# MAPPING THE DIVERSITY OF THOUGHT—AN ATTITUDE THEORY OF CONTRACT LAW

ORI KATZ*

ABSTRACT

*A vast body of literature has been devoted to explaining the values and policies underpinning existing contract law doctrines and the principles to which regulators and courts should adhere when shaping contract law policy. However, a descriptive account of how people actually think about contract law, and the classification of the dilemmas that divide laypersons and jurists as to how to shape contract law, have drawn much less attention. This Article is the first attempt to develop an empirically-based attitude theory of contract law. The theory aims to identify the normative conflicts that explain why people are divided on how contractual disputes should be resolved. The Article maps the ideological diversity surrounding contract law using four key conflicts: (1) individualism versus solidarity; (2) formalism versus anti-formalism; (3) egalitarianism versus non-egalitarianism; and (4) instrumental/economic versus intrinsic perspectives.*

*By employing a series of exploratory and confirmatory studies involving over 2000 participants—MTurk workers, a representative U.S. sample, and Israeli law students—I develop a Contractual Attitude Scale. This multidimensional scale measures contractual attitudes toward the first three of the four aforementioned conflicts. Attitudes concerning these conflicts were*

* Post-Doctoral Fellow at the Hebrew University of Jerusalem. I would like to thank Leon Anijdar, Netta Barak-Koren, Meirav Furth, Ayelet Gordon, Israel Klein, Greg Klass, Dan Klerman, Ofer Malcai, Yahli Shershevski, Doron Teichman and Effi Zemach for valuable comments on previous drafts. Special thanks are due to Yaakov Schul and Eyal Zamir, for their invaluable suggestions and discussions. This study was supported by the Kaye Einstein Scholarship, and by the Aharon Barak Center for Interdisciplinary Legal Research.

*generally found to be discrete, consistent, and varied across participants. In contrast, attitudes toward Instrumentalism were not consistent in participants' responses. Importantly, this scale captures attitudinal variance that cannot be accounted for through self-reported political worldviews. Analyzing participants' characteristics demonstrated, in part, that Israeli law students are less formalistic and less egalitarian than members of the U.S. sample, and that people with academic backgrounds tend to be more individualistic than those without.*

## I. INTRODUCTION

What determines outcomes of contractual disputes that are adjudicated in court and guide policymaking in contractual matters? Legal policy and decision-making are affected by myriad factors, including legal doctrines and institutions, psychological biases, prejudices, beliefs about social and natural reality, and, notably, prevailing normative attitudes. Contract law often leaves an interpretative ambiguity that allows, or even requires, judges to exercise their own discretion when implementing the law in a given case. Thus, judges' normative attitudes with regard to a fair and just ruling play a significant role in shaping their legal decisions. Moreover, legislation itself is—at least in part—affected by policymakers' normative viewpoint. Given the importance of these attitudes, it is surprising that a descriptive account of how people think about contract law has drawn little attention, and no attempt has been made to date to systematically classify the normative dilemmas that divide laypersons and jurists alike with regard to contract law.

This is not to say that normative considerations regarding contract law have not been discussed. In fact, a vast body of literature is devoted to identifying the general principles underpinning existing contract law doctrines and the ideals to which regulators and courts should

adhere when shaping legal policy in this sphere. Contemporary theories of contract law explain contract law doctrines through various values, such as promoting human well-being, protecting parties' autonomy, and preventing harmful acts.[1] However, studies of how jurists and laypersons *actually think* about contract law are few and far between,[2] and no previous study has offered a theory that maps these attitudes.

To clarify this lacuna, suppose a researcher or a lawyer wishes to gauge the views of a given judge on contractual matters in an effort to predict the judge's decision in a particular contractual dispute. Currently, there is no theoretical framework by which one may adequately define and measure a judge's contract law attitudes. The same problem may arise when a legislator wishes to propose legal reforms. Suppose that one is charged with nominating members for an expert committee that will propose revisions to contract legislation, and that person wishes to appoint people with certain contractual attitudes—possibly those that are consistent with the prevailing attitudes of the public at large, or with one's own. Selecting members solely on the basis

[1] *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY 54–163 (Peter Birks ed., 2004); Jody S. Kraus, *Philosophy of Contract Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 687–88 (Jules L. Coleman et al. eds., 2004); HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 19–64 (Cambridge Univ. Press 2017); PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (The Belknap Press of Harv. Univ. Press 2019).

[2] For studies that gauge contractual attitudes *see, e.g.*, Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009) (demonstrating through web-based questionnaires that people are sensitive to the moral dimensions of a breach of contract—especially the perceived intentions of the breacher); Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 UNIV. ILL. L. REV. 151, 151 (2013) (finding that laypersons and experienced businesspeople alike strongly prefer in-kind entitlements and remedies over monetary ones); Eyal Zamir & Ori Katz, *Do People like Mandatory Rules? The Impact of Framing and Phrasing*, 45 L. & SOC. INQUIRY 1052, 1052 (2020) (studying people's attitudes toward various mandatory rules in consumer contracts); Ori Katz & Eyal Zamir, *Do People Like Mandatory Rules? The Choice Between Disclosures, Defaults, and Mandatory Rules in Supplier-Customer Relationships,* 18 J. EMPIRICAL LEGAL STUD. 421, 421 (2021) (comparing people's attitudes toward mandatory rules with their attitudes toward disclosures and default rules).

of the political divide between liberals and conservatives will probably be too crude to account for the complexity of attitudes toward contract issues.

This Article is the first attempt to develop an empirically-based attitude theory ("AT") of contract law. This theory aims to capture the variety of attitudes in the sphere of contract law by identifying the key conflicts that explain attitudinal diversity. Based on preliminary surveys and a review of both positive law and theoretical literature on contract law, I hypothesized that attitudes toward contract law are founded on four key conflicts: (1) *Individualism versus solidarity*, which deals with attitudes toward promoting self-interest through contracts, without considering the interests of others; (2) *Formalism versus anti-formalis*m, which concerns attitudes toward formal rules, contractual textualism, and limited judicial discretion; (3) *Egalitarianism versus non-Egalitarianism*, which reflects the controversy over whether contract law should reflect general social values; and (4) *Instrumental/economic versus intrinsic perspectives*, which encompasses the debate between an economic approach that views contracts as a means of enhancing welfare, and a promissory approach that advocates a moral obligation to keep promises and a deontological constraint against violating them.

Because this hypothesis of a four-dimensional structure purports to describe actual attitudes, it should be substantiated by empirical research that tests its descriptive accuracy. To serve as a genuine reflection of people's (contractual or other) attitudes, an AT should have four features:[3]

[3] *See* Ori Katz, *Attitude Theories of the Law*, SOC. SCI. RSCH. NETWORK 1, 6 (2021) (introducing the concept of *attitude theories*, and providing tools to assess them). On scale construction, *see generally* MIKE FURR, SCALE CONSTRUCTION AND PSYCHOMETRICS FOR SOCIAL AND PERSONALITY PSYCHOLOGY (SAGE Publ'ns Ltd. 2011); ROBERT F. DEVELLIS, SCALE DEVELOPMENT: THEORY AND APPLICATIONS (4th ed., SAGE Publ'ns Ltd. 2017).

(a) Content validity: These four conflicts should account for a large portion of the controversies underlying contract law;

(b) Internal consistency (or reliability): Normative attitudes concerning each key conflict in the theory should be correlated. Put differently, people's attitudes toward issues that relate to the same conflict must correlate in order for the conflict to be consistent;

(c) Attitudinal variance: People should vary in their attitudes toward the theory's conflicts. Legal scholars sometimes hotly debate normative conflicts, when, in fact, there is broad consensus about them—even among jurists outside the academic discourse. These conflicts cannot play a meaningful role in an AT because they do not explain the diversity of thought; and

(d) Dimensionality: Each conflict should be discrete—namely, a person's attitude toward one conflict cannot be merely a reflection of their attitude toward another. If two conflicts are highly correlated, one may question the need to differentiate between them.

Thus, to test the hypothesized four-dimensional AT, I developed a Contractual Attitude Scale ("CAS"), consisting of statements (or items) about normative issues of contract law that exemplify each of the four conflicts. For example, "A person who signs a contract is entitled to rely on verbal promises given by the other party, even if these are not explicitly stated in the contract" is a statement that relates to one's attitude regarding Formalism, and "A person should be allowed to refuse to give private lessons to students of a different ethnic group, even if this is due to racial prejudice" relates to one's attitude toward Egalitarianism. Participants were asked to indicate the degree to which they agree or disagree with each statement. My two initial exploratory studies—involving a total of 652 participants—showed that attitudes toward issues concerning three of the four hypothesized conflicts (Individualism, Formalism, and Egalitarianism) were

distinct, consistent, and varied across participants. In addition, these attitudes, as measured by the CAS, correlated with answers to other related scales and vignette questionnaires. In contrast, attitudes toward normative issues associated with Instrumentalism were inconsistent, in that they were insufficiently correlated with one another.

I then distributed the final version of the CAS—comprising items that arguably best exemplify contractual Individualism, Formalism, and Egalitarianism—to a total of 1697 participants from 3 distinct population clusters: MTurk workers,[4] a representative sample of the U.S. population, and Israeli law students. The internal consistency, attitudinal variance, and dimensionality of the AT (as operationalized by the CAS) were generally confirmed once again, through both exploratory and confirmatory factor analyses.[5]

The CAS may also be used to study attitudes in various populations regarding contracts. Accordingly, I also analyzed the differences between the studied populations' attitudes, attitudinal consistency, attitudinal variance, and the associations between their attitudes toward the three conflicts. I then examined the links between personal characteristics and contractual attitudes through a series of linear regressions.

In general, attitudes toward Individualism and Egalitarianism were strongly correlated, while attitudes toward Individualism and Formalism were only slightly correlated, and attitudes toward Egalitarianism and Formalism bore almost no correlation whatsoever. Individualism and Formalism were distinct from political worldviews, while Egalitarianism was highly associated with them. Interestingly, academic background was positively associated with Individualism—that

[4] MTurk is a crowdsourcing platform run by Amazon, *see infra* note 124.
[5] For a basic explanation about these statistical techniques, *see infra* note 128 and associated text.

is to say, people with extensive academic backgrounds are more individualistic than those without. Israeli law students were less formalistic and less egalitarian than members of the U.S. sample, but it is challenging to pinpoint why.

The remainder of this Article proceeds as follows: Section II will elaborate on what attitude theories are and why they are important in the legal sphere. Section III presents my initial attitude theory of contract law and describes the four constituent key conflicts. Section IV presents the exploratory and confirmatory empirical testing of the theory and analyzes the association between personal characteristics and contractual attitudes, as well as between contractual attitudes as measured by the CAS and related vignettes and questionnaires (*construct validity*). Section V offers a brief summary, highlights important findings, and discusses the limitations of the research. Finally, Section VI identifies paths for further research.

## II. ATTITUDE THEORIES AND THEIR IMPORTANCE

ATs provide a framework for describing the configuration and clustering of individuals' normative judgments.[6] They consist of at least one *key conflict* or *dimension*. These dimensions are the axes by which people's attitudes are measured.[7]

Attitudes, in this context, are normative judgments of behavior, decisions, and rules. An attitude applies to a variety of situations in a consistent manner; in other words, an attitude is a

[6] *Cf.* Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, 18 CRITICAL REV. 1, 3 (1964) (defining a belief system as "a configuration of ideas and attitudes in which the elements are bound together by some form of constraint or functional interdependence").

[7] In a companion article, Katz, *supra* note 3, I investigate the concept of attitude theories in general and of attitude theories of the law in particular, and offer a framework for developing these theories. Specifically, the companion article explains what constitutes ATs; highlights their importance; establishes the criteria for evaluating them; and describes an empirical methodology for testing them.

cluster of associated opinions on various issues. These associations are often established through rational reasoning—thus, people who support harsher penalties for bank robbers are plausibly in favor of harsher penalties for kidnappers as well. Nonetheless, rational reasoning does not necessarily entail correlation between opinions: people may even hold logically inconsistent opinions, especially if they do not give their opinions much thought.[8] Psychological and social constraints can also link opinions together.[9] For example, in the American political discourse, pro-choice attitudes toward abortion often align with support for stricter gun control laws.[10] Although one might draw a rational connection between these two attitudes, it seems reasonable to assume that this association is unique to American society and is a result, at least in part, of particular social and historical factors.

ATs vary in focus, specificity, and the number of attitudes they concern. Some ATs focus on moral conflicts and dilemmas. For example, Jonathan Haidt and Craig Joseph have introduced the Moral Foundation Theory, which seeks to account for moral diversity by measuring attitudes toward five moral virtues (harm/care; fairness/reciprocity; ingroup/loyalty; authority/respect; purity/sanctity).[11] In a more area-specific oriented study, Guy Kahane et al. developed a scale for dissociating two dimensions of utilitarian beliefs (permissive attitude toward instrumental harm,

[8] Converse, *supra* note 6, at 5–6.
[9] *Id.* at 7–10.
[10] *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 99–101 (1997).
[11] Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues*, 133 DAEDALUS 55, 55 (2004); *see also* Jesse Graham, Jonathan Haidt & Brian A. Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations,* 96 J. PERS. & SOC. PSYCH. 1029, 1030–31 (2009); Jonathan Haidt, Jesse Graham & Craig Joseph, *Above and Below Left-Right: Ideological Narratives and Moral Foundations*, 20 PSYCH. INQUIRY 110, 111–12 (2009). In a subsequent study, a sixth foundation of *liberty/oppression* was added. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 194–211 (Pantheon Books 2012).

and impartial concern for the greater good).[12] Other scholars have developed theories on the values that guide behavior. One prominent example of this branch is Shalom Schwartz's theory of *basic human values*,[13] which identifies eleven universal values that represent the motivations underlying people's behavior.[14]

Many political scientists have also researched ATs and developed several theories to account for political attitudes.[15] One simple and very popular political, unidimensional AT defines attitudes by means of a single dimension—liberal-conservative—whereby every individual may be placed somewhere along this axis.[16] A common account for this dimension defines a *liberal* as a person who espouses ideas such as "equality, aid to the disadvantaged, tolerance of dissenters, and social reform," while a *conservative* is one who advocates "order, stability, the needs of business, differential economic rewards, and defense of the status quo."[17]

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[12] Guy Kahane, Jim A.C. Everett, Brian D. Earp, Lucius Caviola, Nadira S. Faber, Molly J. Crockett & Julian Savulescu, *Beyond Sacrificial Harm: A Two-Dimensional Model of Utilitarian Psychology*, 125 PSYCH. REV. 131, 131 (2018).

[13] Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, 25 ADVANCES EXPERIMENTAL SOC. PSYCH. 1, 3 (1992).

[14] These are: *self-direction, stimulation, hedonism, achievement, power, security, conformity, tradition, Spirituality, benevolence,* and *universalism*. *See also* MILTON ROKEACH, THE NATURE OF HUMAN VALUES (Free Press 1973) (discussing and defining human values and pointing to their importance in all social sciences).

[15] For a discussion on such ATs *see* John T. Jost, Christopher M. Federico & Jaime L. Napier, *Political Ideology: Its Structure, Functions, and Elective Affinities*, 60 ANN. REV. PSYCH. 307, 310–15 (2009).

[16] *See, e.g.*, Kathleen Knight, *Transformations of the Concept of Ideology in the Twentieth Century*, 100 AM. POL. SCI. REV. 619, 624 (2006); Jonathan Leader Maynard, *A Map of the Field of Ideological Analysis*, 18 J. POL. IDEOLOGIES 299, 310 (2013); Stanley Feldman & Christopher Johnston, *Understanding the Determinants of Political Ideology: Implications of Structural Complexity*, 35 POL. PSYCH. 337, 337 (2014); Peter H. Ditto, Brittany S. Liu, Cory J. Clark, Sean P. Wojick, Eric E. Chen, Rebecca H. Grady, Jared B. Celniker & Joanne F. Zinger, *At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives*, 14 PERSP. PSYCH. SCI. 273, 273 (2018).

[17] HERBERT MCCLOSKY & JOHN ZALLER, THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY 189 (Harvard Univ. Press 1984). *See also* Jost et. al., *supra* note 15, at 310–11 (reviewing the various characterizations of the left/right and liberal/conservative classifications).

The simplicity and parsimony of a unidimensional AT are also its weaknesses. People are complex, so the notion that one can understand and account for attitudinal diversity by means of a single axis is overly simplistic. When an AT pertains to a limited variety of issues, a unidimensional theory might suffice. But accounting for a broader set of normative judgments calls for a multidimensional structure. The *liberal-conservative* AT, for example, has been roundly criticized in the literature for its attempt to describe political ideology on a unidimensional scale.[18] In one study, Feldman and Johnston used the data from the American National Elections Studies ("ANES") for the years 2000, 2004, and 2006, to compare a unidimensional model of ideology (*liberal-conservative*) with a two-dimensional one (*social ideology* and *economic ideology*, in which each is measured along a *liberal-conservative* spectrum). Their analysis showed that the two-dimensional model much more accurately reflects respondents' domestic policy judgments, and that a unidimensional model obscures demographic correlates of ideology and misrepresents the effects of psychological characteristics on ideology.[19]

In multidimensional ATs, each conflict should represent a discrete attitudinal dimension. Ideally, in a multidimensional AT, attitudes toward different conflicts are orthogonal to each other—i.e., a person's attitude toward one conflict should not tell us anything about their attitude toward another conflict. However, with psychological concepts such as attitudes, there is rarely a completely orthogonal relationship, and even two distinct dimensions are linked to some degree. Nonetheless, two dimensions can be distinct if they correlate only slightly. If, however, this

[18] Maynard, *supra* note 16, at 314–15; Feldman & Johnston, *supra* note 16, at 338–39.
[19] Feldman & Johnston, *supra* note 16.

correlation is relatively high, one might deem them to be indistinguishable, or as different facets of a single, unified dimension.

To the best of my knowledge, no attempts to date have been made to develop a full-fledged empirically-based theory of ATs of the law, or to provide a systematic descriptive account of the basic conflicts that characterize people's attitudes in any particular legal field. Exploring the substance and structure of these attitudes in contract law, and constructing scales for measuring them, can enhance our understanding of the law, attitudinal diversity, and decision-making processes. Let us examine each of these goals in turn.

### A. ENHACING UNDERSTANDING OF THE LAW

Many theories of law have attempted to describe and interpret the law (or a specific field within the law) by means of a single or a handful of general principles. The common purpose of these theories is "to enhance understanding of the law . . . by explaining why certain features of the law are important and unimportant and by identifying connections between these features—in other words, by revealing an *intelligible order* in the law, so far as such an order exists."[20]

Given that attitudes shape legal rules and their implementation, understanding the complexity of the law requires examining the underlying diversities in attitudes. A significant part of legal discourse is rooted in attitudinal controversies, and mapping these conflicts is key to describing what happens in courts and at other legal institutions. By identifying the key conflicts in a specific legal field, one can also discover which of the issues are controversial in a given

[20] SMITH, *supra* note 1, at 5. *See also* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 147–52 (Cambridge Univ. Press 2012) (discussing the nature of general theories of contract law and their purpose); *cf.* Kraus, *supra* note 1, at 694–96 (distinguishing between theorists who place greater emphasis on explanatory goals, and those who focus more on justifying the legal doctrine).

society, and which are comparatively consensual. In addition, in order to grasp the full implications of an argument, one must explore the counter-arguments. By establishing the relevant conflicts in a legal field, one can examine an argument through rival points of view. Constructing theories that arrange the law by its constituent conflicts could also affect how law is studied and taught.[21]

### B. ENHANCING OUR UNDERSTANDING OF ATTITUDINAL DIVERSITY

The second goal of developing legal ATs is to enable the construction of valid scales that can gauge the attitudes of legal actors—and of the public at large—toward various legal issues.

Gauging legal attitudes is of great value. First, to discern the reasoning behind existing legal doctrines and judgments, it is important to understand the normative attitudes of policymakers and judges. Second, gaining insight into prevailing attitudes in society should arguably affect legal policymaking. As a matter of principle, even if deviations from citizens' attitudes are justified when those preferences are misinformed, incoherent, or trumped by more important principles of justice (such as the protection of minority rights), "the presumption of democracy is that there be a close correspondence between the laws of a nation and the preferences of citizens who are ruled by them."[22] At a pragmatic level, research has shown that increasing the law's moral credibility can also enhance compliance.[23] Hence, to achieve legitimacy and compliance, the law should reflect prevailing moral intuitions. Third, assessing attitudes can reveal

[21] BIX, *supra* note 20, at 100.
[22] Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214 (2009). While even this modest statement is disputed by some, an in-depth examination of the issues of authority and legitimacy in a democracy exceeds the scope of the present study.
[23] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1996).

the associations between gender, political affiliation, legal education, religiosity, and culture on the one hand, and specific legal attitudes on the other.

### C. PREDICTING LEGAL DECISION-MAKING

The third goal of ATs is to understand the attitudinal factor in legal decision-making. Decision-making in the legal sphere (be through legislators, judges, litigants, or members of the general public) is governed by many factors, including the law, the institutional environment, individual interests, biases, and so forth.[24] One of these factors is normative attitudes. Thus, gauging attitudes can help us predict how individuals will act in legal contexts.

Naturally, the question of whether or not a legislator will support a given policy depends, in part, on their opinion regarding that policy. Even cynics who believe that decisions in the political arena are made primarily based on narrow political interests will admit that some policies, at least, are partly affected by the policymaker's normative belief system.[25]

The same is true of the behavior of ordinary people, which is influenced by their moral attitudes. For example, people avoid engaging in criminal activity not only—or even primarily—because they fear legal sanctions, but also because it simply would violate their moral beliefs. Indeed, moral attitudes also govern people's behavior in their economic lives, even when a certain immoral behavior might be financially more lucrative.[26]

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[24] *See, e.g.*, BENJAMIN ALARIE & ANDREW J. GREEN, COMMITMENT AND COOPERATION ON HIGH COURTS: A CROSS-COUNTRY EXAMINATION OF INSTITUTIONAL CONSTRAINTS ON JUDGES 31–47 (Oxford Univ. Press 2017); EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 495–565 (Oxford Univ. Press 2018).

[25] Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life*, *in* BEYOND SELF-INTEREST 3 (Univ. Chi. Press 1990); Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1153–56 (2002).

[26] YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 100–01 (Cambridge Univ. Press 2018).

Attitudes are also a prominent factor in judicial decision-making. Although, in the past, scholars believed in the formalistic nature of the law, whereby judicial decisions are derived from a scientific-like process of interpreting legal rules,[27] today, it is broadly accepted that this concept of legal objectivity is naïve and does not reflect actual practice. Reviews of court rulings in research studies by many political scientists have found a significant association between attitudes and judicial decisions. This may be the result of two main factors.

First, legal doctrines often provide judicial decision-makers with considerable discretion. When legal rules generate interpretative ambiguity, a legitimate, and perhaps inevitable, application of the law to a given case requires judges to draw on their own attitudes.[28]

Second, many have argued that judges may have a desired outcome in mind and adjust their arguments accordingly. Arguably, such bending of facts or law to produce a favorable outcome may be a conscious process. In some cases, the justification that a judge uses in a given ruling does not reflect their actual reasons, but is designed for the sake of appearances, public relations, or to persuade others.[29] However, it may also be the product of an unconscious process ("[J]udges cannot be expected to understand their own motivations perfectly or to report them with undiluted candor"[30])—commonly dubbed *motivated reasoning* or *motivated cognition*.[31] Studies

[27] Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255–65 (1997).
[28] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983); Richard A. Posner, *Statutory Interpretation–in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983).
[29] Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 296–99 (1990); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 128 TEX. L. REV. 1307, 1309–14 (1995).
[30] DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 138 (Cambridge Univ. Press 2002).
[31] Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 480–81 (1990) (introducing the concept of *motivated reasoning*); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 307 (2013) (discussing legal applications and implications of motivated reasoning); ZAMIR & TEICHMAN, *supra* note 24, at 58–61 (reviewing the literature on motivated reasoning and the law).

have shown that evaluating evidence and identifying beliefs are often post-hoc processes designed to justify an initial decision. Decisions are frequently shaped by latent motivations, rather than by the quest for accurate conclusions. This motivated reasoning seeks to maintain an "illusion of objectivity," whereby the decision-maker believes that their biased decision is the product of an objective process.[32] Latent motivations can distort reasoning through various mechanisms, such as (1) changing how one evaluates evidence or interprets relevant rules;[33] (2) selectively adopting moral beliefs and norms,[34] or evidentiary standards;[35] (3) ignoring or downplaying the relevance

[32] Kunda, *supra* note 31, at 483.

[33] Mark D. Alicke, *Culpable Causation*, 63 J. PERS. SOC. PSYCH. 368, 368 (1992) (demonstrating experimentally that the perceived blameworthiness of an action affected the judgment of its causal impact on a harmful outcome); Joshua R. Furgeson, Linda Babcock & Peter M. Shane, *Do a Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 L. HUM. BEHAV. 219, 219 (2008) (an experimental study, finding that liberal law students were more likely to overturn laws that decreased taxes than those that increased taxes, and that the opposite pattern held for conservative law students); Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1313–14 (2012) (presenting experiments showing that the question of whether a given conduct caused harm may be influenced by the legal requirement of harm in order to impose a criminal penalty); Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 255 (2016) (experimentally investigating the determinants of judicial decisions in a setting resembling real-world judicial decision-making, and showing that in international criminal appeal cases, the incidence of judges' affirmance was influenced by the defendant's characteristics).

[34] Eric Luis Uhlmann, David A. Pizarro, David Tannenbaum & Peter H. Ditto, *The Motivated Use of Moral Principle*, 4 JUDGEMENT & DECISION MAKING 479, 479 (2009) (presenting five studies which demonstrate that people selectively use general moral principles to rationalize preferred moral conclusions).

[35] Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCH. 568, 568 (1992) (presenting three experiments, showing that information consistent with a preferred conclusion is examined less critically than information inconsistent with a preferred conclusion—and consequently, less information is required to reach the former than the latter).

and weight of certain information;[36] or even (4) shaping decision-makers' memory[37] and their visual perception.[38]

People's motivations also vary. In our context, the relevant motivation is to reason in a manner that fits one's normative attitudes, given the legal constraints. Various studies have demonstrated that people interpret legal rules or evaluate evidence in accordance with their own political affiliation or moral values.[39]

Other scholars have suggested that decision-making is often a complex process that involves both rational and motivated reasoning. In a nutshell, experimental findings demonstrate a *coherence-based reasoning*, in which the cognitive system imposes coherence throughout the decision-making process and gradually *steers* the relevant considerations toward a given decision. In other words, the decision process is bidirectional, and the strength of an initial piece of evidence or legal argument that has been rationally assessed may indirectly influence the reliability and

[36] *See* Asher Koriat, Sarah Lichtenstein & Baruch Fischhoff, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCH. 107 (1980) (demonstrating experimentally that people selectively focus on evidence that supports their chosen answers and disregard evidence that contradicts them).

[37] David A. Pizarro, Cara Laney, Erin K. Morris & Elizabeth F. Loftus, *Ripple Effects in Memory: Judgments of Moral Blame Can Distort Memory for Events*, 34 MEMORY & COGNITION 550, 550 (2006) (demonstrating that people's memory about an account of a crime committed by a given individual is biased in a manner that reinforces the moral blame they initially attributed to that individual); Lisa L. Shu, Francesca Gino & Max H. Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY & SOC. PSYCH. BULL. 330 (2011) (presenting four studies that show that people justified their dishonest deeds through moral disengagement, and exhibited motivated forgetting of information that might have otherwise curbed their dishonesty).

[38] Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCH. 612 (2006) (presenting five studies showing that people's wishes and preferences influence their processing of visual stimuli).

[39] Furgeson, Babcock & Shane, *supra* note 33; Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 388 (2017) (showing that laypersons and law students display a biased interpretation of legal rules, depending on their ideological inclinations). Sood & Darley, *supra* note 33, at 1336–42.

persuasiveness of other pieces of evidence and arguments in an effort to maintain coherence.[40] In that sense, attitudes may lead decision-makers to rationally adopt an argument but may also induce them to accept conflicting evidence to avoid dissonance between their attitudes and decisions.

Be that as it may, attitudes are a key element in legal decisions. Thus, if we want to understand legal decision-making, it is useful to study internal structure of attitudes and develop ways of assessing them. Gauging attitudes directly will also allow us to use experimental design to distinguish between the desirable and undesirable influences of attitudes, and to establish when decision-makers are and are not aware of the impact of their attitudes on their decisions.[41]

In the following section, I introduce an AT of contract law and its key constituent conflicts.

## III. THE KEY CONFLICTS OF CONTRACT LAW

Resolutions of contractual disputes often involve several conflicting values. These include respecting parties' autonomy and freedom of contract, enhancing fairness and social solidarity, maintaining legal certainty, promoting efficiency, and achieving equality and just distribution of wealth and power. Most of these values are widely accepted among jurists, but the way to strike an appropriate balance between them is highly disputed. An attitude theory of contract law aims to identify clusters of normative issues, in which each cluster involves certain competing values in similar contexts, thereby reflecting the variety of attitudes toward contractual dilemmas using a

[40] Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511 (2004); *see also* ZAMIR & TEICHMAN, *supra* note 24, at 528–32 (summarizing the research regarding the story model).

[41] *Cf.* Kahan et al., *supra* note 39, at 357–59 (discussing the limitations of observational studies that do not measure ideologies directly).

few key conflicts.[42] Importantly, an AT of contract law does not purport to reflect the richness of the literature on theories of contract law nor does it intend to fully cover the wide range of possible rationales behind contractual doctrines and practices. Rather, an AT merely posits that many of the normative debates surrounding contract law may be described using a small number of key conflicts. In an effort to develop an AT of contract law, I conducted several preliminary surveys and asked laypersons and law students about their attitudes toward contract law. In addition, I reviewed both contemporary contractual doctrines and the theoretical and normative literature on contracts. This research ultimately yielded an AT consisting of four key conflicts: (1) *individualism versus solidarity*; (2) *formalism versus anti-formalism*; (3) *egalitarianism versus non-egalitarianism*; and (4) *instrumental/economic versus intrinsic perspective*s. The following sections expand upon each of these key conflicts.

### A. INDIVIDUALISM VERSUS SOLIDARITY

The concept of *individualism* is complex; its meaning may vary from one context to another.[43] What most of these meanings have in common is that they acknowledge that individualism cherishes values such as self-reliance and free choice. Individualism calls for entrusting each person with the power to shape and control the course of their life and the responsibilities that come with it.[44] Put differently, people are expected to legitimately advance their own interests while respecting the rules that allow others to do the same. Thus, to an

[42] Some values may play a role in forming attitudes toward more than one conflict—as long as each of these conflicts consists of a unique composition of values that yields a distinct (if sometimes related) attitude.
[43] *See generally* STEVEN LUKES, INDIVIDUALISM (Harper & Row 1973) (reviewing the history of individualism in Europe and the U.S., and the values advanced in the name of individualism).
[44] *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 272–91 (Oxford Univ. Press 1979).

individualist, the primary purpose of social and legal institutions is to serve the interests of individuals and to respect their freedom and autonomy. From this point of view, prioritizing one's own interests over those of other people, or even disregarding the latter, is deemed legitimate.[45] While individualism does not rule out solidarity as a moral virtue, it opposes the use of the state's power to enforce it.[46]

In the context of contract law, individualists argue that the role of the law is to ensure that agreed terms are fulfilled. Under the individualist view, contract law should have no bearing on the contractual terms themselves. Individualists tend to believe in the principle of *caveat emptor* ("let the buyer beware"), whereby people are responsible for their contracting decisions. Contracting parties bear the responsibility for not reading the contracts they make and cannot expect others to help them if the terms do not conform to their expectations.[47] Contractual individualism is often associated with the classical theory of contract and a strong endorsement of freedom of contract. Accordingly, contracts embody the parties' intentions and determine their rights and obligations.[48]

In contrast to individualism*, solidarity* is the notion that contractual obligations should reflect not only the parties' agreement, but also values of solidarity, mutual consideration, and compassion. A solidarity-oriented approach posits that contract law should oversee the contract

[45] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1767–71 (1976) [hereinafter Kennedy 1976].
[46] *Id.* at 1716.
[47] CHRIS WILLETT, FAIRNESS IN CONSUMER CONTRACTS: THE CASE OF UNFAIR TERMS 18–20 (Routledge 2016).
[48] Jack Beatson & Daniel Friedman, *Introduction: From 'Classical' to Modern Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedman, eds., Oxford Univ. Press 1997); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115–16 (2000) [hereinafter Kennedy 2000].

formation, its content, its performance, and the remedies for breach.[49] To promote solidarity when enforcing a contract in any given case, the law should consider the fairness of the terms, the specific context and circumstances of the case, and the parties' inequality in terms of power and wealth.[50]

People's perception as to what constitutes unfair terms and inconsiderate behavior depends on various factors. First, fair contracts are expected to meet people's mutual expectations based on common practices, past transactions, and the nature of the contractual relationship in question. Second, fair terms should maintain a relative equivalence between what one gives and what one gets, taking into account market price, the risks the parties take upon themselves, and their expected profits. Third, a contract may be deemed unfair if the underlying motivations in formulating it were malicious or illegitimate.[51] Finally, the perceived fairness of a contract may be affected by the power and wealth disparities between the parties. For example, studies have shown that employees' needs are a relevant factor when judging the fairness of their wages.[52] Thus, to achieve distributive fairness, some argue that contract law (and private law in general) should be used to rectify inequalities and implement distributive goals.[53]

[49] Beatson & Friedman, *supra* note 48, at 12–13; WILLETT, *supra* note 47, at 21–23.
[50] *See* James Gordley, *Enforcing Promises*, 83 CALIF. L. REV. 547, 548 (1995) (showing that when American courts apply the doctrines of *consideration*, *promissory reliance*, and *offer and acceptance*, they are concerned with the effect of the transaction on the wealth of the parties).
[51] *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 731–32 (1986) (empirically surveying community standards of fairness for the setting of prices and wage); Eyal Zamir & Ilana Ritov, *Notions of Fairness and Contingent Fees*, 74 LAW CONTEMP. PROBS. 1, 7–13 (2011) (providing a taxonomy of different types of fairness).
[52] Miriam Dornstein, *The Fairness Judgements of Received Pay and Their Determinants*, 62 J. OCCUP. PSYCH. 287, 289–94 (1989).
[53] *See, e.g.*, Anthony T. Kronman, *Contract Law and Distributive Justice*, 3 YALE L.J. 472, 472–74 (1980); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 326–31 (2006).

Individualism is justified primarily on grounds of respect for autonomy and the notion that individuals are free to use their skills and resources as they see fit.[54] By enforcing people's voluntary obligations and holding them accountable for their promises, we respect their autonomy. However, advocating for autonomy does not necessarily entail endorsing individualism. Arguably, favoring self-interest over considering others may also violate the autonomy of at least one party (usually the weaker one). Specifically, individualistic contracting may involve deficiencies in the will of one of the parties—for example, when a party does not share important information with the other party, thereby causing procedural unfairness. In these circumstances, a more solidarity-oriented approach may be more effective in serving the value of autonomy.[55] Even when genuine consent has been achieved, unconscionable and unreasonable terms can arguably prevent the weaker party from exercising autonomy and limit its freedom to choose between a range of worthy options.[56]

Moreover, even if autonomy is of great value, there are competing values—such as solidarity and mutual consideration—and in some contexts, communal obligations should receive priority. Thus, according to one view, contract law is aimed at enhancing justice and achieving various social goals throughout the contractual relationship (rather than merely enforcing the

[54] Michel Rosenfeld, *Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 776–79 (1985).
[55] P. S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1, 2 (1985).
[56] *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM (Clarendon Press 1986). From a paternalistic point of view, this posits that people are not the best rational judges of their own interests, and therefore solidarity-oriented law should promote people's interests, even against their declared will. On paternalism in contract law, *see generally* Anthony T. Kronman, *Paternalism and the Law of Contracts,* 92 YALE L.J. 763 (1983); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1785–86 (1997) [hereinafter Zamir 1997]. However, in the preliminary surveys I used to identify the four key conflicts, I could not detect a distinct attitude toward paternalistic solidarity, so I have chosen not to distinguish between paternalistic and non-paternalistic solidarity.

promissory obligations).[57] Enhancing justice by imposing obligations of fair dealing and good faith may be justified on grounds of commutative and distributive justice, a Rawlsian "veil of ignorance,"[58] and efficiency.[59]

The classic approach to contracts reflects an individualistic approach, which states that courts should not write contracts for parties. Once a voluntary contract has been formed, the law should not interfere with the outcomes of a negotiation.[60] However, currently, at least some courts are interested in *contractual fairness*, and modern contract law in most legal systems is characterized by increased oversight of unfair terms and contractual relations.[61] This trend is evident in all Western legal systems—albeit more so in Europe than in the United States.[62] Current contract law renders some unfair terms unenforceable;[63] requires the parties to act in good faith

[57] Jeffrey M. Lipshaw, *Contract as Meaning: An Introduction to "Contract as Promise at 30,"* 45 SUFFOLK U. L. REV. 601, 601–02 (2011).
[58] The veil of ignorance is a method to identify the principles that should govern the social order, by imagining a decision maker who chooses these principles without knowing his position in society (including his gender, social and economic status, ethnicity etc.) (John Rawls, A THEORY OF JUSTICE – REVISED EDITION 118–122 (1990)).
[59] Zamir 1997, *supra* note 56, at 1778–80. Another justification for the law to refrain from enforcing unfair contracts—or for considering the parties' inequalities when enforcing them—may be found in Morris Cohen's argument. Cohen posited that contract law is in fact a branch of public law, since it deals with the question of when the state should exercise its coercive power to enforce contracts. Thus, any enforcement of a contract is a state intervention that warrants justification—and in cases of unfair contracts, or when other communal values are at stake, a mere agreement, in and of itself, may not provide sufficient justification for enforcement. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586–88 (1933).
[60] *See, e.g.*, Beatson & Friedman, *supra* note 48, at 8–9; Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2117–19 (2014) [hereinafter Zamir 2014].
[61] Beatson & Friedman, *supra* note 48, at 12–13.
[62] Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L L.J. 223, 239–40 (2006); Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. COMP. L. 479, 479–81 (2013); Zamir 2014, *supra* note 60, at 2117–19.
[63] Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 302–10 (2020) (surveying existing regulation of the content of contracts in several spheres).

throughout the contractual relationship (and, in some countries, during the pre-contractual negotiations as well); and interprets contracts in light of a *standard of reasonableness*.[64]

Today, it seems most jurists support neither an extreme individualistic approach nor extreme solidarity. Attitudes toward this key conflict may predict support for policies concerning unfair terms, the scope of contractual obligations, the adaptation of contracts to changed circumstances, and the extent to which inequalities between contractual parties should affect the resolution of contractual disputes.

### B. FORMALISM VERSUS ANTI-FORMALISM

The central idea behind *formalism* is that the law should offer a logical mechanism whereby decisions are founded on existing legal norms and rational deduction, with only limited scope for judicial discretion.[65] This idealized concept of legal reasoning affects legal policymaking. First, when forming the legal regime, a formalist would, in principle, prefer well-defined rules over broad standards that are applied in light of the circumstances of the case in question and involve undetermined reasoning.[66] Second, even when the law does not explicitly address the specific case

[64] *See, e.g.*, Beatson & Friedman, *supra* note 48, at 7–8; *see generally* James L. Perry, *Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity*, 6 J. PUB. ADMIN. RSCH. THEORY 5 (1996); SMITH, *supra* note 1, at 315–75; Zamir 1997, *supra* note 56; REINHARD ZIMMERMANN, SIMON WHITTAKER & MAURO BUSSANI, GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmerman & Simon Whittaker ed., Cambridge Univ. Press 2000).

[65] *See, e.g.*, Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973); David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950–52 (1980); Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119, 121–22 (1985); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999).

[66] Kennedy 1976, *supra* note 45, at 1687–89; Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538–42 (1988).

at hand, the decision should be derived from a deductive style of legal reasoning, based (as much as possible) on existing rules and precedents.[67]

An opposite approach has evolved in the wake of insights from legal realism. According to this descriptive and normative approach, the law embodies moral values and prevailing intuitions about public policy. These values are promoted by broad legal standards, which leave room for judicial discretion. Thus, judges must not content themselves with applying the "legal formula" to a given case, but rather seek to attain the moral and social goals underlying the formal legal rules.[68]

Formalism is commonly assumed to promote legal certainty. One priority of the legal system is to minimize arbitrariness and to enhance the predictability of legal decisions.[69] Formal rules and limited judicial discretion, so the argument goes, increase certainty and predictability.[70] Legal certainty, in turn, enhances neutrality and legitimacy, reduces corruption and biases of officials, and strengthens the law's impartiality.[71] The main argument in support of anti-formalism is that anti-formalism promotes fairness and substantive justice, while the mechanistic application

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[67] Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 LAW & SOC'Y REV. 291, 295–96 (1984).

[68] *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 5 (London, MacMillan & Co. 1963); Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 443–46 (1986); Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism about the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 19–20 (2001); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 5–6 (Cambridge Univ. Press 2004); Martin Stone, *Formalism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166–67 (Jules Coleman & Scott J. Shapiro eds., Oxford Univ. Press 2004).

[69] *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law Symposium: A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 533, 542–43 (1992); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47, 47–48 (2002).

[70] Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–63 (1992); Vincy Fon & Francesco Parisi, *On the Optimal Specificity of Legal Rules*, 3 J. INSTITUTIONAL ECON. 147, 149 (2007). However, Eyal Zamir and Doron Teichman, *supra* note 24, at 556–59, review preliminary studies that show that in some instances, standards can be as predictable as strict rules—and occasionally even enhance predictability.

[71] Kennedy 1976, *supra* note 45, at 1688; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 253 (1983).

of legal rules does not. Anti-formalists "spare individuals from being sacrificed on the altar of rules."[72] There is no binary choice between formalism and anti-formalism, but rather a whole spectrum. People differ in the balance they strike between these two extremes.

In the context of contract law, beyond the general question of the legitimate scope of judicial discretion, the conflict over legal formalism pertains primarily to contract interpretation—one of the most frequently litigated issues in contract cases.[73] Attitudes toward contract interpretation involve the tension between textualists, who favor a narrower interpretation of the contract and focus on the literal meaning of the text, and contextualists, who look for the intentions of the parties through further types of evidence. This debate may affect the nature of the intentions that judges are expected to uncover (i.e. objective versus subjective); the range of evidence that judges are allowed to consider in the interpretation process; and the relevance of post-formation behavior.[74]

Another implication of the conflict between formalism and anti-formalism pertains to formal requirements of contracts. Some doctrines in contract law are designed, at least in part, to

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[72] Sullivan, *supra* note 70, at 66.

[73] *See, e.g.*, STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (Oxford Univ. Press 2009); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010); Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1099 (2016).

[74] Bayern, *supra* note 72, at 1099–100; James W. Bowers, *Murphy's Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott Response*, 57 RUTGERS L. REV. 587, 600–03 (2004); Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1756–60 (2000); Schwartz & Scott, *supra* note 73.

Steven Burton identifies three alternative theories of how contract interpretation should be employed:

> [*L*]*iteralism*, which holds that the literal meaning of the contract's governing word or phrase, as found in a dictionary, determines the parties' rights, duties, and powers . . . *objectivism*, which looks for the parties' intention as expressed (manifested) in the contract document as a whole and its objective context, but not the parties' mental intentions, [and] *subjectivism*, which looks for the mental intentions or knowledge of the parties when they manifested their intentions, taking into account all relevant evidence.

Burton, *supra* note 73, at 2. However, for our purposes and for the sake of simplicity, it seems more efficient to describe two extremes, where these three theories range somewhere in between.

ensure that parties to a contract are aware of the nature of their legal relationship and that judges are informed of this awareness. These doctrines may include the requirements of offer and acceptance; consideration; definiteness; and the statute of frauds.[75] Occasionally, strict application of these formalities may undermine parties' actual intentions, thereby heightening the tension between certainty and substantive justice. The number of such requirements—and how rigidly they are enforced among different legal systems—may be a function of attitudes toward legal formalism in general.

Recent empirical findings suggest that, in consumer contracts, people believe that contract law is enforced in a formalistic fashion. For example, Tess Wilkinson-Ryan has shown that the common belief is that a person who enters a written contract has consented to all its terms—even when the contract was unreasonably long, and the person has not read it.[76] In addition, surveys show that people believe contracts are formed through formalities, such as signatures, and that the mere representation of consent is not enough.[77] Moreover, when an oral representation contradicts a written term, people assume that the latter is binding—even when induced by fraud.[78] However, these studies did not explore people's attitudes about the degree to which contracts *should* be enforced formalistically.

There is a discernible link between this conflict and the conflict between individualism and solidarity. An individualist emphasizes self-reliance as a basic value and holds people responsible

[75] Kennedy 1976, *supra* note 45, at 1690–94.
[76] Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print Essay*, 99 IOWA L. REV. 1745, 1764–65 (2013).
[77] Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1286–87 (2015).
[78] Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. 503, 551–52 (2020).

for their actions. Given that the contract wording and formal rules are, in principle, knowable in advance, if one suffers from the strict application of these rules, one can only blame oneself. In contrast, solidarity requires the parties' reasonable expectations to be fulfilled, even if they are not fully reflected in the formal contract.[79] However, these conflicts are analytically independent of one another. In certain situations, an anti-formalistic approach may foster individualism. For example, consider a contract that sets a broad supplier's liability, but the parties agree verbally to exclude this liability in certain circumstances. In this situation, a formalistic approach might be more willing to disregard the oral agreement, thereby protecting the interests of the consumer (and possibly promoting distributive justice). Thus, although correlation between these two conflicts is expected, they constitute distinct attitudinal dimensions.

### C. EGALITARIANISM VERSUS NON-EGALITARIANISM

Equality and discrimination are prominent issues in public and private law alike and therefore attract much regulatory and policy attention.[80] In many legal systems, civil and human rights legislation forbid discrimination and sometimes implement affirmative action policies.[81]

As previously noted, the classical law of contract is often associated with the concept of *autonomy*. In the context of equality and discrimination, contractual autonomy reflects the idea of freedom *from* contract, whereby people are free to choose whom to contract with. This includes

[79] Kennedy 1976, *supra* note 45, at 1738–40. In addition to this moral explanation, Kennedy also provides an economic and political explanation for the correspondence between these two conflicts. *See id.* at 1740–66.
[80] MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 190 (1997).
[81] *See, e.g.*, SANDRA FREDMAN, DISCRIMINATION LAW, (2d ed., Oxford Univ. Press 2011); Oliviera Pinto & Mac Crorie, *Anti-Discrimination Rules in European Contract Law*, *in* CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW 111 (Stefan Grundmann ed., 2008); EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 228–31 (Oxford Univ. Press 2010).

the right not to contract with people due to their gender or race. Thus, from this perspective, antidiscrimination laws violate people's liberties.[82] Others raise pragmatic reasons against prohibiting discrimination, such as undermining standards of achievement, generating excessive bureaucracy, and the unfeasibility of decreasing discriminatory practices through legislation.[83]

In contrast, the value of human dignity may support limitations on freedom from contract and require that decisions affecting other people are based only on relevant factors.[84] Redistributive goals also support antidiscrimination policies by integrating members of discriminated groups and rectifying entrenched inequalities.[85] Moreover, some argue that an autonomy perspective may support antidiscrimination laws. The ideal of autonomous life demands that people have an adequate range of valuable options to choose from. By respecting the freedom to discriminate, we limit the choices of others, thereby denying them fully autonomous lives.[86] Finally, some argue that limiting parties' freedom through antidiscrimination norms is, in fact, more efficient, due to market failures and externalities.[87]

People's attitudes toward egalitarianism in contract law vary depending on the specific policy and circumstances in question. For example, discrimination may be regarded as more legitimate in transactions between two private people than in consumer contracts, where the

[82] *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108 (Univ. Chi. Press, 1962); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 3 (Harvard Univ. Press 1995); Kennedy 2000, *supra* note 48, at 118.
[83] EPSTEIN, *supra* note 82.
[84] TREBILCOCK, *supra* note 80, at 200–03; ZAMIR & MEDINA, *supra* note 81, at 240–41; FREDMAN, *supra* note 81, at 4–33.
[85] Samuel R. Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839–44 (2003).
[86] John Gardner, *On the Ground of Her Sex(uality) Review Article*, 18 OXFORD J. LEGAL STUD. 167, 170–71 (1998); Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010).
[87] ZAMIR & MEDINA, *supra* note 81, at 234–40.

discriminator is a firm. By the same token, antidiscrimination laws may be less of a threat to autonomy in commercial contracts than in contracts of a more personal nature, such as marriage contracts. The type of discrimination also has an effect on attitudes toward the discriminatory practice. Generally, there are two types of discrimination: *animus-based* and *statistical*. Animus-based discrimination means treating members of particular marginalized demographic groups as inherently unequal, with no rational justification. In contrast, statistical discrimination is when a discriminator employs statistical proxies that produce disparate (and usually adverse) impacts on disadvantaged groups.[88] People may find statistical discrimination more legitimate than the animus-based variety due to its rationale and financial advantage. Saving information costs may render this type of discrimination profitable, even when such proxies are crude.[89]

Another policy that relates to egalitarianism in contract law is affirmative action—i.e., policies that require employers or institutions to integrate members of disfavored groups. This may include obligations to remove barriers that prevent specific groups from qualifying for a job and obtaining certain services, or to ensure representation of minority groups in workplaces, academia, and other institutions.[90] While some see these duties as an inherent part of antidiscrimination policies,[91] others see them as an illegitimate extension of the antidiscrimination principle[92] and

[88] TREBILCOCK, *supra* note 80, at 204–05.
[89] Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972); Kenneth J. Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3, 24 (Orley Ashenfelter & Albert Rees ed., Princeton Univ. Press 1973); Andrea Moro & Peter Norman, *A General Equilibrium Model of Statistical Discrimination*, 114 J. ECON. THEORY 1, 20 (2004).
[90] ZAMIR & MEDINA, *supra* note 81, at 228–29.
[91] *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation Commentary*, 115 HARV. L. REV. 642, 667–68 (2001); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 668 (2004).
[92] *See, e.g.*, Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 25 (1996); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 844 (2000).

doubt their likelihood to succeed in reducing discrimination.[93] Be that as it may, it stands to reason that support for affirmative action and antidiscrimination laws are both derived from the same egalitarian attitude.

The debate over egalitarianism in contract law is linked to the conflict between individualism and solidarity. Both conflicts are about the limits placed on contractual freedom to promote social values. However, egalitarianism is different from solidarity in that egalitarianism reflects the commitments of the individual to society at large, while solidarity refers to the relationships between contracting parties.[94]

### D. INSTRUMENTAL/ECONOMIC VERSUS INTRINSIC PERSPECTIVES

One of the leading theories of contract law is Charles Fried's "Contract as Promise." According to Fried, contract law is justified because it enforces the moral obligation to keep one's promises.[95] The "institution of promising," as Fried calls it, is founded on the principles of trust and respect.[96] This approach treats contracts as morally binding obligations. It views the keeping of promises as an intrinsic value and views breaches as morally wrong.[97] Other related approaches, often labeled *transfer theories*, consider contractual obligations a type of property right that is

[93] TREBILCOCK, *supra* note 80, at 204–05.
[94] I previously considered promoting distributive justice as part of solidarity. However, it may also be perceived as part of egalitarianism. Redistribution of wealth and power through contract law is not only a matter of achieving fairness between the contracting parties, but a tool for enhancing equality in society in general. While in theory, distributive justice may be linked to both conflicts, in practice, people may associate distributive justice with one more than the other. To resolve this issue, I conducted preliminary surveys, which showed that distributive issues are more closely associated with the general question of individualism versus solidarity. These findings led me to include distributive justice as part of Individualism—although the overlap will still be apparent in the associations between the key conflicts.
[95] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 5–6 (Harvard Univ. Press 1981).
[96] Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961, 963 (2011).
[97] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 7–21 (2nd ed., Oxford Univ. Press 2015).

transferred between parties.[98] At the theoretical level, transfer theories are distinct from promissory theories—for example, in whether contractual rights are created by a promise or already exist before making the contract. However, for the purpose of this empirical project, they can be treated together as being founded on the intrinsic value of contractual obligations.

In contrast, other theorists consider contracts to be mere instruments to achieve certain purposes.[99] In this view, "contract law is essentially an empty vessel that allows parties to organize their affairs in a way that makes them better off."[100] Thus, when performance of the contract no longer serves those purposes, it should preferably not be performed. The instrumental approach has been broadly embraced by legal economists, who see the contract as a means for promoting efficiency. Contracts facilitate the efficient trade of goods and are, therefore, desirable.[101] Hence, if enforcing a contract reduces overall social utility, it should not be enforced. This notion also applies to contractual remedies. To an instrumentalist, the purpose of remedies for breach of contract is not to correct the injustice caused by the breach, but rather to create the optimal incentives.[102]

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[98] *See, e.g.*, Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 118–205 (2001); SMITH, *supra* note 1, at 97–99; Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 40 (2009).

[99] *See*, e,g, Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135 (2003) (surveying the instrumental arguments for compensation in contract law); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 289–324 (2004) (presenting an overview of the economic analysis of contracts and the basic economic justifications for their existence).

[100] DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 6 (2013).

[101] SHAVELL, *supra* note 99, at 304–12.

[102] Craswell*, supra* note 99, at 1137. A related, more general debate in private law is between those who hold that private-law rules have intrinsic significance, and those who believe that private law has merely functional purposes, *see* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1–21 (Oxford Univ. Press 1995). This general debate may also be associated with the conflict of formalism versus anti-formalism—where a formalistic approach treats the law as an internally intelligible phenomenon, and an anti-formalistic approach highlights the law's external moral purposes (such as fulfilling parties' intentions). For my limited purposes, however, there appears to be no need to delve into these theoretical nuances.

This conflict between instrumentalist and intrinsic views of contracts is evident, for example, in the ongoing debate surrounding the so-called *efficient breach doctrine*. This doctrine posits that a person who enters a contract may either perform the contract or pay expectation damages. From an economic standpoint, as long as the breaching party pays full damages, the injured party should be indifferent as to whether the outcome is specific performance or expectation damages. Thus, breaching a contract is allowed, and even desirable, when the gain (to the breaching party) from the breach exceeds the loss (to the injured party) from the breach.[103] In other words, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."[104] One of the main reasons for opposing efficient breaches and insisting on contract performance—even when the promisor is willing to fully compensate the promisee—is the belief in the intrinsic value of keeping promises.[105] However, even people who espouse an instrumentalist approach may oppose the efficient breach doctrine for various reasons, such as the limitations of monetary damages, which typically result in under-compensation.[106] Nonetheless, all else being equal, instrumentalists are inclined to allow

[103] Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1969).
[104] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).
[105] It should be noted that Charles Fried has argued that expectation damages fully realize the moral duty to keep promises, because they place the injured party in the same position she would have been in had the contract been performed. FRIED, *supra* note 95, at 17–19. However, as Fried's critics have compellingly argued, if the goal of contract law is to let the promisee get what she was promised, then the primary remedy should in fact be specific performance. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–24 (2006). In retrospect, Fried conceded that the connection he made between the promise principle and expectation damages was "insufficiently nuanced." Charles Fried, *The Ambitions of Contract as Promise*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 24–29 (Oxford Univ. Press 2014).
[106] Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 276 (1979); Daniel Markovits & Alan Schwartz, *(In)Efficient Breach of Contract*, *in* 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed., 2017).

the breaching of contracts—subject to payment of damages—more than those who see an intrinsic value in keeping promises.[107]

Seeing breach of contract as a moral violation arguably also affects the role of the parties' blameworthiness in determining the breaching party's liability, as well as the appropriate remedy. The traditional rule of liability in contract law under common law systems is *no-fault*. However, many argue that, in practice, courts do consider the parties' fault to a significant extent.[108] From an economic point of view, fault is relevant only to the extent it affects parties' incentives.[109] In contrast, an intrinsic view of promise may result in greater compensation in cases of malicious breaches.[110] Some even argue that those who cherish the value of promise might impose a reduced liability in cases of "innocent" breaches.[111]

An economic attitude is linked to an individualistic view, since they both advocate self-interest, either to promote autonomy or for instrumental reasons rooted in the common belief shared by economists that "by pursuing [one's] own interest[,] he frequently promotes that of the society more effectually than when he really intends to promote it."[112] However, this is not necessarily the case, and, sometimes, a promissory approach can yield individualistic consequences. If people ought to keep promises merely because a promise has been invoked, then

[107] For a discussion of some of the main arguments for and against the efficient breach doctrine, *see* Leon Yehuda Anidjar, Ori Katz & Eyal Zamir, *Enforced Performance in Common-Law Versus Civil Law Systems: An Empirical Study of a Legal Transformation*, 68 AM. J. COMP. L. 1, 10–12 (2020).
[108] George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1226 (1994); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1342–44 (2009).
[109] Ben-Shahar & Porat, *supra* note 108, at 1341.
[110] Shiffrin, *supra* note 105, at 724.
[111] Marco J. Jimenez, *Retribution in Contract Law*, 52 U.C. DAVIS L. REV. 637, 640 (2018), *contra* Shiffrin, *supra* note 105.
[112] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. IV, ch. II (Strahan & Cadell 1776).

promisors should be held to their contract even when solidarity considerations suggest otherwise. For example, in cases in which the other party has not yet relied on the contract in any way, or when they encounter unexpected difficulties in performing their obligations, individualistic considerations may lead to enforcement in accordance with the intrinsic perspective of promises, whereas solidarity considerations may not.

Empirical studies have shown that contracts are generally perceived to be moral obligations and that, therefore, breaches are morally wrong.[113] They also show that people, including businesspeople, prefer specific performance over expectation compensation.[114] However, in contracts between organizations (unlike contracts involving individuals), breaches are more likely to be perceived as legitimate business decisions.[115]

In this Section, I introduced an AT of contract law. I argued that a large portion of the normative landscape in contract law can be described in terms of four key conflict types: (1) individualism versus solidarity; (2) formalism versus anti-formalism; (3) egalitarianism versus non-egalitarianism; and (4) instrumental/economic versus intrinsic perspectives. I also hypothesized that some of these conflicts are interlinked. Figure 1 illustrates the constituent conflicts of the theory, the issues to which each conflict relates, and the associations between the conflicts.

The basic premise of this AT is that people's attitudinal patterns reagrding these four dimensions are consistent. However, in reality, people often hold different attitudes in different

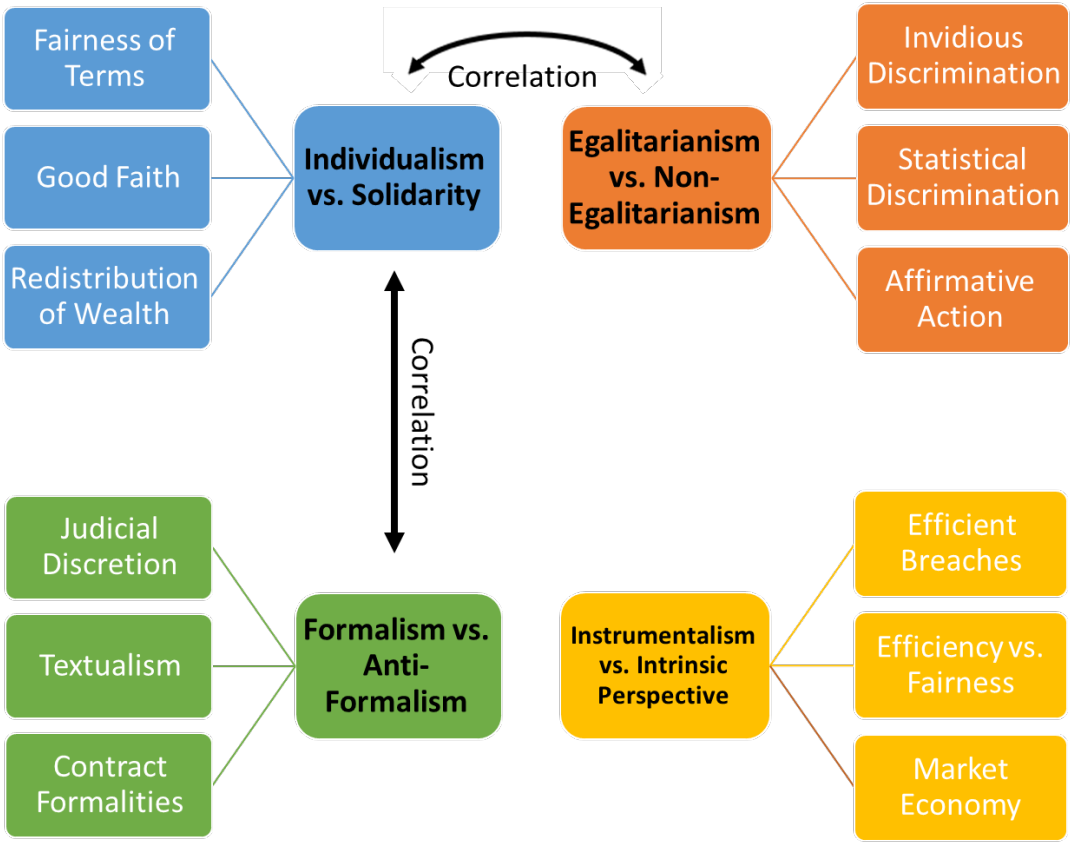
[113] Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 845 (2012); Wilkinson-Ryan & Baron, *supra* note 2.
[114] Lewinsohn-Zamir, *supra* note 2, at 159–63.
[115] *See* Uriel Haran, *A Person-Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts but Individuals Cannot*, 59 MGMT. SCI 2837, 2837 (2013).

contractual contexts. Thus, a person may be inclined toward a less formalistic approach when it comes to consumer contracts, as opposed to commercial transactions.[116] Nonetheless, if these context variations affect all people in broadly the same way, they may still be consistent.

To demonstrate that contractual attitudes can indeed reliably be placed on these four dimensions, in the following section I shall present several studies that I conducted in order to test this theory.

[116] *Cf.* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 555–556 (2003); Schwartz & Scott, *supra* note 73.

**Figure 1: Attitude Theory of Contract Law – Hypothesis**




## IV. EMPIRICAL TESTING OF THE THEORY

The AT I proposed in the previous section identifies the key conflicts in people's attitudes toward contract law. As previously noted, every AT must meet four requirements to be successful: (1) the theory's conflicts account for a significant portion of the controversial issues in contract law (*content validity*); (2) people's normative attitudes toward each key conflict correlate with each other (*internal consistency* or *reliability*); (3) people vary in their attitudes toward these

conflicts (*attitudinal variance*); and (4) each conflict is discrete: a person's attitude toward one conflict is not merely a reflection of their attitude toward another (*dimensionality*).[117]

To test these four conjectures and to measure attitudes toward these conflicts, I conducted a series of self-report surveys and developed a *Contractual Attitudes Scale* ("CAS"). On completion, this multidimensional scale comprised items (or statements) that reflect the controversial issues of contract law and their key conflict types. Then, by analyzing people's answers to these items, I tested the consistency of each conflict and its dimensional structure, as well as the extent to which people's attitudes vary on these issues. In addition, I analyzed the correlation between attitudes as measured by the CAS and responders' attributes and demographics, and tested the connections between the CAS conflicts and other measurements of contractual attitudes (*construct validity*).

The following section describes the process of developing the multidimensional scale and testing the theory, and it consists of four parts. Part A describes studies 1 and 2—exploratory investigations to develop an adequate scale for testing the theory. These included the initial generation of items for the scale[118] and scale modifications based on people's responses (where I omitted, added, or rephrased items). It should be noted that, during this exploratory process, I also modified the theory (omitting the fourth conflict and narrowing the incidence of the second and third conflicts). Part B describes a confirmatory analysis of the theory, in which the scale was tested with three groups of people: Amazon Mechanical-Turk (MTurk) workers (Study 3), a representative sample of the U.S. adult population (Study 4), and Israeli law students (Study 5).

[117] *See* Katz *supra* note 3, at 33.

[118] This was the initial systematic effort to develop a CAS. However, as previously noted, in order to identify the key conflicts, I conducted preliminary surveys, which are not fully reported in this Article.

Part C analyzes the associations between personal characteristics and contractual attitudes for the participants of studies 3–5. Finally, Part D tests the CAS's construct validity by analyzing associations between the scale and related measurements.

## A. EXPLORATORY STUDIES

### 1. Study 1—Initial Exploratory Investigation

#### i. Generating items

A major challenge in scale construction is to make the items as simple as possible. Item ambiguity—whereby responders do not understand the items in the way the scale's designer intended them to be understood—compromises the scale's validity. This problem is of particular concern when measuring attitudes toward legal issues, which are often complex and nuanced, and may therefore be unclear (especially for laypeople). People who do not contend with legal issues on a regular basis may be unable to report their legal attitudes when asked about them in the abstract. Moreover, research suggests that legal intuitions may be malleable when assessing contractual situations and may be affected by minor framing changes.[119] Another cause for inconsistent responses is people's lack of introspective access to the general principles that shape their decisions, which results in discrepancies between their abstract principles and their judgments in real-world cases.[120]

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[119] *See, e.g.*, Wilkinson-Ryan & Hoffman, *supra* note 77, at 1270 (arguing that the law affects transactional decision-making and parties' commitments to their interpersonal obligations); Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 MINN. L. REV. 1339, 1340 (2017) (demonstrating that the majority's opinion causes a significant shift toward support for or opposition to particular policies).

[120] *See, e.g.*, Marc Hauser, Fiery Cushman, Liane Young, R. Kang-Xing Jin & John Mikhail, *A Dissociation Between Moral Judgments and Justifications*, 22 MIND & LANGUAGE 1, 1 (2007); Walter Sinnott-Armstrong,

To address these issues, I used relatively concrete items that are arguably easier to comprehend, rather than ones which deal with abstract values. For example, rather than asking people to express their opinion about discrimination in contracts in general, I asked them about specific cases of discrimination, such as the legitimacy of refusing to give private lessons to students of a different ethnic group on the basis of racial prejudice. In addition, I used several items for each key conflict to mitigate the effects of idiosyncratic attitudes that may be relevant to specific contexts but do not reflect the general attitude toward the key conflict in question.

Theoretically, another possible means of ensuring that responders understand the normative issues at hand is to use detailed contractual vignettes, rather than short statements. However, capturing attitudes toward the multiple facets of each of the key conflicts using lengthy vignettes would have been overly cumbersome and impractical. Accordingly, the items used for the scale were brief, and participants were asked to provide simple 7-point Likert-scale answers (i.e. *Strongly disagree* (1); *Disagree* (2); *Slightly disagree* (3); *Neither agree nor disagree* (4); *Slightly agree* (5); *Agree* (6); *Strongly agree* (7)).

The selection of items (which is made by non-empirical means) is essential for ensuring content validity—namely, that the items reflect the content of the four key conflicts. Any empirical analysis that utilizes a scale is only as good as the constituent items of the scale. A scale's content validity can be undermined by including irrelevant items (i.e., items that are unrelated to the conflict they are supposed to represent) or by under-representing relevant items (i.e., the items present in the scale fail to measure all facets of the legal issue at hand). In that regard, any empirical

*Abstract + Concrete = Paradox*, *in* EXPERIMENTAL PHILOSOPHY 209 (Joshua Knobe & Shaun Nichols ed., Oxford Univ. Press 2008); Tania Lombrozo, *The Role of Moral Commitments In Moral Judgment*, 33 COGNITIVE SCI. 273, 273 (2009).

investigation using a scale cannot rule out an alternative AT that might provide a better typology of attitudes and can be tested by a more adequate scale. For example, when a researcher does not identify a certain key conflict, it may indicate the absence of a coherent conflict of that type among the tested sample—but it may also mean that the researcher failed to identify the conflict due to a poor selection of items.

Given the importance of the choice of items, a researcher should not rely too heavily on their own conjectures when constructing a scale. The prevailing method of ensuring content validity is to consult independent experts with a thorough understanding of the relevant field.[121] For that reason, to assemble the initial pool of items, I first surveyed the literature on contract law in an effort to identify important controversies in the field, from which I drew a pool of items. I then consulted with seven contract law experts and revised the pool of items in light of their comments to better reflect the spectrum of attitudes about contract law. I then distributed this scale among 174 Israeli law students and 169 Israeli laypersons, who were asked to state the degree to which they agreed with the various statements. Based on their responses, I revised the pool of items once again, by omitting or altering items that were extremely skewed and did not vary between participants, in order to capture attitudes that are contentious in society.

The process of reviewing the literature, consulting experts, and surveying law students and laypersons yielded an initial CAS of thirty-four items, representing different aspects of the four key conflicts (the list of items of the initial CAS is presented in Table A1 in Online Appendix A).[122]

[121] FURR, *supra* note 3, at 54–55.
[122] Ori Katz, *Mapping the Diversity of Thought—An Attitude Theory of Contract Law*, OSF HOME, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400 (last visited May 9, 2021, 3:00 PM) [hereinafter Online Appendix].

By way of illustration, **Individualism** included items such as: "*People should be prevented from entering into unfair contracts*," and "*A contracting party should be obliged to be considerate of the other party when the latter encounters difficulties in executing the contract*." **Formalism** included items such as: "*When interpreting a written contract, the focus should be on the written word, rather than the parties' presumed intentions based on other evidence*," and "*A person is bound by whatever is written in a contract, even if he or she signed it without reading it*." **Egalitarianism** included items such as: "*Employers should be prohibited from asking female job candidates whether they are pregnant or plan to become pregnant*," and "*Commercial firms should be entitled to refuse to service clients who live in remote locations*." **Instrumentalism** included items such as: "*A person who breaches a contract should be compelled to fulfill his or her contractual obligations—simply paying damages is not enough*," and "*The chief purpose of contracts is to promote market economy, rather than the notion that promises should be kept.*"

After generating the items mainly through theoretical inquiry, an exploratory empirical analysis was required. The theoretical endeavor of generating the scale's items is ultimately subjective. Therefore, to ensure that the scale can measure the distinct attitudes it is intended to measure, one must carefully analyze the variance in responses to each item, the internal consistency of the hypothesized conflicts, and the dimensional structure of the scale as a whole. This exploratory empirical process commonly involves revising the scale in order to reach a sufficiently accurate measurement that represents the theory's constructs.

### ii. Participants and Procedure

A total of 356 MTurk Master Workers[123] from the United States completed the initial version of the CAS for a fee of $1.[124]

To avoid order effects, the order of the thirty-four items was randomized between participants. Participants were asked to indicate the degree to which they agreed or disagreed with each statement on a 7-point Likert scale. The participants were told that, when evaluating the statements, they should not refer to the law as it currently stands, or to other people's views, but solely base their evaluations on their own opinion as to what the law should be. Then, the participants were asked to provide a few demographic details about themselves. To enhance

[123] *Master Workers* are individuals who regularly take part in studies on MTurk, and have demonstrated consistent success in performing a wide range of assignments.

[124] Although MTurk subjects from the United States are more representative of the U.S. population than the in-person convenience samples that are often used by experimental researchers, they are considerably younger and more liberal than the U.S. adult population as a whole. *See* Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 351 (2012) (empirically assessing the internal and external validity of experiments performed using MTurk); Connor Huff & Dustin Tingley, *"Who Are These People?" Evaluating the Demographic Characteristics and Political Preferences of MTurk Survey Respondents*, RSCH. & POL. July–Sept. 2015, at 1 (comparing MTurk subjects' characteristics and political inclinations to those of the Cooperative Congressional Election Survey's subjects). However, this limitation should not be overstated. While some concerns have been raised about whether liberals and conservatives recruited through MTurk share the same psychological dispositions as their counterparts in the general public, *MTurk* samples have been found to "closely mirror the psychological divisions of liberals and conservatives in the mass public" and "produce substantively identical results with only minor variation in effect sizes." Scott Clifford, Ryan M. Jewell & Philip D. Waggoner, *Are Samples Drawn From Mechanical Turk Valid for Research on Political Ideology*?, RSCH. & POL., Oct.–Dec. 2015, at 1. Thus, by taking into account the subjects' ideological worldview and other demographic characteristics, one may cautiously gain insight into the prevailing attitudes in the population as a whole. Kevin E. Levay, Jeremy Freese & James N. Druckman, *The Demographic and Political Composition of Mechanical Turk Samples*, SAGE OPEN, Jan.–Mar. 2016, at 9 (showing that MTurk data can be profitably used by observational researchers of public opinion when accounting for a range of political and demographic variables). Moreover, it has been shown that MTurk workers are comparatively more attentive to study materials, and that they produce similar results in treatment effects as subjects in other representative and unrepresentative platforms. *See* Krin Irvine, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 333–34 (2018) (evaluating replications of three canonical law and psychology findings using three contemporary subject pools, including MTurk); Kevin J. Mullinix, Thomas J. Leeper, James N. Druckman & Jeremy Freese, *The Generalizability of Survey Experiments*, 2 J. EXPERIMENTAL POL. SCI. 109, 109 (2015) (finding considerable similarity between many treatment effects obtained from convenience and nationally representative population-based samples).

concentration, participants were told, "Note that your responses will be monitored, and random responses could result in loss of compensation."[125] In addition, the scale included an attention-check item that stated: "*For this statement, please select the answer 'Slightly agree': It evaluates the validity of the questionnaire*."

Ten participants who failed the attention-check were excluded from the analysis. To further increase the reliability of the results for the exploratory analysis, the fastest 10% of the remaining participants to complete the entire survey (in 206 seconds or less) were also excluded from the analysis.[126] This left 312 participants, 147 of whom were female (47.1%) and 165 of whom were male (52.9%). A total of 248 participants had attended college or other higher education (79.5%). Twenty-five participants had some legal education (8%). The average age of the participants was 39.44 (*Standard deviation (hereinafter: SD)=11.12*). Finally, participants were asked to rate themselves on two scales: *Political Worldview* (from 0 = Liberal to 100 = Conservative) and *Religiosity* (0 = Not at all religious, 100 = Devout). The average Political Worldview score was 41.82 (*SD=29.13*), and the average Religiosity score was 27.29 (*SD=34.86*).

### iii. Results

First, I tested the reliability of the hypothesized conflicts. The reliability reflects the degree of internal consistency between the various statements in the scale. All statements in a scale are supposed to measure different aspects of the same construct and, thus, correlate. The common measurement for a scale's reliability is Cronbach's alpha (α). The Cronbach's alpha of Individualism, Formalism, and Egalitarianism were adequate; however, the alpha of

[125] In reality, all participants received the full compensation.
[126] The results were basically the same when these participants were included.

Instrumentalism was very low,[127] which means that, with regard to the set of items used in the study, Instrumentalism does not form a consistent dimension.

To understand the structure of the scale (*dimensionality*) and the nature of the associations between the responses for the different items, an Exploratory Factor Analysis ("EFA") should be performed. Factor analyses are a group of statistical techniques used to reduce variability among a large number of variables to a few latent factors. For example, applying factor analysis on a set of four variables—*frequency of smiling*; *frequency of laughing*; *frequency of crying*; and *frequency of having bad thoughts*—would probably generate two latent factors, which we might dub *happiness* (for the two former variables) and *sadness* (for the latter two).[128]

Accordingly, I applied an EFA[129] to the participants' responses to explore the dimensional structure of the scale. The EFA demonstrated that three general conflicts (or factors) can explain 40.43% of the variance in participants' responses. In other words, 40.43% of the differences between participants' responses for each item can be attributed to one of three attitudes that can be measured by other associated items.[130] The EFA also showed that, by and large, items were highly

[127] $\alpha_{ind}$=0.71; $\alpha_{form}$=0.66; $\alpha_{egal}$=0.84; $\alpha_{inst}$=0.48. To interpret the meaning of the alpha coefficients, Robert DeVellis suggests the following as rules of thumb for assessing alphas: 0.6 = unacceptable; 0.6–0.65 = undesirable; 0.65–0.7 = minimally acceptable; 0.7–0.8 = respectable; 0.8–0.9, very good; and considerably above 0.9 = one should consider shortening the scale. DEVELLIS, *supra* note 3, at 145.

[128] *See* FURR, *supra* note 3, at 25–35, 91–109. EFA is considered the appropriate method and common practice in the early stages of building new scales. *See* Amy E. Hurley, Terri A. Scandura, Chester A. Schriesheim, Michael T. Brannick, Anson Seers, Robert J. Vandenberg & Larry J. Williams, *Exploratory and Confirmatory Factor Analysis: Guidelines, Issues, and Alternatives*, 18 J. ORG. BEHAV. 667, 668 (1997); An Gie Yong & Sean Pearce, *A Beginner's Guide to Factor Analysis: Focusing on Exploratory Factor Analysis*, 9 TUTORIALS QUANTITATIVE METHODS FOR PSYCH. 79, 79 (2013).

[129] Specifically, a maximum likelihood EFA, with promax rotation using SPSS.

[130] It should be noted that the EFA yielded a scree plot (a graph that helps determine the number of factors one should extract, to account for people's responses) that slightly implies a two-factor structure. *See* Online Appendix B, fig.B1, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400. However, given my theory and the fact that the scree plot was not conclusive, I extracted three factors.

associated with their hypothesized conflicts—or, put differently, items of each hypothesized conflict were associated with one another.[131]

### iv. Discussion

This study demonstrated that Instrumentalism, at least as measured by the items I used and when measuring the attitudes of laypersons, is not a consistent conflict. In contrast, the hypothesis regarding the other three conflicts was borne out: Individualism and Egalitarianism were both very consistent, and Formalism was relatively consistent, as well.

The results of Study 1 indicated that the scale could be improved in the following respect: although theoretically, Individualism and Egalitarianism are distinct constructs, they correlate quite substantially ($r=0.59$). Therefore, to capture the uniqueness of each dimension, (1) the differences between them should be more salient; (2) the reliability of Formalism should be improved; and (3) Instrumentalism items should be changed to reflect a coherent attitudinal dimension.

## 2. Study 2—Revised CAS

In this study, I used a revised version of the CAS. Based on the results of Study 1, I reworded, omitted, and added items to improve the scale in the aforementioned respects (*see* Table A1 in Online Appendix A).[132] The major substantial change pertained to Instrumentalism. In this

[131] *See* Online Appendix A, tbl. A2, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400 (showing the pattern matrix of factor loadings). Roughly speaking, factor loadings reflect the extent to which each statement correlates with the extracted factors/conflict.

[132] *See* Online Appendix A, tbl.A1, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400; With regard to **Individualism**, I removed items *ind9* and *ind10* which were insignificantly loaded on their factor ($<|0.35$ ), and instead added a new item (*ind11*). In addition, I reworded items *ind6*, *ind7* and *ind8* that were insignificantly

version of the scale, I sought to better capture attitudes toward the economic point of view associated with an Instrumentalist approach. Thus, I added items that address the use of contract law to incentivize efficient behavior (e.g., "*When deciding contractual disputes, courts should focus on the likely effects of their rulings on future behavior, rather than on attaining a just resolution of the specific dispute*") and the belief in the efficiency of free markets (e.g., "*The law should reflect the notion that market reputation is more effective in disciplining firms' behavior than extensive legal duties*"). While none of these items is a *necessary* or *logical* element of an instrumentalist or economic approach, they do, in fact, reflect the common perceptions among people who are inclined to an economic perspective and resultingly can be used to capture attitudes in this regard.[133]

### i. Participants and Procedure

A new sample of 405 MTurk Master Workers from the United States completed the survey online, in return for a fee of $1.50. Participants were presented with the revised CAS—thirty-nine items in randomized order—and asked to indicate the degree to which they agree or disagree with each statement. Participants were also asked to provide a few demographic details about themselves. As in Study 1, participants were asked to pay attention while completing the survey, and an attention-check was included.

loaded on Individualism, and greatly skewed (>|*1.1*). As for **Formalism**, I reworded items *form7* and *form8* due to their substantial low loadings on their conflict (<|*0.16*|), and added 6 items to increase reliability. In the case of **Egalitarianism**, I rephrased item *egal7,* which was insignificantly loaded on its factor (0.33). Finally, as for **Instrumentalism***,* I considerably altered the content of the conflict by removing items *inst4-8*, and replacing them with 5 different items, as described in the body of the text.

[133] Study 2 also included a section at the end of the survey that tested the construct validity of the scale—as described in detail in section IV.D.

Twenty-eight participants who failed the attention-check item were excluded from the analysis. Once again, to further increase the reliability of the results for the exploratory analysis, the fastest 10% to complete the entire survey (in 308 seconds or less) were excluded from the analysis as well.[134] Of the remaining 340 participants, 177 were female (52.1%), 159 were male (46.8%), and 4 preferred not to answer this question. A total of 259 participants had attended college or had received other higher education (76.17%), and 21 participants had some legal education (6.17%). The average age was 40.4 (*SD=10.76*). The average Political Worldview score (from 0 = Liberal to 100 = Conservative) was 39.74 (*SD=29.4*), and the average Religiosity score (0 = Not at all religious, 100 = Devout) was 29.25 (*SD=35.37*).

### ii. Results

The reliability of three of the four conflicts was acceptable.[135] However, the alpha of Instrumentalism was still low,[136] and, even after excluding the two most inconsistent items,[137] the results were still relatively poor.[138] I therefore excluded the Instrumentalism items from the rest of the analysis.

To reach an adequate CAS—in which items of each dimension (or conflict) are consistent, the scores of each attitude vary across participants, and dimensions are distinct from one another—I excluded thirteen items from the scale.[139] Even after excluding these items, the Cronbach's alphas

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[134] As in Study 1, the results were basically the same when including these participants.
[135] $\alpha_{ind}$=0.78; $\alpha_{form}$=0.68; $\alpha_{egal}$=0.83, *cf. supra* note 127.
[136] $\alpha_{inst}$=0.52.
[137] Inst1 and inst9.
[138] $\alpha_{inst}$=0.59.
[139] I screened the items through a four-stage process. First, I excluded 4 items that had reduced the conflicts' reliability (*ind8*, *form9*, *form12*, and *form14*). Second, I excluded 5 items that had been hypothesized to load on one conflict, but following an EFA were found to load on a different conflict (>|*0.3*|; *form8*, *form10*, *form11*, *form13*,

remained mostly acceptable.[140] An EFA on the final scale demonstrated a three-dimensional structure that explains 48.49% of the variance in responses, with each item associated primarily with its conflict.[141] The mean scores of Individualism, Formalism, and Egalitarianism were 3.29 (*SD=1.19*), 4.92 (*SD=0.93*), and 4.93 (*SD=1.46*), respectively, on a 1–7 scale (the final version of the CAS is available in the Online Appendix).

### iii. Discussion

As with the results of Study 1, the Instrumentalism items did not form a consistent scale. This means that MTurk Master Workers did not perceive the items of Instrumentalism in either study as sharing a significant common attitudinal attribute. Importantly, this does not necessarily mean that Instrumentalism is not a coherent attitudinal dimension in contract law. First, an inherent limitation of scale construction is its dependence on content validity—namely on the assumption that the items chosen are indeed a true reflection of the theoretical construct. Thus, it is at least theoretically possible that, had I used a different set of items to represent this conflict, I would have obtained different results. Second, even if Instrumentalism does not constitute a coherent attitude of MTurk workers, it is possible that, had the survey been conducted with legally trained people, a coherent dimension predicting decision-making would indeed have emerged. That said, the fact that two sets of items aimed at reflecting Instrumentalism in contract law did not yield

and *ind11*). Third, I conducted another EFA, and excluded 2 items that did not load above 0.3 on their hypothesized conflicts (*ind7* and *egal8*). Finally, I excluded 2 items that were greatly skewed (>|*1.3*|; *form7* and *egal7*). After all these exclusions, 18 items were left—6 items per conflict (*ind1–6*, *form1–6*, and *egal1–6*).

[140] $\alpha_{ind}$=0.81; $\alpha_{form}$=0.64; $\alpha_{egal}$=0.82.

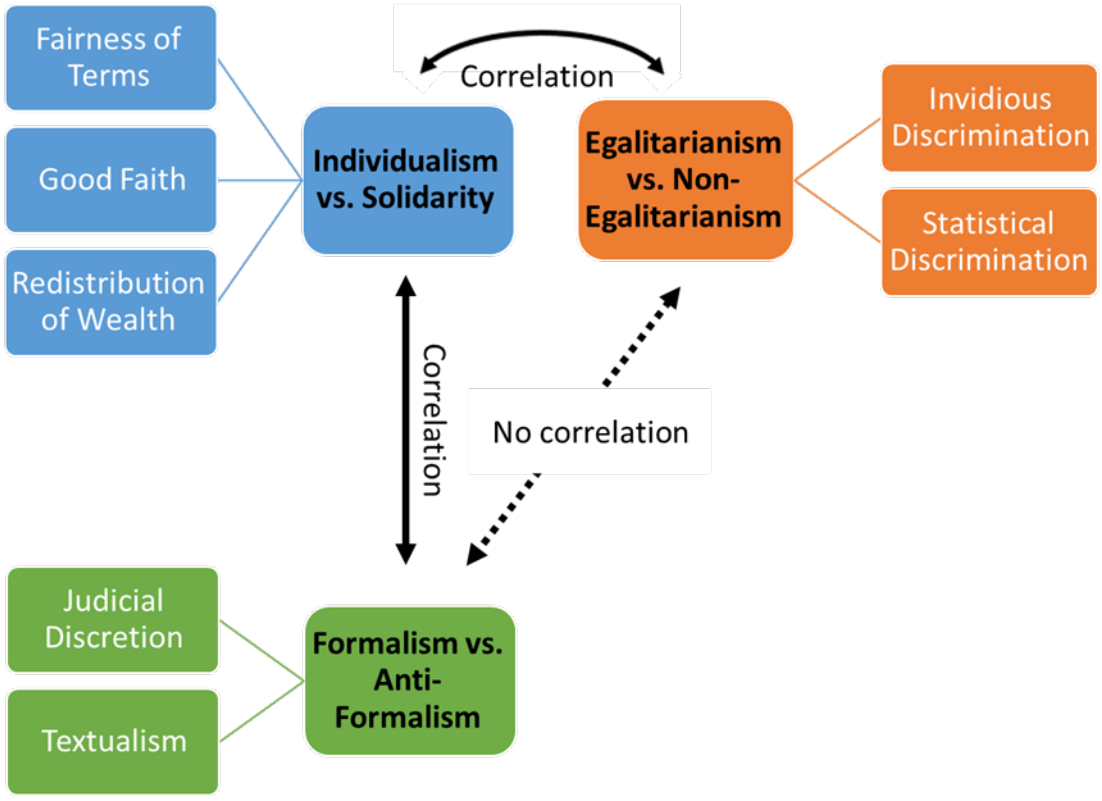
[141] *See* Online Appendix B, fig.B2, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400 (scree plot); Online Appendix A, tbl.A3, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400 (factor loadings).

consistent responses suggests that Instrumentalism is not as straightforward a construct for organizing people's contractual attitudes as one might think. Although, from a purely analytical standpoint, one can use Instrumentalism to form an intelligible order in normative judgments, it is much harder to show that (at least) laypeople do, in fact, follow such an order. Be that as it may, any future attempt to demonstrate that Instrumentalism is a coherent dimension of contract attitudes should take these results into account.

Putting Instrumentalism aside, after omitting several items, I developed a reliable three-dimensional CAS. During the item-screening process, two substantial topics were excluded from the CAS: attitudes toward contract formalities and attitudes toward affirmative action. Although associations between contract formalities and Formalism, and between affirmative action and Egalitarianism, are likely to exist, these associations are not apparent in the final version of the CAS and were therefore excluded. The revised AT of contract law, as reflected in the CAS, is depicted in Figure 2.

It is important to note that these results do not only support the theory, but also validate the scale and indicate that participants understood the items the way they were meant to be understood. The fact that the items in each dimension hang together reliably and construct a three-dimensional structure suggests that, for the participants, each of the three clusters of items reflects a distinct and coherent normative issue.

**Figure 2: Attitude Theory of Contract Law – Revised**




## B. CONFIRMATORY STUDIES: STUDIES 3–5

After constructing a scale using exploratory analysis, one should confirm the scale structure to ensure its validity. Thus, in this Section, I conducted a confirmatory analysis of the scale dimensions using three population samples: MTurk workers (Study 3); a representative sample of the U.S. population (Study 4); and Israeli law students (Study 5). A confirmatory testing of a scale's structure should be conducted by running a further EFA, followed by a structural equation

modeling technique known as *confirmatory factor analysis* ("CFA").[142] These tests are aimed at reaffirming the three-dimensional structure of the scale. For a full understanding of the CAS, attributes, attitude, scores, variances, and correlations between conflicts are also discussed.

### i. Participants

In Study 3, I recruited a new sample of 601 MTurk Master Workers from the United States. Participants were paid $0.80 for responding. Fourteen participants who failed the attention-check were excluded. This left 587 participants, of whom 247 were female (42.1%), 335 were male (57.1%), and 5 preferred not to say. A total of 435 participants had attended college or had higher education (74.1%), and 44 participants had some legal education (7.5%). The average age of participants was 37.85 (*SD=10.46*). The average Political Worldview score (from 0 = Liberal to 100 = Conservative) was 38.99 (*SD=28.58*), and the average Religiosity score (0 = Not at all religious, 100 = Devout) was 27.69 (*SD=34.08*).

In Study 4, a sample of 968 U.S. adults was recruited through Toluna, a company specializing in web-based surveys. Participants' remuneration was determined by Toluna.[143] The

[142] *See, e.g.*, Peter Cabrera-Nguyen, *Author Guidelines for Reporting Scale Development and Validation Results*, 1 J. SOC'Y SOC. WORK & RES. 99, 99 (2010); Roger L. Worthington & Tiffany A. Whittaker, *Scale Development Research: A Content Analysis and Recommendations for Best Practices*, 34 COUNS. PSYCH. 806, 806 (2006). To perform a CFA, I used the lavaan package in R. Since the responses were on a Likert scale and some of the items deviate from normality, I used a *parceling* technique (parcels are score averages of groups of homogeneous items, which can generally be treated as continuous variables, even though they are based on ordinal items). I therefore randomly grouped items in each conflict into two parcels and averaged their scores, and then used these parcels as indicators in the CFA model. REX B. KLINE, PRINCIPLES AND PRACTICE OF STRUCTURAL EQUATION MODELING 331–32 (4th ed., Guilford Publ'ns 2015). There is no clear approach to CFA reporting, and the adequate standards are vague. *See* Reid Bates, Simone Kauffeld & Elwood F. Holton, *Examining the Factor Structure and Predictive Ability of the German-Version of the Learning Transfer Systems Inventory*, 31 J. EUR. INDUS. TRAINING 195, 200 (2007). As a flexible reference point, I used the cut-off criteria implemented by Kahane et al., *supra* note 12, at 142, since, they too used CFA to examine people's normative attitudes. These "cut-off criteria" are presented in Table 2.

[143] Participants who failed the attention check were excluded by Toluna, and are not included in the sample of the 968 participants.

participants were a representative sample of the U.S. adult population in terms of age, gender, income, and ethnicity. Participants' average score on the Political Worldview scale was 52.88 (*SD=29.41*), and the average Religiosity score was 49.80 (*SD=35.71*).[144]

A total of 147 third- and fourth-year LL.B. and LL.M. students at the Faculty of Law of the Hebrew University in Jerusalem took part in Study 5. They were recruited by email. To encourage participation, six respondents were randomly selected to win a prize of NIS 180 (approximately US$ 45). After excluding 5 participants who failed the attention check, a sample of 142 participants remained—16 of whom preferred not to provide any demographic details. Of those who completed the demographic questionnaire, 67 were female (53.2%), 58 were male (46%), and 1 preferred not to say. The average age of the participants was 24.67 (*SD=2.59*). The average Political Worldview score was 34.03 (*SD=23.21*), and the average Religiosity score was 27.46 (*SD=33.32*).

### ii. Procedure

Participants were asked to complete, online, the final version of the CAS—consisting of eighteen items in randomized order—and to provide a few demographic details (*see* the final version of the CAS in the Online Appendix).[145] The participants were told that their responses would be monitored, and an attention check was included in the scale.[146]

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[144] As expected, the general U.S. population sample was, on average, more conservative and more religious than the MTurk pool. *See supra* note 124.

[145] *See The* CAS, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400; The Israeli law students were asked to answer a Hebrew version of the CAS. The author and a contract-law expert first reached a consensus on the "best" translation. Then, to validate the translation, a second version has been independently made by a native bilingual. No meaningful differences were found between the two versions.

[146] Zamir & Katz, *Do People Like Mandatory Rules? The Impact of Framing and Phrasing*, *supra* note 2, at 1054. Study 4 was part of another study that aimed to capture people's attitudes toward the wording of mandatory rules in

### iii. Results

First, I tested the internal consistency (i.e., reliability) between the various statements in the scale. In all three studies, the results were quite similar to those of Study 2, and the three conflicts were consistent.[147]

EFAs on the responses of the MTurk workers (Study 3) and the representative sample of the U.S. population (Study 4) demonstrated fairly similar results to those of Study 2. The responses reflected a three-dimensional structure that explains 50.15% of the variance in responses in Study 3 and 44.16% of the variance in Study 4. In addition, in both studies, items were associated with the hypothesized conflicts.[148] The CFA[149] I conducted on the responses from these studies returned satisfactory global fit indices (*see* Table A5 in Online Appendix A), indicating that the associations between the responses fit well with the hypothesized three-dimensional structure. To further examine the hypothesis about the dimensionality of the scale, I tested whether three alternative structures are better at explaining the association between the responses: (1) a unidimensional structure, in which all items are explained by a single factor; (2) a two-dimensional structure, in which Formalism items are explained by the same factor as Individualism ones; and (3) a two-dimensional structure, in which all Egalitarianism items are explained by the same factor as the

contract law. Thus, in the first part of the survey (which is not reported here), people were asked to assess several mandatory rules, and to provide certain demographic details about themselves. They were then asked to complete the CAS questionnaire.

[147] Cronbach's alphas were as follows:

| | Individualism | Formalism | Egalitarianism |
|---|---|---|---|
| Study 3 | 0.80 | 0.67 | 0.81 |
| Study 4 | 0.74 | 0.67 | 0.70 |
| Study 5 | 0.74 | 0.69 | 0.75 |

For interpretation of the Cronbach's alphas, *see supra* note 127.

[148] *See*, Online Appendix B, figs.B3 & B4, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400; *and* Online Appendix A, tbl.A4, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400.

[149] *See supra* note 142.

Individualism items. This test indicated that the three-dimensional structure was significantly better in its fit indices than the alternative structures (*see* Table A5 in Online Appendix A).[150]

In contrast, the EFA on the responses of the Israeli law students in Study 5 suggest the existence of only two dimensions that explain 38.32% of the variance, while three dimensions explain 46.11%.[151] In addition, several items did not associate properly with the hypothesized conflicts.[152] Specifically, two items concerning the fairness of terms (ind3 and ind4) were only slightly associated with Individualism[153] and were associated comparatively well with Egalitarianism.[154] However, a CFA test of the three-dimensional structure yielded adequate results, which were significantly better than unidimensional and bidimensional structures[155] (*see* Table A5 in Online Appendix A).[156]

The mean scores of Individualism, Formalism, and Egalitarianism in all three studies are reported in Table 1, and the distribution of participants' scores in each conflict are presented in Figure 3. Table 2 displays the correlation matrices between participants' scores in each conflict, Political Worldview, and Religiosity for the three studies.[157]

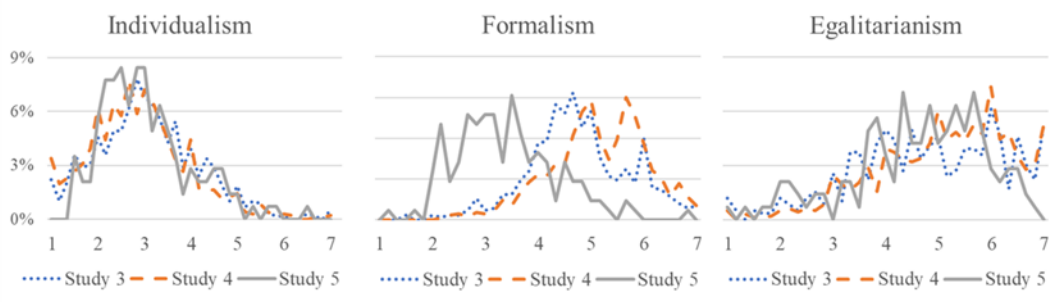
**Table 1:** *Participants' Mean Scores on the CAS in Studies 3–5*

[150] *See* Online Appendix A, tbl.A5, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400; Study 3: $\chi 2>194$, $p<0.001$; Study 4: $\chi 2>350$, $p<0.001$.
[151] *See* Online Appendix B, fig.B5, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400.
[152] *See* Online Appendix A, tbl.A4, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400.
[153] Factor loadings: 0.12 and 0.18, respectively.
[154] Factor loadings: 0.54 and 0.24, respectively.
[155] $\chi 2>30$, $p<0.001$.
[156] To further test if the issue of terms' fairness is part of Egalitarianism among Israeli law students, I compared my AT structure with an alternative three-dimensional structure. In the alternative structure, items that addressed the terms' fairness were parceled together and considered part of Egalitarianism. This comparison indicated that the original structure had better indices. *See* Online Appendix A, tbl.A5, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400. However, caution should be used in drawing conclusions from this comparison, since these models use different sets of parcels.
[157] For the scatter plots of the correlations between the three conflicts in the three studies *see* Online Appendix B, figs.B6–B8, https://osf.io/n4tvg/?view_only=d449adb3e13c4c5aadaf36dfce4e5400.

| | Individualism | Formalism | Egalitarianism |
|---|---|---|---|
| Study 3 | 3.08 (1.11) | 4.77 (0.96) | 4.81 (1.41) |
| Study 4 | 2.89 (1.06) | 5.14 (0.91) | 5.11 (1.25) |
| Study 5 | 3.04 (0.97) | 3.4 (0.95) | 4.6 (1.26) |

Scores are on a Likert scale of 1–7 where 7 represents individualistic, formalistic and egalitarian attitudes. Standard deviation in parentheses.

**Figure 3**: Histograms of Participants' Scores on the CAS in Studies 3–5




Scores are on a Likert scale of 1–7 where 7 represents individualistic, formalistic and egalitarian attitudes.

**Table 2:** *Correlations Matrices of Conflicts' Scores, Political Worldview, and Religiosity for Study 3–5*

| | Study 3 | | | | Study 4 | | | | Study 5 | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Ind. | Form. | Egal. | Pol. | Ind. | Form. | Egal. | Pol. | Ind. | Form. | Egal. | Pol. |
| Individualism | - | | | | - | | | | - | | | |
| Formalism | .23** | - | | | .1** | - | | | .3** | - | | |
| Egalitarianism | -.41** | -.02 | - | | -.24** | -.08** | - | | -.55** | -.21* | - | |
| Political worldview | .3** | .15** | -.48** | - | .14** | .12** | -.34** | - | .23** | .26** | -.35** | - |
| Religiosity | 0.01 | 0.01 | -.11** | .44** | .08* | .09** | -.12** | .43** | .13 | .29** | -.29** | .62** |

** $p < 0.5$ **$p < 0.01$*

### iv. Discussion

All conflicts in all three studies were acceptably consistent,[158] which means that for each set of six items, each item measured different aspects of the same attitude. In terms of

[158] $\alpha > 0.65$.

dimensionality of the scale, Study 3 and 4 replicated the results of Study 2 using both EFA and CFA, thereby demonstrating that the three conflicts reflect distinct attitudes in contract law and that each one of them is necessary to understand the underlying attitudes that explain various judgments and legal decisions regarding contracts. However, the three-dimensional structure of the CAS fits less well with the responses of the Israeli law students. The main reason for these results appears to be that items about the terms' fairness were associated with Egalitarianism more than with Individualism. This suggests that, to some extent, to understand the underlying attitudes of Israeli law students, it may suffice to use only two key conflicts: Formalism and a combined conflict of Individualism and Egalitarianism.

Attitudes on Individualism and Formalism were normally distributed around the average, and Egalitarian attitudes were distributed more uniformly. The attitudes of the MTurk respondents were less formalistic, less egalitarian, and more individualistic than those of the general population.[159] These differences may be due to the associations between personal attributes and contractual attitudes, as presented in section IV.C below.

Israeli law students were less formalistic and less egalitarian than the average U.S. participant.[160] It is hard to identify the precise reason for these disparities; however, there are four notable differences between these two samples that come to mind: (1) Political Worldview, (2). Religiosity, (3) culture, and (4) legal expertise. In the Israeli sample, the participants' Political Worldview was more liberal, and the participants were less religious. However, it is unclear why a more liberal approach would result in a non-egalitarian attitude. Also, the average Political

[159] $t(1553)=7.54$, $p<0.001$; $t(1553)=4.24$, $p<0.001$; and $t(1553)=3.45$, $p=0.001$, respectively.
[160] $t(1108)=21.22$, $p<0.001$; $t(1108)=4.42$, $p<0.001$, respectively.

Worldview and Religiosity of Israeli and MTurk samples were quite similar, yet the Israelis were less inclined to Formalism. It is possible that the differences between the samples were due to culture or legal expertise. It stands to reason that certain issues are associated with each other in one society but not in the other or that people's attitudes vary between cultures. In the same vein, legal expertise may also affect how people think about legal issues. However, since I do not have a big enough sample of non-Israeli legal experts or Israeli laypersons, the data cannot distinguish between the effects of culture and those of legal expertise. In addition, the sample of Study 5 was relatively small, so more data may be needed to reach a more robust conclusion.

The correlations highlight the nature of the conflicts. Egalitarianism and Formalism are both associated with Individualism, but mostly not with each other. This suggests that, as hypothesized, the Solidarity component of Individualism is also evident in Egalitarianism and Formalism. The strongest correlation between Individualism and Egalitarianism was found among the Israeli law students' sample ($r=-0.55$), which is accounted by the fact that, as previously noted, among this sample, the fairness of the terms was associated with Egalitarianism. The correlation between Egalitarianism and Individualism was weaker in the representative sample ($r=-0.24$) than in the MTurk sample ($r=-0.41$). This indicates that, in the general population, these conflicts are more independent of one another than among the MTurk workers.

The relatively low correlations between Political Worldview and either Individualism and Formalism indicate that these conflicts are relatively independent of the Liberal-Conservative divide (unlike Egalitarianism). This means that, although they are related, political attitudes do not capture most of the variance in contractual attitudes.

### C. CONTRACTUAL ATTITUDES AND PERSONAL CHARACTERISTICS: STUDIES 3–5

To analyze the associations between attitudes in the CAS and participants' personal characteristics, I ran a set of linear regressions on responses from the three confirmatory studies, using the scores on each of the conflicts as dependent variables and participants' demographics as predictors. Since all participants in the Israeli sample had legal training, I ran separate regressions for the American and Israeli samples to prevent misinterpretation of the distinct associations between contractual attitudes and legal background, academic training, and Israeli culture.

Political Worldview had a significant effect on all three contractual attitudes in the American sample and on Individualism and Egalitarianism in the Israeli sample—inasmuch as conservatives demonstrated more individualistic, formalistic, and non-egalitarian attitudes than liberals. In the American sample, gender was associated with Egalitarianism, showing that women expressed more egalitarian attitudes; in the Israeli sample, female law students were less individualistic and formalistic, and more egalitarian. Age was positively associated with formalistic attitudes in both samples, negatively associated with egalitarian and individualistic attitudes in the Israeli sample, and positively associated with egalitarian attitudes in the American sample.[161] In addition, the more religious Americans were less individualistic, Americans with academic training were more individualistic, and Black Americans were more egalitarian (for the elaborate report on the regressions, *see* Table A5 in Online Appendix A).

[161] However, caution should be taken when comparing the two samples in terms of age, since the range and variance of this variable differed substantially between them (in the Israeli sample: *MEAN=24.67*, *SD=2.59*, *RANGE=19–34*; in the American sample: *MEAN=44.46*, *SD=15.87*, *RANGE=17–85*).

### D. CONSTRUCT VALIDITY

When constructing a new scale, one must test its *construct validity*, or the degree to which it measures the construct it seeks to assess.[162] A valid scale should be associated with related measurements (*convergent validity*), rather than with unrelated ones (*discriminant validity*). In the present context, construct validity refers to the extent to which each dimension of the scale measures the conflict in question, as reflected in other measures.

Since, to date, there are almost no scales for assessing legal attitudes in the context of private law, the task of finding relevant valid measurements is rather challenging. Therefore, I used attitude scales that relate to legal issues and several relevant vignettes that have previously been used in the empirical legal literature. This included the following six scales or vignettes (for the full text of the scales and vignettes, *see* Online Appendix C):

(1) *Cultural Cognition Worldview Scale (Short Form) ("CCWS")*. The CCWS was developed by Dan Kahan as an operationalization of the *cultural theory of risk* formulated by Mary Douglas and Aaron Wildavsky[163] and is designed to measure cultural worldviews along two dimensions: *individualism-communitarianism* ("*IC*") and *hierarchy-egalitarianism* ("*HE*"). The former dimension reflects the extent to which people believe that the government should be involved in individuals' lives, and the latter reflects attitudes toward minority rights, discrimination, and the distribution of wealth.[164] Thus, I hypothesized that, in my scale, Individualism would correlate with IC and Egalitarianism would correlate with HE.

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[162] DEVELLIS, *supra* note 3, at 95–100.
[163] MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS (1st ed., Univ. Cal. Press 1982).
[164] Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, *in* HANDBOOK OF RISK THEORY 725 (S. Roeser ed., 2012).

(2) *Oxford Utilitarianism Scale ("OUS")*. Developed by Guy Kahane et al., the OUS measures people's attitudes toward utilitarianism.[165] According to their theory, utilitarianism encompasses two distinct attitudinal dimensions. The first dimension is the degree to which people care for the well-being of everyone, be they near or far (*impartial beneficence*, or "*IB*"*)*. This dimension is arguably associated with both Individualism and Egalitarianism. The other dimension deals with people's willingness to sacrifice one individual in order to save a greater number (*instrumental-harm*, or "*IH*"*)*. This dimension concerns attitudes toward deontological constraints that trump efficient behavior. I therefore hypothesized that this dimension would be associated with Instrumentalism (which, in the event, I was unable to measure) and not with the other dimensions. Although Instrumentalism was omitted from the final version of the CAS, the correlations between the CAS's conflicts and IH are important for ensuring discriminant validity, namely that the three conflicts do not measure attitudes that are associated with Instrumentalism.

(3) *Chapman v. Skype*. This vignette was based on a study by Meirav Furth-Matzkin & Roseanna Sommers[166] and on an actual court case, *Chapman v. Skype Inc.*[167] The participants were asked to indicate how fair is it to charge a customer fees based on the fine print that she had not read when the supplier's advertisement implied that there would be no such fees. I hypothesized that this vignette would correlate with Formalism.

(4) *Automobile Shortage.* This vignette was based on a question from a survey administrated by Daniel Kahneman et al.,[168] in which participants were asked to indicate how fair

[165] Kahane et al., *supra* note 12, at 133.
[166] Furth-Matzkin & Sommers, *supra* note 78.
[167] Chapman v. Skype Inc., 220 Cal. App. 4th 217, 222 (2013).
[168] Kahneman et al., *supra* note 51, at 732.

it is for a dealer to raise prices due to a shortage of a popular automobile model. Because this question concerns the fairness of the contract, I expected it would correlate with Individualism.

(5) *Kitchen Renovations* & (6) *Condo Selling.* These two vignettes were based on a study conducted by Wilkinson-Ryan & Baron to address the *efficient breach doctrine*.[169] In *Kitchen Renovations,* the participants were asked to indicate the extent to which the law should permit a contractor to breach a contract with a client in order to take a more profitable job, while compensating the client for their losses (for non-performance).[170] In *Condo Selling,* participants were asked whether it is moral for a floor refinisher to break a promise in order to take a more lucrative job.[171] These vignettes were supposed to be strongly correlated with Instrumentalism and not with the other dimensions.

This testing of the construct validity was incorporated within Study 2 as a subsequent section and completed by the same 405 MTurk workers who were described above in Study 2.[172] After participants had completed the CAS,[173] they were presented with two of the six vignettes/scales described above. Attention-checks were included in both sections. Participants were then asked to provide a few demographic details about themselves.

Table 3 displays a correlation matrix between the conflicts' scores,[174] Political Worldview, Religiosity, the OUS and CCWS scales, and the four case vignettes. The correlations between the CAS conflicts were basically similar to the results from Study 3, which also used MTurk

[169] Wilkinson-Ryan & Baron, *supra* note 2.
[170] *Id.* at 413–14.
[171] *Id.* at 418–20.
[172] *See supra* Section IV.A.2.
[173] The participants completed the Study 2 version.
[174] The scores were computed using only the 18 items that make up the final version of the CAS—excluding items that were included in the Study 2 version of the CAS, but ultimately omitted in the final version.

responders. As expected, Political Worldview correlated with Egalitarianism (-0.47) but was only slightly correlated with the other two CAS conflicts (≈*0.2*). Contrary to my initial hypothesis, neither the Individualism score of the CCWS (reflecting attitudes toward governmental paternalism) nor the Automobile Shortage vignette were highly correlated with CAS Individualism (*r=0.23* and *r=0.1* respectively). In contrast, attitudes toward Hierarchy were correlated with both CAS Egalitarianism (*r=-0.59*) and Individualism (*r=0.42*). The *Impartial Beneficence* dimension in the OUS—which basically measures caring for strangers—was, as expected, strongly correlated with CAS Individualism (*r=-0.39*). The *Chapman v. Skype* vignette—concerning the validity of a written contract that was at odds with a previous advertisement—correlated with Formalism (*r=0.33*). Finally, the *Instrumental Harm* dimension in the OUS, and the *Kitchen Renovations* and *Condo Selling* vignettes, which measure attitudes toward an aspect of utilitarianism and efficient breach, only slightly correlated with the other CAS conflicts (*r<|0.19|*)—thus demonstrating discriminant validity.

**Table 3:** *Correlations Matrix of Conflicts' Scores, Political Worldview, Religiosity, Other Scales, and Vignettes*

| | Ind. | Form. | Egal. | Pol. | Relig. |
|---|---|---|---|---|---|
| Individualism (*N=340*) | - | | | | |
| Formalism (*N=340*) | **0.34**** | - | | | |
| Egalitarianism (*N=340*) | **-0.45**** | -0.19** | - | | |
| Political Worldview (*N=336*) | 0.21** | 0.02** | **-0.47**** | - | |
| Religiosity (*N=337*) | -0.14** | -0.04 | -0.06 | **0.38**** | - |
| CCWS.*Individualism* (*N=114*) | 0.23* | 0.21* | -0.27** | **0.37**** | 0.08 |
| CCWS.*Hierarchy* (*N=114*) | **0.42**** | 0.22* | **-0.59**** | **0.73**** | 0.14 |
| OUS.*IB* (*N=116*) | **-0.39**** | -0.24** | 0.28** | -0.09 | 0.23* |
| OUS.*IH* (*N=116*) | 0.15 | -0.02 | -0.19* | 0.02 | -0.01 |
| *Chapman vs. Skype* (*N=109*) | 0.12 | **0.33**** | -0.12 | 0.27** | 0.02 |
| *Automobiles' Shortage* (*N=110*) | 0.1 | 0.12 | -0.24* | 0.15 | -0.02 |
| *Kitchen Renovations* (*N=115*) | -0.03 | -0.17 | -0.1 | -0.1 | -0.24** |
| *Condo Selling* (*N=114*) | -0.15 | -0.14 | -0.08 | 0.02 | 0.15 |

**NOTES**: The correlation matrix is not complete, since all participants completed the CAS, and almost all of them reported their Political Worldview and Religiosity—yet each participant only answered questions about two other scales/vignettes. Absolute correlations above 0.3 are presented in bold.
*$p < 0.5$ **$p < 0.01$

From the correlations of the CAS conflicts and the other scales and vignettes, we can deduce that (1) Individualism was associated with general compassion for strangers; (2) Formalism was linked to perceived fairness of enforcing a written contract that contradicts a previous presentation; and (3) both CAS Egalitarianism and Individualism are associated with general attitudes toward minority rights, discrimination, and the distribution of wealth. None of the CAS's conflicts were associated with attitudes toward the efficient breach doctrine or toward deontological constraints when these trump efficient behavior. These results substantiated the construct validity of the CAS by showing that other means of attitude measurements yield similar results.

## V. GENERAL DISCUSSION

Contract law encompasses various normative debates—yet, to date, no study has tried to consolidate all these debates into a single theoretical framework that describes the richness of the attitudinal variance with regard to contracts. This study offered an attitude theory of contract law, consisting of several key conflicts that shape people's attitudes toward contractual disputes. Initially, the theory comprised four contractual attitudes: Individualism, Formalism, Egalitarianism, and Instrumentalism. However, exploratory factor analyses identified only the three former attitudes in MTurk Workers' responses to self-report surveys, whereas no coherent attitude of Instrumentalism was found. While further investigation of Instrumentalism in other populations and with other items is warranted, in this study I focused on the other three conflicts.

I introduced a measuring instrument that allows contractual attitudes to these three conflicts to be gauged, and I tested it on MTurk Workers*, a* representative sample of U.S. population, and Israeli law students. I used both EFA and CFA. With some variations, participants' responses (1) formed a three-dimensional structure; (2) attitudes were normally distributed around the mean; (3) Individualism and Egalitarianism were correlated; (4) Individualism and Formalism also correlated to some extent; and (5) Egalitarianism and Formalism were almost orthogonal to each other.

The attitudes of Israeli law students toward the fairness of terms were highly associated with Egalitarianism and were less formalistic and less egalitarian than those of their counterparts in the U.S. samples. From the data at hand, it is difficult to discern the reason for these results; it may be the Israeli participants' legal background, their culture, or other unobservable factors.

Another important observation concerns the links between Political Worldview (as measured by a unidimensional *Liberal-Conservative* scale), and contractual attitudes. Evidently, when new constructs of attitudes are highly correlated with the known Political Worldview, their importance is limited. The findings here suggest that, although Political Worldview correlated with contractual attitudes to some extent, the correlations between Political Worldview and both Individualism and Formalism were fairly minimal. To illustrate, while cultural attitudes of Individualism and Hierarchy (as measured by the CCWS) were highly correlated with Political Worldview in Study 2, CAS Individualism and Formalism exhibited a lower correlation with Political Worldview across Studies 3–5.[175] This finding highlights the importance of the CAS. The

[175] In contrast, Egalitarianism was highly associated with Political Worldview ($\bar{r}_{egal} = 0.41$).

fact that people's attitudes toward contracts do not necessarily follow the usual attitudinal divide between conservatives and liberals suggests that contractual disputes embody unique controversies that must be accounted for with a specifically designated scale.

Another interesting finding is the connection between academic background and individualistic attitudes: the linear regressions showed that academic background is associated with a more individualistic attitude. In other words, people with academic training believe that power inequalities should be taken into account to a lesser extent in contractual resolutions and that the parties to a contract should be less considerate of the other party when determining the terms of the contract, or during the contractual relationship. Of course, we cannot tell whether academic training is the reason for these attitudes or that people with these attitudes tend to pursue this type of training, or whether a third, unknown factor is responsible for both these attitudes and the pursuit of academic training.

This study is not without limitations. The first limitation relies on the content validity of the scales' items. Arguably, using other items might have yielded different results, such as indicating the existence of Instrumentalism or other relationships between, and within, the hypothesized conflicts. Thus, one must review the items of the CAS (and its early version) in a bid to understand what can, and cannot, be inferred from the CAS about the structure of contractual attitudes.

The second limitation concerns the external validity of the scale. The scale was mainly tested on American laypersons, but its applications are also (if not mainly) relevant to measuring the attitudes of jurists. Although it was administrated to Israeli law students as well, this was only a small sample, and they were only students (as opposed to experienced legal experts).

## VI. FUTURE RESEARCH AND CONCLUDING REMARKS

The literature on theories of contract law is extensive. However, to date, it has focused on the normative principles underpinning contract law, with no attempt to empirically study the prevailing attitudes toward normative dilemmas in contract law. The AT developed in this study enhances our understanding of the attitudes that drive policy- and decision-making in a contractual context. This Article is the first step to empirically studying attitudes toward contract law specifically. The three-dimensional CAS introduced in this Article provides researchers with a tool to measure individuals' attitudes along three attitudinal dimensions of contract law.

Further research should be pursued along several avenues. The scale should be applied to other populations, including legal experts and laypersons from various countries and legal cultures. There is also room to study in greater depth the association (and perhaps the causal connections) between contractual attitudes and personal attributes, such as gender, age, culture, and legal training and experience.

The CAS should be used to study how contractual attitudes influence judicial decision-making. Legal doctrines often provide judicial decision-makers with considerable discretion, and when this occurs, judges' attitudes may play a major role in shaping the final judgments. Judicial disputes also typically involve factual disputes, and, in such cases, attitude-motivated reasoning may bias the evaluation of the relevant facts. Thus, implementing the CAS will allow one to investigate whether, and how, contractual attitudes predict decisions in the face of legal and factual ambiguity, and to understand both conscious and unconscious legal reasoning. Comparable studies may possibly pertain to other decision-makers in contractual contexts, such as lawyers who draft contracts or negotiate contractual disputes.

Even more ambitiously, the CAS could be used to study the differences between contract law and practice across different societies and legal systems. In so doing, a new dimension may be added to comparative contract law. In addition to comparing law academic principles with law in action, the CAS may shed new light on the reasons for similarities and dissimilarities across legal systems.

Finally, the gap that this study has aimed to fill in contract law scholarship is not unique to contract law but characterizes other legal spheres as well. Thus, the methods and findings of this research may hopefully inspire comparable studies in tort law, corporate law, and other legal spheres.