expectations and inviting trust in one's fellow. Thus, every contract can be viewed as a microcosm of a "social contract."<sup>21</sup> Correspondingly, the protection afforded to the value of interpersonal trust reflects the status that law places on the idea of trust itself in a liberal, civil society.

---

18. Cf. Anthony J. Bellia, Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25, 27 (2002) ("What is the common thread in these divergent accounts of contractual obligation? It is that each invokes the notion of trust in explaining why it is appropriate for the law to enforce certain promises.").

19. See Rotter, *supra* note 8.

20. This idea reflects, simultaneously, a deontological rationale and a utilitarian one. See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 838 (1997).

21. Cf. THOMAS HOBBS, *LEVIATHAN* 74–75 (Dover Publ'ns Inc. 2006) (1651) ("Again, one of the Contractors, may deliver the Thing contracted for on his part, and leave the other to perform his part at some determinate time after, and in the mean time be trusted; and then the Contract on his part is called PACT, or COVENANT: Or both parts may contract now, to perform hereafter: in which cases, he that is to performe in time to come, being trusted, his performance is called *Keeping of Promise*, or Faith; and the faying of performance (if it be voluntary) *Violation of Faith*.").



*Fourth*, the close linkage between contracts and interpersonal trust is evident from their “interchangeability.” On the one hand, if we could foresee, formulate, oversee, and enforce detailed contracts concerning all situations and developments, there would be no need for interpersonal trust. On the other hand, a society placing great importance on interpersonal trust would have no need for contracts. A possible inference from this is that the widespread presence of detailed contracts, frequent adjudication (in general), and the regular use of good faith principles (in particular) do not give rise to instability, uncertainty, and lack of trust. Instead, they result from the absence of those values and have the potential to directly construct a culture of trust.<sup>22</sup>

*Fifth*, anecdotally, one who keeps an agreement (even when she no longer has any interest in doing so) is considered trustworthy. That characterization—a characterization quite different from a person known to fulfill her will and intent—provides powerful evidence that it is the sense of trust, and not that of will or intent, that supports contracts.

*Sixth*, a contract, by its very definition, is not a unilateral matter but a voluntary meeting of the intentions of two or more parties. This view underlies the laws of contract formation, and it provides the basis for the rules of interpretation, which are directed toward uncovering the intentions of the parties and their shared purposes. Thus, contracts by nature express a social relationship that reflects will and a shared expectation of cooperative exchange.<sup>23</sup>

*Finally*, the approach that posits trust as the meta-theory of contract law can serve as a consistent descriptive tool for contract law in general and especially for principles of good faith and public policy that appear, at first glance, to be foreign to the institution of contract law under its traditional rationale.<sup>24</sup>

In sum, interpersonal trust embraces the law of contracts, which necessarily entails the greatest potential for establishing trust, namely, confidence in the realization of just expectations of participants in the legal system, the ability to plan and rely on social interactions, and the readiness to cooperate with one another. In this way, and through the

---

22. See Menachem Mautner, *Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 558 (2002) (“Contract-making . . . is a functional equivalent of trust.”).

23. As such, it also creates mutual power and the enforcement of relationships, recognized in the law as establishing obligations of trust on one or another level. Cf. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983).

24. See *infra* Part IV.

protection of the triangle of expectations—promisor, promisee, and public—contract law contributes to legal stability and certainty. The rest of this Article will be devoted to substantiate this claim, but first, and before turning to examples of the triangle of expectations as a means of interpersonal trust, whether and how contract law can advance the ideal of personal trust—an essentially social concept—should be considered.

### B. *Intent, Promise, Expectation, and Interpersonal Trust in Contract Law*

The basic characteristics of the typical contract comprise elements of reciprocity,<sup>25</sup> mutuality, willfulness (that is, intent), promise, expectation, interpersonal relationships,<sup>26</sup> and cooperation.<sup>27</sup> Numerous rationales and values are rooted in these basic characteristics, but the lion's share can be summarized by the idea of interpersonal trust, intimately tied to the expectations of the parties involved in the contractual process.<sup>28</sup> Interpersonal trust draws on the notion of expectation—an abstract and sophisticated idea preceding even that

---

25. FARNSWORTH, *supra* note 2, § 3.1 (“The requirement of a bargain imposed by the doctrine of consideration means that the parties’ manifestations must have reference to each other, i.e., that they be reciprocal. Not only must the promisor seek the promise or performance that is the consideration in exchange for the promise, but the promisee must give it in exchange for that promise”); *see also id.* § 2.6.

26. As a practical matter, every contract creates or reflects some sort of relationship. *See* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 816 (2000) (“[V]irtually all contracts either create or reflect relationships. Discrete contracts—contracts that are not relational—are almost as imaginary as unicorns. A contract to build something as simple as a fence creates a relationship. A contract to sell almost any commercial product is likely to either create or reflect a relationship.”); *see also* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 45 (1981) (“Promises—and therefore contracts—are fundamentally relational; one person must make the promise to another, and the second person must accept it.”); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 901 (1978). *See generally* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

27. The existence of these characteristics is evident, directly or by implication, in the opening paragraphs of the *Restatement of Contracts*. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy . . .”). The requirement of mutuality in American contract law can be seen in the requirement of consideration and the idea of the “bargain” that underlies it. *See id.* § 171; Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982).

28. *See, e.g.*, Gambetta, *supra* note 15, at 217 (“[T]rust (or, symmetrically, distrust) is a particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both *before* he can monitor such action (or independently of his capacity ever to be able to monitor it) *and* in a context in which it affects his own action . . . . When we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is beneficial or at least not detrimental to us is high enough for us to consider engaging in some form of cooperation with him.”). For a further definition and a comprehensive, updated sociological theory of trust, *see* PIOTR

of reliance<sup>29</sup>—which flows from the relationship and intentional promise implicit in the contract. In fact, law in general, and not only contract law, protects reasonable expectations and strives to instill the idea of trust between two parties.<sup>30</sup> In the specific area of contract law, however, these expectations arise regarding the interpersonal trust forged on the basis of interpersonal interactions and reciprocal promises that are exchanged in the context of the contract and demand cooperation. This special quality requires clarification and mapping of several terms and considerations.

*First*, the link between the idea of interpersonal trust and contract law is certainly symbiotic but not circular. The sociocultural existence of the idea of trust can strengthen the hope that expectations (including contractual expectations) will be realized, but our interest here is in the opposite vector, that is, the ability of contract rules, as a legal mechanism, to support the concept of interpersonal trust by ensuring the realization of expectations associated with the promises they protect. Moreover, and as we will see, the interest of the rules of contract lies in protecting the triangle of expectations—in realizing not only the concrete expectations of the parties to the contractual interaction (the “promisor” and the “promisee”) but also the reasonable and normative expectations of the public, a present yet silent observer that relies on the institution of contract. In that way, rules of contract act to protect and implement expectations that may be ideal, rather than

---

SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 25 (1999) (“TRUST IS A BET ABOUT THE FUTURE CONTINGENT ACTIONS OF OTHERS.”).

29. In their classic article on the subject, Fuller and Perdue see the protection of reliance as the primary purpose of contract law; protecting expectation is secondary. L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). The development of contemporary contract law shows, as a practical matter, a reversal of those priorities: protecting expectation precedes and is independent of protecting the resulting reliance.

30. See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 176 (Transaction Publishers 1999) (1922) (“Looking back over the whole subject, shall we not explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations . . . .”); *id.* at 226 (“[In a civilized society] men must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto.”); see also ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 81 (1942) [hereinafter POUND, SOCIAL CONTROL] (“It is seldom that a legal right is conferred consciously and intentionally otherwise than as a recognition of reasonable expectations, or what are believed to be reasonable expectations, expressing presuppositions of civilized life.”); Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863 (2001); Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 19 n.1 (1997). Interestingly, though Kuklin offers various moral justifications for the protection of reasonable expectations—including deontological justifications and justifications that rely on considerations of corrective justice, distributive justice, and intuitive justice—he does not directly treat the idea of trust as intimately bound to the idea of expectation.

real, and exemplify the active role played by the law in constructing a culture of interpersonal trust in the institution of contracts, above and beyond the passive role of contract law in reflecting and realizing existing expectations.

*Second*, the interjection of contract law into protecting expectation—arising out of a willful *promise*—shows the existence of a close albeit somewhat confusing connection between protecting will (or intent) and protecting the promise and expectation forged in consequence of it. Contract law developed in the West as an expression of individualism that sanctified individual will and autonomy. Accordingly, court decisions and legal literature traditionally focused on intent and will more than on the idea of interpersonal trust as a central value to be protected by contract law. Yet, focus on autonomy of will turns out, especially today, to lack the consistent capacity to provide a harmonious justification and explanation for the internal developments as they occurred. Moreover, modern contract law is used in many interactions in which willfulness is limited and makes use of paternalistic mechanisms to forge legal responsibility.<sup>31</sup> Given that, the doctrine of will runs counter to the manner in which judges rule and to rationales of courts in many disputes bearing on contract law today.<sup>32</sup>

To summarize, classical contract law is anachronistic,<sup>33</sup> overly narrow, and usually erroneous in regarding a contract as an act of will and nothing more. To do so, moreover, misses other fundamental, social phenomena and goals that are bound up in the contractual institution—phenomena that are fundamental even to the concept of “autonomy of the will” itself. In contrast, the idea of interpersonal trust, constructed through the protection that contract law gives to voluntary and desirable promises, affords a sound and coherent explanation of the law and entails an array of broad and bountiful normative benefits that embrace will-based theories of contract law. Thus,

---

31. FARNSWORTH, *supra* note 2, § 3.6.

32. There is good reason, therefore, to suggest abandoning the metaphor “meeting of the minds” in examining the formation and content of contracts. *Cf. id.*

33. See Gordley, *supra* note 2, at 3. Based on this claim and the shift that happens in contract law, this Article takes a different view from the one raised by Lawrence Mitchell. In opposition to the claim raised in this Article, Mitchell claims that contract law is actually one of the main reasons for erosion of trust in our society, given its main concern in individual autonomy and its encouragement of individuals to seek their own goals without regard for those of others. See Lawrence E. Mitchell, *Trust. Contract. Process.*, in *PROGRESSIVE CORPORATE LAW* 185–217 (Lawrence E. Mitchell ed., 1995). However, given the current deteriorating status of autonomy in contract law and the rising position of good faith and social order doctrines in modern contract law, it is easier to notice the normative superiority of trust as a governing principle in contract law over values of autonomy.

ensuring expectations and the idea of interpersonal trust also serves, in most instances, as a precondition to realizing will.

While the idea of promise in contract law is not new, the notion of trust—implemented by the triangle of expectations protected by contract law—is new. The opening section of the *Restatement of Contracts* embodies this concept of promise,<sup>34</sup> which is implicit in the requirements for contract formation, namely, offer and acceptance. The characteristics of promise—as a *willful commitment giving rise to expectation*—are implicit in the tests of “certainty” and “specificity,” which are enumerated in “offer” and “acceptance” when forming the contract. Both offer and acceptance incorporate *commitment* and constitute components of promise that create expectation on the part of the other.<sup>35</sup>

Thus, the idea that expectation in contract law is a social value associated with, and even more important than, autonomy of will is not new.<sup>36</sup> Corbin, for example, viewed contract law as intending first and foremost to protect (reasonable) expectations of the parties. Corbin’s position is clear in the caption of the first paragraph of his treatise: “The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises.”<sup>37</sup>

In other words, expectation is what underlies the modern approach to interests protected by contract law and is attached to the social value of interpersonal trust more directly than to the social value of will.<sup>38</sup> Correspondingly, the rationale focused on the role of contract law in protecting autonomous will cannot itself justify protecting the *promise* and the justified (i.e., the legitimate and reasonable) expectations of the other party. Moreover, such a rationale cannot justify imposing the duty of proper interpersonal behavior on contracting

34. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

35. Cf. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.13 (Joseph M. Perillo ed., rev. ed. 1993) (“The act constituting an offer and the act constituting an acceptance may each consist in a promise.”).

36. See *id.* §§ 20, 200–01; see also Eisenberg, *supra* note 5, at 1756–60.

37. See CORBIN, *supra* note 35, § 1.1 (“That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose which motivated the creation of the law of contracts; but . . . it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.”); see also Barry J. Reiter & John Swan, *Contracts and the Protection of Reasonable Expectations*, in *STUDIES IN CONTRACT LAW* 1 (Barry J. Reiter & John Swan eds., 1980); Johan Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 L. Q. REV. 433, 433–34 (1997).

38. The source of this approach is in the classic article by Fuller & Perdue, see *supra* note 29, who emphasized the priority of the interest in reliance (though one must remember that reliance flows from expectation). See also RESTATEMENT (SECOND) OF CONTRACTS § 344.

parties by subjecting them to the basic principles of the legal system through the public policy doctrine.

It should be emphasized that there is no denying that contract law clearly aims to ensure the *willfulness* of the promise, which contributes much to the idea of interpersonal trust. However, the intent of the parties is not the main issue. Trust and will are intertwined in the commercial and social world, which is based on cooperation and confidence in the performance of future promises. The idea of interpersonal trust can advance subjective expectations as well as ideal ones. Thus, trust has the capacity to express the “added value” of the promise implicit in the contract. This is because the promise, unlike purely willful expression, bears on the future, creates expectations by the other party, and entails cooperation.<sup>39</sup> Protecting these attributes achieves broader social goals than those that focus solely on protecting momentary will, by itself, and is better suited to the interpersonal character of contractual interaction.

In addition, intent is certainly not a value unique to contract law; it is also a fundamental component of civil and criminal law alike. However, contract law attends to particular expressions of intention—which is, for example, different than intent in the context of a “Last Will and Testament” and, as is suggested by its title, embodies a person’s will. While a will (and, in a certain sense, a gift) entails a *unilateral* intentional act, which has a limited effect on another’s expectations, a contractual promise is a mutual act that exerts *external and social* influence beyond the individual. Moreover, it proposes to create expectation and reliance by the other party in order to realize self-interest. The contractual promise creates a “bond,” a personal and cooperative relationship that usually involves both parties assuming risks related to future circumstances. The contractual promise protects not only a party’s right to realize his or her will but also its freedom to expect something from, to rely upon, and to cooperate with another individual.<sup>40</sup> When all is said and done, a party that keeps promises is esteemed by society and known for his or her trust-

---

39. The centrality of the promise is evident in one of the classic statements of American contract law, made by Williston in 1926 in the course of deliberations at the American Law Institute. When asked about a case in which an uncle had promised to give his nephew \$1,000 for the purchase of an automobile but the nephew had bought a car for only \$600, Williston replied that the uncle should nonetheless be required to give the nephew the full \$1,000, for the simple reason that “[e]ither the promise is binding or it is not. If the promise is binding it has to be enforced as it is made.” Yorio & Thel, *supra* note 17, at 117. For a comprehensive review of authorities dealing with promise, see FRIED, *supra* note 26, at 137 n.9, 138 n.21.

40. Fulfilling a promise does not limit liberty; on the contrary, it enhances it inasmuch as a promise is a person’s independent and willful creation.

worthiness. In keeping a promise, the promisee adheres to social institutions of expectation and trust. Thus, in an agreement, the promisor trades not only his or her will but also the social institutions of expectation and trust. The emphasis of trust and expectation avails contract law with a richer meaning than does the traditional understanding, focused exclusively, and often artificially, on autonomy of will.

The same can be illustrated by the process of contract interpretation. Even in this context, which is at the heart of contract law, civil courts question the purposes, goals, and interests underlying the contract and the parties' desire to fulfill it. Courts' inquiries into the parties' goals and purposes reflect the manner in which contract law looks toward culture to fulfill the parties' future expectations<sup>41</sup> and emphasize, primarily, parties' expectations, not merely their intentions.

Fried's approach in *Contract as Promise*<sup>42</sup> supports my thesis herein, but the latter adds a different twist. Fried mostly bases his claim on the "will theory,"<sup>43</sup> which does not afford adequate emphasis on the social concept of realizing expectation and interpersonal trust as an institution and a social convention that plays an independent role in contract law. Fried emphasizes liberal grounding for protecting promise as a willful act and, accordingly, focuses on the inherent moral value of the promise implicit in a contract only as a powerful expression of the autonomy of the individual's will.<sup>44</sup> In contrast, this Article emphasizes promise as a powerful expression of interpersonal trust.<sup>45</sup>

These variations in emphasis are not merely semantic. Rather they can lead to different conclusions, for example, in connection with the erosion of autonomy of the will. The idea of interpersonal trust can harmoniously justify and account for contract law's protection of ex-

41. FARNSWORTH, *supra* note 2, § 1.1.

42. FRIED, *supra* note 26.

43. *Id.* at 5–6 ("I begin with a statement of the central conception of contract as promise. This is my version of the classical view of contract proposed by the will theory . . .").

44. *Id.* at 57 ("The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be.")

45. As noted, Fried, too, emphasizes the importance of the idea of trust and the link between it and protecting free will, but he treats the idea as a means for realizing the shared will and concretizing the ability of one person to use another to attain his goals. *See id.* at 8 ("The device that gives trust its sharpest, most palpable form is promise. By promising we put in another man's hands a new power to accomplish his will . . ."); *id.* at 4 ("[S]o long as we see contractual obligation as based on promise, on obligations that the parties have themselves assumed, *the focus of the inquiry is on the will of the parties.*") (emphasis added); *see also* FRIED, *supra* note 26, at 3 ("[T]he conception of the will binding itself—the conception at the heart of the promise principle—is neither necessary nor sufficient to contractual obligation.").

pectations that are deemed desirable, even if not actually created by the parties—something that traditional will theory has difficulty doing.<sup>46</sup> Moreover, the notion of interpersonal trust can be viewed as a basis for the alternative theory based on autonomy of will. This is due to its axiomatic importance in providing the groundwork for conditions that allow human beings, as “social animals,” to forge relationships, attain self-realization, and provide for most of their needs in a willful way through coordination and cooperation.<sup>47</sup>

C. *Contract Law’s Influence (as a Legal Institution) on Interpersonal Trust (as a Social Convention)*

This part will not be complete without a discussion about the important question posed by the interrelationship between social norms and legal norms. More specifically, does contract law provide the basis for a social culture of trust where it would otherwise be lacking? Implications of this key question are not limited to the law of contracts, and it poses a challenge to the status and influence of law within society. Indeed, contract law provides a degree of certainty that people will live up to their promises to others. However, motivation to fulfill contractual promises is rooted in external commands (law), rather than internal sentiment (belief in the other party), which might neutralize the prospect of authentic trust.<sup>48</sup> Moreover, some claim interpersonal

---

46. Fried himself sometimes has difficulty using his theory to explain American contract law as actually practiced. The trust theory discussed in this Article, with its “triangle of expectations,” does so in a more harmonious and coherent manner. See, for example, the difficulty Fried has in discussing unconscionability. In his view, the doctrine of unconscionability has been applied inconsistently. *Id.* at 103 (“The decided cases do not invoke the doctrine of unconscionability in any systematic or even coherent way. Claims of substantive unfairness are mixed with suggestions of fraud, cognitive deficiency, and duress . . .”). The triangle-of-expectations test, which is at the basis of the idea of trust, can be of assistance here as well, for if the capacity to choose freely is somehow denied, or if the case is one in which economic or other power is being abused, the subjective expectations of the contracting parties will not be realized, at least not fully. In such cases, that conclusion will pertain as well to the expectations of the public, which observes the transaction from behind the “veil of ignorance” and has difficulty identifying with it because of its expectations regarding the way in which binding contractual promises are generated within the legal system.

47. BENN & PETERS, *supra* note 10, at 279; see also Dori Kimel, *Neutrality, Autonomy, and Freedom of Contract*, 21 OXFORD J. LEGAL STUD. 473, 482 (2001) (“Personal autonomy is an ideal of self-creation, of people exerting control over their destinies. An autonomous life consists in their pursuit of freely chosen activities, goals and relationships.”).

48. See, e.g., DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003); Kimel, *supra* note 47, at 489–93; Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 LEGAL THEORY 313, 325–28 (2002). For criticism of this position, see Bellia, *supra* note 18, and Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 369 (1997). In this context, doubts can be raised about the relevance of motive in the process of instilling the idea of trust. In the model proposed by Kohlberg, who deals with the moral development of the individual, some will fulfill the expecta-



trust cannot be instilled into contract law because contractual obligation is grounded in considerations of self-interest while trust is grounded in the interest of the other. That view is held by Eisenberg, for example, who assumes that there is difficulty in establishing the idea of trust in the context of contractual relations.<sup>49</sup> Blair and Stout too concur, noting that a relationship cannot be based both on trust and on a contract.<sup>50</sup>

In response, the institution of contract is indeed rooted in self-interest, but by its very essence, the institution of contract can be realized only if the reasonable expectations of the other are taken into account as well. It therefore contemplates, by its very essence, consideration of the other, even if only for utilitarian reasons. Yet this response is limited and partial. It is necessary to respond to the more general criticism—Can the law really promote the establishment of social norms?

With reference to contract law, this criticism is joined in the literature with the argument that sees the law of contract as an artificial alternative to ensure cooperation even when trust, as a cultural-social-psychological concept, is lacking or impaired.<sup>51</sup> This criticism is consistent, on the one hand, with the premise advanced in this Article, according to which contract law and trust share common features that are directed toward attaining universal goals of cooperation, assumption of risks, and fulfillment of reasonable expectations. On the other hand, however, this Article claims that contract law provides a powerful mechanism to create mutual influences between the two. Contract law, despite its legal, sanction-based character, has declaratory and motivational roles that cast light on individual commitment.

---

tions they generated because they fear the sanctions that will ensue if they do not; others may take account of broader social considerations; while still others may fulfill their promises out of pure, internal motives. According to this model, the moral development of human beings comprises several stages, not all of which are attained by all individuals: moral judgment based on the external, physical consequences of one's actions, moral judgment based on the social consequences of actions, and moral judgment based on universal moral and ethical principles. See H. ANDREW MICHENER & JOHN D. DELAMATER, *SOCIAL PSYCHOLOGY* 73 (3d ed. 1994).

49. Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contract, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 835 (1999); see also Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1274 (1999) [hereinafter Eisenberg, *Corporate Law and Social Norms*]. This argument is based on an article by Chapman. Bruce Chapman, *Trust, Economic Rationality, and the Corporate Fiduciary Obligation*, 43 U. TORONTO L.J. 547 (1993) (likewise denying the contractual model of society insofar as it is grounded on the idea of trust).

50. Blair & Stout, *supra* note 15, at 1780–89.

51. See, e.g., FUKUYAMA, *supra* note 12, at 26, 152; Eisenberg, *supra* note 5; Kimel, *supra* note 47, at 490; Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 556 (2001) (“[L]aw substitutes for rather than complements trust.”) (emphasis added).

In intimate social contexts, indeed, there are extralegal (though not necessarily sanction-free) cultural mechanisms that act as social glue and instill the idea of interpersonal trust. In commercial contexts, however, and in encounters between strangers, contract law serves exactly the same purpose.

There is no substantial difference between the fulfillment of reasonable expectations derived from the “natural” force of extralegal mechanisms, such as morality, reputation, or esteem, or from legal measures. In either case, varied mechanisms—some of which are coercive and all of which are situated within the bounds of a single culture and directed towards reinforcing interpersonal trust among players within the legal system—play a role. Moreover, even if contract law was based upon an external system that compels compliance, the question of a legal motivator would remain secondary. Additionally, the firm establishment of a socio-legal process that implants a culture of interpersonal trust will transform artificial incentive into authentic impetus. In sum, many, if not most, contracts are carried out, and most reasonable contractual expectations are fulfilled, without the law’s involvement (and the fear thereof)—a fact that provides additional proof of the social force of the contractual institution notwithstanding its legal origins.

According to Dori Kimel, for example, legal enforceability of contracts weakens the idea of trust as a factor in contractual relations.<sup>52</sup> Although he acknowledges that promise (a social institution) and contract (a legal institution) share the same instrumental value since both encourage and facilitate reliance and cooperation,<sup>53</sup> Kimel maintains that they differ in their intrinsic value. He argues that since the intrinsic value of promise lies in its ability to promote interpersonal trust through its natural fulfillment, the coerced fulfillment of promise diminishes the value of trust and impedes the development of interpersonal trust-based relationships.<sup>54</sup> Contracts, Kimel continues, generally lie outside the context of ongoing interpersonal relationships and lack any basis in preexisting relationships of trust between

---

52. Kimel, *supra* note 47, at 491 (“[E]nforceability casts a thick and all-encompassing veil over parties’ motives and attitudes towards each other . . .”). See Smith, *supra* note 48, at 369, for an argument similar in effect, explaining that the remedy of enforcement is not the primary remedy in Anglo-American law, primarily because of the limitations on the law’s capacity to create bonds of trust between the parties to a contract and on its ability to intervene in the life of the individual.

53. Kimel, *supra* note 47, at 489.

54. *Id.* at 491 (“[T]he enforceability of contracts significantly detracts from the practice’s ability to fulfill the kind of *intrinsic* function that promises fulfill: that of enhancing inter-personal relationships.”).

the parties. Accordingly, contract law provides a different sort of assurance that promises will be fulfilled. In other words, the intrinsic value of contract law lies precisely in its maintenance of the parties' personal detachment—the value of being able to undertake activities with others without thereby becoming committed to personal relationships.<sup>55</sup>

Kimel's position is at odds with the thesis that I advance here, for it regards contract law not only as failing to promote the idea of trust but also as actually working against it.<sup>56</sup> In response, I argue that motive for fulfilling promises, even in social contexts, is also not grounded exclusively in purely emotional considerations. Beyond that, it appears that contracts should be regarded as playing a more substantial role in forging interpersonal relationships,<sup>57</sup> even though they usually involve practical rather than emotional relationships, particularly when recognizing the mutual and symbiotic links between social and legal norms.<sup>58</sup>

As noted, I maintain that contract law plays a powerful and multifaceted role—both expressive and coercive—as a legal mechanism. These roles symbolize and instill a culture of interpersonal trust even, perhaps mainly, in places where culture is not prevalent. Kimel's ap-

55. Kimel's position has been criticized by Anthony Bellia. Bellia, *supra* note 18, at 40 ("The need for individuals to be able to trust that promises will be performed is central to justifying a law that renders certain promises enforceable. For a law of contract to enforce certain promises to meet this need is not necessarily to diminish the personal relationships of trust in which they are made. Rather, the making and performance of legally enforceable promises can assist individuals in building relationships of trust. The intrinsic value of enforceable promises thus lies not in their ability to facilitate detachment from personal relationships. The trustworthiness of promises is valuable to the pursuit of myriad goods, even among friends.").

56. Eisenberg raises a similar argument regarding the significance of enforcing gift contracts and their negative effect on personal relationships. Even though the claim may be more understandable in the socio-legal context of a gift, one legal approach—adopted in Israeli law—conditions the legal force of a gift commitment on its being in writing. In effect, the donor thereby declares that he is moving from the realm of pure emotional relationships to the realm of legal obligation. See Eisenberg, *supra* note 20, at 850.

57. Eisenberg, *supra* note 26; see also Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 Nw. U. L. Rev. 877, 894–95 (2000).

58. Eisenberg, *Corporate Law and Social Norms*, *supra* note 49, at 1269–70 ("While social norms differ from legal rules, there is often a symbiotic relationship between legal rules and social norms. On the one hand, legal rules are often based on social norms. On the other hand, many legal rules have an expressive effect—that is, in addition to their regulatory effects, legal rules send messages of various kinds. Adoption of a legal rule that is based on a social norm sends a message that the community regards the norm as especially important. This message increases both the likelihood that the norm will be internalized and the reputational penalties for violating the norm. Furthermore, legal rules add, to the force of a specific obligational norm, the force of the general norm of obedience to law, which is one of the most powerful norms of our society. Legal rules may also serve to clarify social norms by providing focal points for their meaning.") (footnote omitted).

proach is founded on his premise that the idea of trust is, in effect, the primary one and encompasses the institution of promise in its social context but not in its contractual one. This view seems to be unconvincing as a promise is a promise is a promise. Certainly, trust and expectation are, to a degree, circular concepts: Interpersonal trust influences the expectations that flow from a promise, but the systematic fulfillment of expectations—including those that flow from a contractual promise—influences the social, aggregate sense of expectation and interpersonal trust, especially given that contractual promises are usually made between strangers.

Accordingly, I find that the social institution of promise is grounded on the idea of trust as a primary concept that generally characterizes interpersonal relationships. Contracts, however, generally involve an encounter between people that usually have no previous social relationships, and therefore, they cannot rely on a premise of trust flowing from previous familiarity. Thus, the trust they invoke rests on legal foundations. Yet, in both cases, social and contractual promises constitute a set of relationships that require interpersonal trust and perpetuate the sense of trust through fulfillment.

Accordingly, promise draws, in its social sense, on interpersonal trust while promise, in its legal sense, draws on the existence of contract law. Even if the latter begins by constructing trust in its instrumental sense, its role in recurring social interactions and its application, accompanied by rhetoric of interpersonal trust, eventually cause it to affect trust in an intrinsic sense. As such, contract law can be compared to training wheels on a bicycle: training wheels provide confidence and stability until skills are developed whereas contract law provides confidence and stability until interpersonal trust is developed.

I also differ with the claim regarding the lack of affinity between the idea of trust and the institution of contract from another perspective that emphasizes not only the “legal” quality of the latter but also the “psychological” quality of the former. Trust is rooted, first and foremost, in the psychological plane, i.e., expectation that certain actions will occur. This follows from the definition of trust: reliance based upon A’s assessment (internal) that B will act in a particular manner (external).<sup>59</sup> And given that, A’s assessment is situated within the

---

59. Gambetta, *supra* note 15, at 217; see also Claire Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust* 6–14 (Minn. Legal Studies Research Paper No. 05-51, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=869423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869423).

emotional–psychological domain and is considered a vital element of a healthy personality.<sup>60</sup>

In its external sense, trust reflects social and economic interactions, for trust leads to cooperative efforts, assumption of risks, and achievement of better results by minimizing transactional and oversight costs.<sup>61</sup> By playing the “complementary” function of law,<sup>62</sup> contract law can integrate the same *external* cooperative goals achieved usually by the “social norm”<sup>63</sup> of trust with the *internal-psychological* component. As an area of law grounded principally in the idea of expectation and cooperative effort, contract law can act both expressively<sup>64</sup> and coercively (by imposing legal responsibility)<sup>65</sup> to generate an authentic social culture of trust. Law can nurture proper behavior not only by generating concern about liability and legal “penalties” but also by implanting cultural norms as discussed by the literature linking legal norms and extralegal mechanisms that determine proper and improper conduct.<sup>66</sup>

When all is said and done, a social culture of interpersonal trust need not grow out of a profound belief in either the high morality of people or their pure and natural motivation to fulfill the reasonable expectations held by others. As I have shown elsewhere, law plays an important role in instilling social values through its practical effect of imposing legal responsibility and not only through its expressive and pedagogic qualities.<sup>67</sup> That is especially so with contract law, which transforms the abstract idea of trust into behavioral norms meant to promote trust, and it does so through expressive and practical mechanisms designed to bear the promisor’s, the promisee’s, and the public’s reasonable expectations. We now turn to that subject.

60. ERIKSON, *supra* note 13.

61. See BENN & PETERS, *supra* note 10.

62. One approach in the literature suggests that law influences trust as an artificial alternative (the “substitute” function of law). See Ribstein, *supra* note 51.

63. Eisenberg, *Corporate Law and Social Norms*, *supra* note 49 (using the term “social norm of loyalty”).

64. Cf. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

65. For an approach that views contract law as a coercive means for promoting cooperation, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* 160 (2000).

66. Cf. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982). For additional references, briefly noted, on the relationship between legal norms and social norms, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997), and Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996). See also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

67. Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception that the Corporation Is a Nexus of Contract*, 2 HASTINGS BUS. L.J. 229, 239–45 (2006).

## III. TRIANGLE-OF-EXPECTATION MODEL

Examination of various doctrines in contract law suggests that interpersonal trust, in addition to its standing as an ideal, offers the best descriptive account and explanation for modern contract law, understood in the context of the following principles:

1. The various doctrines within contract law all draw on a broad social basis<sup>68</sup> that needs to be generalized.<sup>69</sup>
2. The will and expectation of the promisee, promisor, and *the public* are relevant factors as will be claimed in this part.
3. Contract law recognizes not only self-interest but also good faith, reasonable expectations, and social policy considerations as will be demonstrated in the next part.

In order to substantiate my claim, the point of departure is a reminder of the obvious fact that contracts involve at least two parties, along with a broad social purpose that affects the general public.<sup>70</sup> Accordingly, and as aforementioned, it is necessary from the outset to uproot the traditional emphasis given in contract on the promisee's intention and, even more, on his reliance, which is imprecise and unjustified. That traditional and mistaken approach is exemplified by Fuller and Purdue's classic article,<sup>71</sup> which played a key role in shifting the emphasis from the promisor's will to the promisee's reliance on the promise made to him and to the loss he incurs by reason of that reliance. This approach is reflected as well in Gilmore's provocative book on "death of contract" and in Atiyah's account of the rise and fall of freedom of contract; both works emphasize the promisee's reliance as a condition precedent to the legal validity of the contract.<sup>72</sup>

---

68. Cf. Eisenberg, *supra* note 5, at 1752 ("[D]octrinal propositions can be ultimately justified only by propositions of morality, policy, and experience."); *id.* at 1750 ("[T]he premise of substantive legal reasoning is that doctrinal propositions are not autonomous from social propositions."); *id.* at 1753 ("In contrast to the formal reasoning of classical contract law, modern contract law reasoning is substantive. That is, modern contract law seeks to justify doctrines on the basis of social propositions. Of course, doctrines have a role to play in substantive legal reasoning, but that is because of the social values that underlie doctrinal stability, not because doctrines are either self-evident or established by deduction."); *id.* at 1813 ("Where classical contract law employed reasoning that purported to be axiomatic and deductive, modern contract law employs reasoning that is explicitly grounded in social propositions.").

69. This ambition rests on the metaphor of Hercules, the "super-judge" depicted by Dworkin as dealing with the "theory" that suits and justifies most private-law arrangements. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975) ("[A theory] must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and . . . constitutional and statutory provisions as well.").

70. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

71. Fuller & Purdue, *supra* note 29.

72. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); see also P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). In later writings, Atiyah acknowledged that reliance, in itself, cannot justify imposing liability on the party relied on, and that it is necessary to

However, the various doctrines related to contract—offer and acceptance, mistake and deception, rules of invalid contracts, laws related to contractual content, and laws governing remedies for breach—are concerned not only with the will and expectation of the promisee but also with those of the other party (the promisor) and the public,<sup>73</sup> such that a three-dimensional perspective is much better suited to understanding the contractual interaction. As a mechanism for the exchange of promises, the contract is, by its nature, a mutual legal and social instrument, and it follows that its purpose goes far beyond the realization of a single expectation.

We can therefore refer to the new suggested model for contract law as one that follows the triangle of expectations:

1. Expectations of the *promisee* (also a promisor when promises are mutual);
2. Expectations of the *promisor* (also a promisee when promises are mutual);
3. Expectations of the law-abiding *public* that witnesses the promise with regards to ensuring the fulfillment of the reasonable expectations of the parties.

The test is simple, and it offers a consistent and accurate prediction of the legal order embodied in statutory provisions or court determinations of contractual disputes, which endeavor to instill a culture of trust. In contrast, an exclusive focus on the promisee's expectations generally fails to explain a statute's complexities or the spontaneous motivation for court decisions in contract cases. It may also detract from the reciprocal and social essence woven into the contract and from the mission of the contractual institution to advance one's egotistical interests together with the reasonable expectations of the other.<sup>74</sup>

---

refer to conventional social values to decide which expectations and which sorts of reliance warrant legal protection. It is the law, not the parties, that must determine which expectations are reasonable and entitled to protection. See P. S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 36 (5th ed. 1995); P. S. ATIYAH, PROMISES, MORALS, AND LAW 68 (1981). In these later works, one can see support, albeit indirect, for the thesis advanced in the present Article, maintaining that contract law deals as well—and perhaps primarily—with the protection of justified expectations, in contrast to subjective ones.

73. For examples in the various doctrines of Israeli law, see ELI BUKSPAN, THE SOCIAL TRANSFORMATION OF BUSINESS LAW (2007) [in Hebrew].

74. The triangle-of-expectations test, and especially the component concerned with the expectations of the public, emphasizes the interpersonal relationship, the need for cooperation, and the contract process going forward. In that way, the triangle of expectations introduces a dynamic dimension to the contractual process, making it into one that creates an ongoing social relationship. Cf. Eisenberg, *supra* note 5, at 1813–14 (“The paradigm at the center of classical contract law was a snapshot taken at the moment a bargain was made. In contrast, modern contract law recognizes that contract is a process, so that the picture we see at the time of contract formation, however important, is only one of a series of frames. Unless contract law responds to the whole moving picture, it cannot capture the reality of contract.”).

The contractual institution is based on an exchange of voluntary promises and the formation of reciprocal expectations. It follows that the laws of contract must attend, first and foremost, to the subjective expectations of the contracting parties. At the same time, by recognizing (sometimes different) expectations of two or more parties, contract law must be subjected as well to the additional objective and pragmatic test of public expectations.<sup>75</sup> This “aggregated” analysis—filtering the parties’ expectations with those of the public—maintains the social standing of the contractual institution and contributes to the coordination of various expectations involved in each contract. In addition, it reflects the hypothetical expectations of the “consumers of contract law,” the people whose lives are guided by the law, regarding the desired behavior of the parties to the contractual relation and the legitimacy of contractual obligations.<sup>76</sup>

In other words, the third element of the triangle of expectations centers on the public’s expectations and provides a harmonious and integrative account of how and why contract law is subjected to objective tests and to fundamental social principles that are assimilated into contractual interactions. Thus, it structures desirable interpersonal expectations within the legal system. No one denies that contract law, especially in its modern form, increasingly protects a party’s subjective expectations, but it also protects normative and objective expectations, which are accordingly termed a “reasonable expectation” or a “proper expectation.”<sup>77</sup> While the examination of the promisor’s and promisee’s expectations is a “private” and subjective matter, the pub-

---

75. See Mautner, *supra* note 22, at 558 (“The fact that contract-making serves as a functional equivalent of trust provides an additional explanation for the rise of the objective approach in contract law.”); see also POUND, *SOCIAL CONTROL*, *supra* note 30, at 226; cf. Mautner, *supra* note 22, at 553–59 (suggesting that the objective approach in contract law be explained in light of the sociological concept of trust).

76. The third component of the triangle-of-expectations model—the public expectations—matches Mitchell’s proposal to view the concept of trust from the perspective of a reasonable person. Mitchell, *supra* note 33, at 194. Thus, the triangle-of-expectation model might improve the ideal function of contract law in advancing trust even in Mitchell’s eyes. *Id.* at 205 (“In order for the law to be effective, the legal structure reinforcing trust must set forth principles which are both reasonable and ascertainable. Ideally, these principles will lead members of society to internalize the principles of trust such that they are instilled as a central part of each individual’s value system. In order for trust to reach this level, it must be based on principles which are attainable by the mass of its members.”). On the importance of the public’s identification with the legal norm, see Robert Cooter, *Expressive Law and Economics*, 27 *J. LEGAL STUD.* 585 (1998). See also H. L. A. HART, *THE CONCEPT OF LAW* 79–88 (1961).

77. Cf. CORBIN, *supra* note 35, § 1.1 (“The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform.”). For additional authorities supporting the view that the community, in determining the obliga-



lic's expectations are subjected to normative examinations—What can be reasonably expected of one's fellow? The answer to this question allows us to outline the bounds of "freedom of promise"<sup>78</sup> or "freedom of expectation." In taking account of the public's expectations, the law looks at contractual interaction as an "iterated game" and tests the extent to which the public, situated behind the "veil of ignorance," identifies with the parties' expectations.

The third element of the triangle of expectations also examines the public's expectations with respect to the functioning and standing of the contractual institution in establishing interpersonal trust within the legal system. As such, the public's expectations can sometimes be paramount, not only in cases where the expectations of the promisor and of the promisee differ but also in cases where the parties' expectations are identical yet inconsistent with the proper and reasonable expectations of the public.<sup>79</sup> In that way, the public understanding of contract law becomes evident, as does its central role, bearing on the most common interpersonal interactions. Taking account of the public's expectations makes it easier for the public to identify with the contractual institution and the expectations it protects, and it provides practical advantages of serving as a decisional rule that may apply in the frequent cases in which the parties' subjective expectations are in conflict. That standard encourages the players in the legal system to take account of others and to carefully consider how they present their understanding of the contract and its surrounding facts and circumstances, and how their behavior is received by the public. In doing so, they strengthen the standing of interpersonal trust as a social idea underlying the contractual relationship.

As a practical matter, consideration of the triangle of expectations is already implied by the definition of the term "promise," which forms the basis of contract in American jurisprudence. Section 1 of the *Restatement of Contracts* defines contract as follows: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."<sup>80</sup> Section 2(1) of the *Restatement* defines promise as fol-

---

tions to be enforced, takes account of its goals and values and does not simply honor, in a neutral manner, the undertakings of the contracting parties, see FRIED, *supra* note 26, at 3.

78. A term borrowed from Fried. FRIED, *supra* note 26, at 35.

79. See FARNSWORTH, *supra* note 2, § 7.9; cf. Steyn, *supra* note 37, at 434 ("The law does not protect unreasonable expectations. It protects only expectations which satisfy an objective criterion of reasonableness. . . . [R]easonableness postulates community values. It refers not to the standards of Lord Eldon's day. It is concerned with contemporary standards not of moral philosophers but of ordinary right thinking people.").

80. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

lows: "A promise is a *manifestation of intention* to act or refrain from acting in a specified way, *so made as to justify a promisee in understanding that a commitment has been made.*"<sup>81</sup>

According to Section 2(1), a promise is *manifestation of intention* to act or refrain from acting in a certain way (expressing the expectations of the promisor), *so made as to justify a promisee in understanding that a commitment has been made* (expressing both the expectations of the promisee and of the public observing the interaction).<sup>82</sup> The phrase "so made as to justify" and the requirement for a "manifestation of intention" suggest that in the *Restatement* the test used in finding liability applies an external and objective standard for interpreting behavior rather than a standard focused on intention and internal expectation. The *Restatement*, thus, looks to the way in which the promise is understood by the public—and not necessarily at the subjective understanding of the promisor or the promisee—as the standard for determining whether the expectation under consideration should be considered a contractual promise.<sup>83</sup>

A more extensive definition of a promise, one that further sharpens the components of the triangle-of-expectations test, is provided by Corbin:

A promise is an *expression of commitment* to act in a specified way, or to bring about a specified result in the future, or to take responsibility that the result has occurred or will occur, *communicated in such a way that the addressee of the expression may justly expect performance and may reasonably rely thereon.*<sup>84</sup>

Like the definition in the second *Restatement*, and as implied by the terms "justly expect" and "reasonably rely," this definition also affords decisional standing to the expectations of the public, which observes—metaphorically, whether by passively witnessing contractual interactions or by learning of them through court opinions—the "commitment" and assesses whether the promisee's expectations and reliance on it are just and reasonable. Moreover, the use of the term "commitment" and the requirement that the promisor express and communicate it emphasize his own expectations, not only the expectations and reliance of the promisee.<sup>85</sup>

---

81. *Id.* § 2 (emphasis added).

82. *Id.*

83. *Cf. id.* § 2 cmt. b.

84. CORBIN, *supra* note 35, § 1.13 (emphasis added).

85. The need to examine the expectations of the promisor as a central component of the contractual promise is implied as well by Corbin. *Id.* ("If a person has reason to know that his or her words or other conduct may reasonably cause another to believe that a promise is being

The triangle of expectations is taken into account in another key provision—perhaps, indeed, the pivotal provision—of the *Restatement*, that is, section 90(1):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>86</sup>

The attitude toward the promisor's expectations is reflected in the passage, "which the promisor should reasonably expect;" the promisee's expectations are reflected in the passage, "which does induce such action or forbearance;" and the public's expectations can be revealed in the passage, "if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." Also pertinent in that regard is the word "reasonably" with respect to the promisor, as it appears at the beginning of the section. According to section 90, only the confluence of these three components generates a contractual event, grounded in consideration of the expectations and reliance of the three agents involved in the contractual interaction. The confluence of the three components also highlights the fact that, in this section as well, it is the promise, as the source of reliance, that is primary.<sup>87</sup>

#### IV. PUBLIC POLICY, THE PRINCIPLE OF GOOD FAITH, AND THE OBJECTIVE THEORY OF CONTRACTUAL AGREEMENT

##### A. *Public Policy*

The principle of freedom of contract rests on the conventional premise that enforcement of the parties' agreement is consistent with the

made and such belief actually results, a promise has been made even though the speaker or writer of the words does not intend to convey such a meaning.").

86. RESTATEMENT (SECOND) OF CONTRACTS § 90(1). Section 90 has been described as a "most notable and influential rule," FARNSWORTH, *supra* note 2, § 2.19 (emphasis added), and as "perhaps the most radical and expansive development of this century in the law of promissory liability." See Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981).

87. In this context, it is worth noting the argument of Yorio and Thel, who remark that this section is concerned—as is all of contract law—with protecting promises and not with the tort-related idea of reliance. Yorio & Thel, *supra* note 17, at 167 ("Like the rest of contract law, Section 90 is about promises. . . . Section 90 has greatly expanded the scope of civil liability in twentieth-century American law. Contrary to received wisdom, that expansion has occurred in the contractual context of promise rather than the tort-related context of reliance. Far from evidencing the death of contract, the application of Section 90 by the courts demonstrates that promise is more vital than ever."); *id.* at 130 ("That courts enforce promises rather than compensate reliance under Section 90 is powerful evidence that the basis of the section in the courts is promise.").

public interest. That said, a court can determine that the parties' autonomy must yield to another interest and thus invalidate a contract in whole or in part.<sup>88</sup> Public policy is determined by the application of principles embodied in precedent developed over the years—principles that change over time as the public interest evolves. Such changes are evident with respect to moral values, such as policies supporting family lifestyles or those against gambling; they may also be evident with respect to economic views or other matters.<sup>89</sup>

The public policy principle, emanating from its very name that emphasizes the public rather than the contractual parties, poses significant theoretical difficulties for the will theory as a basis for contract law, perhaps more than any other contractual doctrine. But the approach suggested herein, interpersonal trust, promoted by the triangle of expectations, provides a consistent explanation for the integrative and harmonizing role of this principle in the framework of contract law.

An examination of this principle suggests that public policy has been used to justify the triangle-of-expectations test, especially in light of its third component pertaining to the public's expectations. This component aims to enlist contract law as a mechanism for structuring ideal expectations.

The public policy principle ensures the invalidity of a contract that is unlawful, immoral, or otherwise contrary to public policy. That result establishes the legal system's limits on legitimate promises and expectations, as well as the place of the contractual institution in the overall social tapestry. This, in turn, means that voiding contract provisions is not necessarily a departure from contract law. On the contrary, because contractual interaction draws on consideration of the other's expectations, considering the basic principles of the system as part of the parties' expectations is not foreign. In this way, interpersonal trust and trust in the contractual institution are strengthened more than they would be under an approach that zealously emphasizes the place of promises within the legal system. From a different perspective, this principle promotes the establishment of a human and

---

88. FARNSWORTH, *supra* note 2, § 5.1. For a description of cases in which the public policy principle was applied as well as for an economic analysis of this principle, see Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445 (2006).

89. FARNSWORTH, *supra* note 2, § 5.2. In Israeli law, it has been said that it is not for naught that the public policy provision of the Israeli Law of Contracts, as a common-law system, has been described as "a primary legal instrumentality—together with other principles, such as good faith—as a means by which overall harmony within the legal system is ensured. It is the main instrument that reflects 'the basis of the social order.'" CA 294/91 Jerusalem Cmty. Burial Soc'y v. Kestenbaum 46(2) PD 464, ¶ 22 [1992] (Isr.) (Barak, J.).

social culture that protects expectation and trust in the broad sense by making transparent the expectations of the contractual player situated behind the veil of ignorance.

In that player's view, promises whose formation, content, or goals run counter to law, morality, or public policy endanger the very underpinnings of society and the institution of the contract that draws on them. It follows that the law of contract itself justly sets the limits of freedom to contract, as well as the limits of proper expectations within the legal system.<sup>90</sup>

The principle of public policy is one of the key concepts that affects the assimilation of interpersonal trust into contract law and the promotion of the fulfillment of individual expectations alongside those of the other and of the public. As noted, the principle is primarily concerned with the realization of ideal expectations, not only real ones. This doctrine "breaks" the circularity that seems to exist between trust and expectation. Indeed, fulfilling an improper expectation has the potential to undermine the idea of interpersonal trust and of trust in the institution of contract. It is, therefore, easy to justify the place of public policy within the law of contract and its call for examining the propriety of expectations rather than enforcing every subjective expectation.<sup>91</sup> Doing so promotes expectations and trust not only within the contractual context but also within the social system, including its constituents and the interpersonal relationships that exist within it.

Notwithstanding the preferred place of the public's expectations within the framework of the principle of public policy, the laws governing invalid contracts do not neglect the other sides of the triangle of expectations—those that pertain to the subjective expectations of the parties to the invalid contract. The court need not invalidate and decline to enforce an entire contract because of provisions that run counter to public policy. It is free to decide that the contract must be performed by only one of the parties to it or that only part of the contract will be enforced, taking into account the reasonable expectations of the parties, the public interest that might be impaired by enforcement of the contract in full, and the reliance of the parties.<sup>92</sup>

---

90. See RESTATEMENT (SECOND) OF CONTRACTS § 178(2)(a) ("In weighing the interest in the enforcement of a term, account is taken of the parties' *justified* expectations . . .") (emphasis added).

91. This is similar to the goals of the good-faith provisions of the Israeli Law of Contracts as construed in *Gans v. British & Colonial Co.* CA 2643/97 *Gans v. British & Colonial Co.* 57(2) PD 385, ¶ 15 [2003] (Isr.) (Barak, J.) ("[B]ehavior is in good faith if it is consistent with the 'proper moral standards of [Israeli] society, as the Court understands them from time to time.'") (citation omitted).

92. FARNSWORTH, *supra* note 2, § 5.1.

While the public policy principle creates an objective–normative examination of the public interest, it also considers the parties’ authentic expectations as implied in section 78 of the *Restatement of Contracts*.<sup>93</sup> In other words, the public policy principle forms a synthesis that takes into account simultaneously the full array of expectations involved in the contractual interaction—those of the parties and those of the public. In that way, the two-fold—or, as a practical matter, three-fold—purpose of the public policy principle is fulfilled. The rules pertaining to invalid contracts thereby illustrate the way in which the triangle of expectations is taken into account, even though they afford precedence to the public’s expectations in view of their primary role in inculcating just and reasonable expectations.

### B. *Principle of Good Faith*

The central claim of this Article—that contract law strives to concretize the idea of interpersonal trust by means of the triangle of expectations created by each contractual promise—is clearly implicit vis-à-vis the principle of good faith. The principle of good faith, provided for in section 205 of the *Restatement of Contracts*,<sup>94</sup> is an important focus of contract law.<sup>95</sup> Farnsworth had good reason for noting that “[t]he concept of *good faith* has, in a relatively few decades, become one of the peculiarly American cornerstones of our common law of contracts” and has accomplished a “reformulation of traditional

---

93. RESTATEMENT (SECOND) OF CONTRACTS § 178.

94. *Id.* § 205 & cmt. a, d (“*Every contract* imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”) (emphasis added).

95. The principle is well-known in other legal systems as well. See GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1995); GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., 2000); R. HARRISON, GOOD FAITH IN SALES (1997). For a comprehensive discussion of the case for and against this principle, see ROGER BROWNSWORD, CONTRACT LAW: THEMES FOR THE TWENTY-FIRST CENTURY 111–34 (2d ed. 2006). In Israel, for example, the application is prescribed by Articles 12 and 39 of the Israeli Law of Contracts and, more recently, by Article 2 of the Draft Bill Civil Law Codification. Draft Bill Civil Law Codification, 2011, HH 712 (Isr.); in its first chapter of the Draft Bill, which examines basic principles, it states: “In exercising a right, in taking legal action, and in fulfilling a duty, one must act in good faith.” *Id.* On the rationale for these provisions, see CA 207/79 Raviv Moshe Partners Ltd. v. Beit Yulis Ltd. 37(1) PD 533, 543–44 [1982] (Isr.) (“This directive [of section 12 of the Law of Contracts] imposes special ‘relationships of trust’ on those taking part in contractual negotiation and contractual trust, whose source is in § 39 of the Law of Contracts, is thereby extended beyond the pre-contractual stage. . . . This duty to conduct negotiations in the usual course and with good faith means that the negotiators are bound to act toward one another honestly and fairly. They are no longer ‘strangers’ to each other; rather, the law creates an affinity between them that generates expectations and imposes a duty of consideration.”).

law.”<sup>96</sup> This is so much the case that it is no longer possible to escape the conclusion that the idea of trust and the triangle of expectations pervade the contractual institution, especially while taking into account that the good faith principle “[s]ets an objective standard, vis., the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.”<sup>97</sup>

### 1. During Negotiation

Negotiation invokes a willful social interaction (and, impliedly, a consensual one) in the formation of an agreed-upon arrangement. Because of these characteristics, the negotiation stage bears on the parties’ expectations, on the character of their future interactions if the negotiations bear fruit and a contract is formed, and on similar interactions in future negotiations. In other words, already at the negotiation stage—the stage at which the parties are invited to extend interpersonal trust to one another—the crystallization and shaping of the parties’ wills, consciousnesses, and expectations have substantial significance. The principle of good faith in pre-contractual negotiations is not directly dealt with by section 205 of the *Restatement of Contracts* and section 1-203 of the Uniform Commercial Code. Still, bad faith in negotiation, although not within the scope of this section, may be subject to sanctions.<sup>98</sup> Some comparative examples from Israel illustrate the effort made by contract law to instill the idea of interpersonal trust both on the expressive plane and with respect to its sanction, i.e., remedies for breach.

Article 12 of the Israeli Law of Contract provides as follows:

- (a) In negotiating a contract, a person will act in customary manner and in good faith.
- (b) A party who does not act in customary manner and in good faith will be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or of the conclusion of the contract.<sup>99</sup>

---

96. FARNSWORTH, *supra* note 2, § 7.17b. For a detailed description of the principle of good faith in the American law, see E. Allan Farnsworth, *Good Faith in Contract Performance*, in *GOOD FAITH AND FAULT IN CONTRACT LAW*, *supra* note 95, at 153.

97. ROGER BROWNSWORD, SMITH & THOMAS: A CASEBOOK ON CONTRACT 54 (12th rev. ed. 2009). Viewing the principle from a different angle, “duties not explicitly assumed by the parties may be imposed if required by good faith. . . . [I]t seems as if contractual relations depend not on the will of the parties but on externally imposed substantive moral judgments of what the relations between the parties should be.” FRIED, *supra* note 26, at 75; see also BROWNSWORD, *supra* note 95, at 129 (“[The good-faith principle] can contribute to a culture of trust and cooperation . . .”).

98. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c.

99. Article 12 of Contract Law, 5733–1973, 694 LSI 118 (1973) (Isr.).

A review of the court decisions concerning Article 12 shows that the provision is grounded less in will and intention and more in interpersonal trust and its derivatives (such as the duty to disclose and the requirement of cooperation), which color the expectations of those involved in the contractual interaction. In *Fenider*, the court noted: “Article 12 . . . is founded in the relationship of trust, which must prevail among the parties conducting negotiations in anticipation of executing a contract.”<sup>100</sup> In another decision, the former President of the High Court, Judge Shamgar, stated:

It appears that there is a close connection between the concept of trust and the legal concept of good faith. Both concepts are based on the same underlying idea. The sociological concept of trust has, at its foundation, the ability of each individual to rely on the fulfillment of his reasonable expectation that another individual or an institution will act in accord with the obligations suggested by their situation or their role. The legal concept of good faith has, at its foundation, the ability of each individual to rely on the fulfillment of his reasonable expectation regarding his legal relationship to another.<sup>101</sup>

As a practical matter, trust—dealt with by contract law in general and the principle of good faith in particular—implies consideration of the triangle of expectations. “Good faith tries to ensure that this concern is treated in a fair manner, taking account of the just expectations of the other party and ensuring the parties’ shared endeavor.”<sup>102</sup>

Even though the principle of good faith is a normative and objective principle formulated as an open-ended standard, its application involves a “normative concretization” that examines each transaction and its individual circumstances, probing the dynamic expectations of the participants and seeking their attainment. That normative concretization grows out of the pre-contractual triangle-of-expectations test, and the idea of trust is thereby realized as a social value promoted by contract law. Courts generally attempt to advance this goal by treating the duty to disclose as part of the duty to act in good faith.

---

100. CA 230/80 *Fenider Inv., Dev. & Constr. Co. v. Castro* 35(2) PD 713, 724 [1981] (Isr.). For additional references on the subject, see *id.* at 725 and FH 7/81 *Fenider Inv., Dev. & Constr. Co. v. Castro* 37(4) PD 673, 690, 703 [1983] (Isr.).

101. CA 3912/90 *Eximin SA v. Itel Style Ferarri Textiles & Shoes Ltd.* 47(4) PD 64, 83 [1993] (Isr.).

102. FH 22/82 *Beit Yules v. Raviv* 43(1) PD 441, 484 [1989] (Isr.); CA 6370/00 *Kal Binyan v. A.R.M. Rananah Bldg. & Leasing, Ltd.* 56(3) PD 289, 298 [2002] (Isr.) (“What this means is that those engaged in negotiations in contemplation of executing a contract, and the parties to the contractual relationship after the contract has been executed, are to act fairly and in a manner that takes account of the reasonable expectations of the other party.”).



The duty to disclose is the key duty that courts read into the principle of good faith, for it bears directly on the idea of interpersonal trust and the sincerity, mutuality, and expectation involved in the contractual interaction. Legal rhetoric justifies interposing the duty to disclose, with all its implications, into the sense of fairness, the atmosphere of trust between the parties to the negotiation, the fulfillment of their reasonable expectations, and the manner in which they understand the pros and cons of their encounter and the range of possibilities open to them.<sup>103</sup>

The duty to disclose, which makes it possible to protect the expectations of parties involved in negotiations, receives an even more prominent status due to the imbalance of power between the parties. In such situations, the Israeli courts pay special attention to the objective and normative aspects of the public's expectations, striving to prevent more powerful contracting parties that are very common these days—most prominently, banks and insurance companies—from taking advantage of the trust placed in them (or that ought to be placed in them) by the parties that typically contract with them, who generally are economically weaker and have less access to information. Thus, greater social responsibility is cast on corporations, especially financial corporations:

In Israel, the starting point with respect to the duty to disclose is different, and the general approach is that the duty to disclose routinely attaches to those about to enter into a contract, even in the absence of special relationships of trust; rather, it arises by force of the trust that is formed between the negotiating parties. . . . The bank is bound by a duty to disclose substantive matters to its customers by force of the duties of trust imposed on it, which go beyond the duties borne by parties to an ordinary contract.<sup>104</sup>

This duty of faithfulness, imposed on the bank as a commercial corporation, is warranted by the public's real and ideal expectations:

The set of relationships between a customer . . . and a bank is a special set of relationships, flowing from the broader public's trust

---

103. CA 230/80 *Fenider Inv., Dev. & Constr. Co. v. Castro* 35(2) PD 713, 724 [1981] (Isr.) (“The duty to negotiate in the customary manner and in good faith is a general duty from which there naturally follow concrete duties that depend on the particular circumstances of the case. . . . One of the duties generally imposed is the duty to disclose information about those matters concerning which the receipt of information is likely to be important in deciding whether or not to enter into a contractual relationship. . . . In that regard, a person involved in negotiations for the sale of property bears the duty to disclose to the other party that the property does not yet belong to the seller, or that someone else has certain rights to it. That information is important to the other party, for it bears directly on his deliberations over whether and on what conditions to enter into the contract.”); *see also* FH 7/81 *Fenider Inv., Dev. & Constr. Co. v. Castro* 37(4) PD 673, 690, 703 [1983] (Isr.).

104. CA 5893/91 *Tefahot Isr. Mortg. Bank Ltd. v. Tsavah* 48(2) PD 573, 596 [1994] (Isr.).

in that institution. The bank and its officers are regarded by the public as endowed with professional authority, in part because of their possession of information that is inaccessible to the general public; moreover, the bank, as a financial institution, has unique capabilities and can employ technical methods that are beyond the reach of individuals. All of this allows the bank to avoid damage to its customers, while the potential injured party lacks any such capacity. Because the individual in many cases has a sense of greater trust in the bank, believing in its capabilities and technical methods and seeing it as a quasi-public institution, he sometimes is inclined not to take precautions and not to anticipate possible harm even if he has the means to do so. . . . By virtue of these special relationships, the bank has special duties, duties not imposed on parties to an ordinary contract.<sup>105</sup>

## 2. Vis-à-Vis Contractual Performance and the Triangle of Expectations

The principle of good faith, formulated as a positive duty,<sup>106</sup> clearly rests on the basis of consideration of the three players in the contractual process—the promisor, the promisee, and the public:

Good faith presumes that one possessed of a right is concerned about protecting the right. At the same time, good faith seeks to avoid exercising the right in a way that disregards the existence of the other party and of society's interests. . . . The principle of good faith means that in protecting one's self-interest, one must act fairly and must take account of the justly held expectations of the other party and its reasonable acts of reliance. It does not require the parties to be angels toward one another. It is meant to prevent a situation of *homo homini lupus*. It seeks to introduce a normative framework whereby *homo homini-homo*.<sup>107</sup>

The affinity between the principle of good faith and the idea of trust is expressed not only in the rhetoric accompanying its application, which adopts a “mediating” and integrative philosophy, but also in how it is applied, touching on the fulfillment of the parties’ real and justified expectations, especially by insisting on the duties to disclose and to cooperate. This rhetoric and application provide an example of the simultaneously “coercive” and “expressive” roles of the law in instilling a culture of trust in interpersonal relationships.<sup>108</sup> However, especially in the context of the principle of good faith, law also has a

105. *Id.* at 585. To similar effect, with respect to an insurance company, see CA 4819/92 *Eliyahu v. Yeshar* 49(2) PD 749, 765 [1995] (Isr.).

106. FARNSWORTH, *supra* note 2, § 7.17 (“[T]he duty may not only proscribe undesirable conduct, but may require affirmative action as well.”).

107. Compare CA 2643/97 *Gans v. British & Colonial Co.* 57(2) PD 385, 400–01 [2003] (Isr.), with RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

108. See HART, *supra* note 76, at 79–88; Cooter, *supra* note 76; McAdams, *supra* note 66.

significant expressive, educational, and “hortatory” role. Court decisions dealing with the principle of good faith in contractual performance often include incisive declarations regarding the inherent relations of trust that are formed in the penumbra of contractual relations. For example:

The duty to fulfill a contractual obligation in good faith and in the customary manner means that the parties to the contractual relationship are bound to act justly and fairly to each other, in accord with customary practice among upright contracting parties. To be sure, the parties need not behave as angels toward each other, but neither may they act as wolves. . . . All parties to a contract bear the duty to cooperate with one another and to act in a way that takes account of their shared interest in the contract. The contracting parties must act to realize their shared intention, faithfully and with dedication to the goal they envisioned and with consistency in realizing their reasonable shared expectations. Indeed, had the terms “trust,” “faith” and “faithfulness” not been used, it would have been possible to describe the set of relationships formed between the contracting parties . . . as relationships of faithfulness, such that a contracting party has the duty to carry out the contract faithfully, by realizing the trust placed in him by the other party . . . .<sup>109</sup>

### C. *Objective Theory of Contractual Assent*

The formation of a contract depends on the existence of an offer and an acceptance as indications for mutual assent.<sup>110</sup> More precisely,

---

109. H CJ 59/80 Beer-Sheba Pub. Transp. Servs. Ltd. v. Nat'l Labour Court 53(1) PD 828, 834 [1980] (Isr.). In Chapter 6 of his book on contracts as a promise, discussing the principle of good faith, Fried writes that the doctrine of good faith is regarded as a particular challenge to the idea of contract as promise, inasmuch as the promise embodied in the contract often fails to define sufficiently the relationships between the parties. FRIED, *supra* note 26, at 74 (“The most direct challenge to the conception of contract law as a coherent expression of the principle of autonomy is thought to come from the doctrines of good faith, unconscionability, and duress. These doctrines explicitly authorize courts in the name of fairness to revise contractual arrangements or to overturn them altogether. Good faith is a way of dealing with a contractual party: honestly, decently. . . . Duress is a vice inhering in the pressure used to procure the agreement, while unconscionability refers to a vice in the agreement itself.”) (footnote omitted). In the view set forth in this Article, however, the principle of good faith is entirely consistent with contract law, drawing on its general drive to fulfill the triangle of expectations of the players involved in the contract. Compare Fried’s treatment of the contrast between Belmont and Venice in Shakespeare’s *Merchant of Venice*. The two locales represent divergent attitudes to the law of contract; Belmont is a regime of love and familial relationships while Venice is a place of commerce that insists on the literal performance of agreements. Fried believes that it is possible to integrate the realms. *Id.* at 90–91 (“Nor in commercial relations is there any imperative that contractual partners refuse to share. In fact there are many motives for such sharing in most commercial contexts: from the desire to maintain goodwill so that relations will continue into the future, to a genuinely altruistic concern for one’s fellow man, customer, or business partner. Nothing in the liberal concept of contract, nothing in the liberal concept of humanity and law makes such altruism improbable or meaningless.”).

110. RESTATEMENT (SECOND) OF CONTRACTS § 22.

the typical offer is, in effect, a proposed promise or a promise conditioned on a reciprocal promise.<sup>111</sup> The requirement for congruence between the elements of the offer and those of the acceptance ensures the shared interpersonal relationship that develops between the parties, as well as the mutual, social, and voluntary character of the contractual interaction.<sup>112</sup> Only the congruence of the parties' expectations makes the contractual expectation legally valid and contractually binding on both parties.

These requirements<sup>113</sup> test not only the existence of subjective expectations held by the parties themselves but also the expectations of the public who relies on the institution of contract. In that way, the triangle-of-expectations test is carried out in full: an *offeror* must outwardly present the offeree with a proposal reflecting her intent to incur an obligation in a concrete manner. In that way, contract law ensures that the *offeror* expected (and not merely intended) for her proposal to lead to the conclusion of a contract. The requirement of acceptance, for its part, ensures not only the conditions for realizing the *offeror's* expectation that a contract be formed on the terms she expected but also the realization of the *offeree's* expectation that she, too, be bound by the contract. It follows that the requirement of congruence between acceptance and offer and their public nature ensures that the mutual expectations are fully developed and known to all parties that rely on the contractual institution.

These requirements focus on the integration of the shared expectations of the parties to the contractual process and confer with the public's expectations of the manner in which contracts are formed. The public's expectations, however, acquire a more concrete and independent dimension when there is no subjective meeting of expectations; in that case, the public's expectations require testing the formation of a contract by means of objective, external tests of reasonableness.<sup>114</sup>

---

111. Cf. FARNSWORTH, *supra* note 2, § 1.1.

112. See FRIED, *supra* note 26, at 45 ("Promises—and therefore contracts—are fundamentally relational; one person must make the promise to another, and the second person must accept it."); see also Macneil, *supra* note 26, at 901; cf. Eisenberg, *supra* note 26, at 816–17.

113. See RESTATEMENT (SECOND) OF CONTRACTS § 200 cmt. b ("As is made clear in Chapter 3, particularly §§ 17–20, the intention of a party that is relevant to formation of a contract is the intention manifested by him rather than any different undisclosed intention."); cf. *id.* §§ 17–20 (stating that the intention of the parties that is relevant to the formation of a contract is the external, manifest intention, not the inner one).

114. On the origin of the term "meeting of the minds," see E. Allan Farnsworth, "Meaning" in *the Law of Contracts*, 76 YALE L.J. 939, 943–44 (1967). The classic statement of the objective view is that of Learned Hand in *Hotchkiss*. *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

The elements of offer and acceptance apparently ensure that both the offeror and the offeree expect to become contractually bound and that both sides consider their obligations in this regard. Yet because the contract is a basic social “product” on which society and commerce depend, the relevant sections have been interpreted as directed at the subjective expectations of the parties and the expectations of the public related to the process of contract formation. In that way, the “private” contract is subjected, from the outset, to the social–public aims of contract law. The requirement for external manifestation of the offer and acceptance is meant to ensure that there is an indication of the subjective intentions and expectations of the parties. But given the decisive weight assigned in case law to this external manifestation of intent (even in cases where the subjective expectation of one of the parties differs), there appears to be no escaping the conclusion that the laws governing contractual formation have their center of gravity located more in public and normative rationales than in private, subjective ones.<sup>115</sup>

Hence, the objective–extrinsic approach to examining contract formation has become the dominant one.<sup>116</sup> Adoption of this standard implies a legal policy that directs legal players to take account of the other and the manner in which their postures are understood by the public; it follows that the idea of interpersonal trust is the social idea on which the formation of a contract is based. Therefore, the triangle-of-expectations test is more useful than the will theory of contract in justifying and explaining the routine use of an objective standard for examining the formation of a contract, for by the nature of things, the will theory is less accepting of the objective–extrinsic standard than is the idea of trust.<sup>117</sup>

---

115. FARNSWORTH, *supra* note 2, § 7.9 (“Since a contract involves two parties, however, the search for meaning begins with the meaning attached by both parties to the contract language; each needs the other’s assent. . . . The reader should look with some skepticism on the judicial commonplace that in interpreting a contract the court merely carries out ‘the intentions of the parties.’ The court does indeed carry out their intention in those relatively rare cases in which the parties attached the same meaning to the language in question. But if the parties attached different meanings to that language, the court’s task is the more complex one of applying a standard of reasonableness to determine which party’s intention is to be carried out at the expense of the other’s. And if the parties attached no meaning to that language, its task is to find by a standard of reasonableness a meaning that does not accord with any intention at all.”) (footnote omitted).

116. *Id.* § 3.9 (“The objective theory is today so widely and unquestioningly accepted as protecting the reasonable expectations of the parties . . .”).

117. This claim can be nicely illustrated by an Israeli contract-law case. CA 1548/96 Bank Iggud Le-Yisrael v. Lupo 54(2) PD 559 [2000] (Isr.) (discussing reliance as part of the objective tests regarding contract formation). In this case, the mortgaged property consisted of both a residential building and the land on which it was built—both jointly owned by the debtor and his

## V. CONCLUSION

This Article argues that trust serves as the foundation for the laws of contract. I ground my argument in key contract-law doctrines related to good faith, public policy, and contractual assent, all of which challenge the classical will theory and parallel the intuitive respect society has for a person who keeps her promises. By identifying contractual expectation with the idea of trust and by considering the *actual* expectations of the contracting parties, as well as the *ideal* expectations of the public, this Article develops the triangle-of-expectations model as the most coherent account of modern contract law today. This model also contributes to stability, certainty, and the ability of one person to rely on another and on the contractual institution. Moreover, it also explains the complex economic, social, and communal interactions modern contract law is asked to face, many of which are no longer based on the freedom of contractual choice in its classical sense.

---

wife (respondents). The Israeli Supreme Court, truer to the triangle-of-expectations test, attributed contractual validity to her signature which was made blindly, finding that in so signing she had placed full trust in her husband. In its ruling, the court inculcated the idea of interpersonal trust, in that it fulfilled the expectations of the bank (the promisee) regarding the liability of the two respondents and of the public. The high court's ruling corresponds to the reasonable expectations of the public and to its ideal expectations regarding the standing and formation of contractual liability.

