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The French Subjective Theory of Contract: Separating Rhetoric from Reality

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The French Subjective Theory of Contract: Separating Rhetoric from Reality

Wayne Barnes*

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I. INTRODUCTION

The central premise to the objective theory of contracts is that contractual assent is determined by analyzing external evidence, and evidence of subjective, internal intention is therefore unimportant.¹ That is, contract formation is concerned with communication, not cognition.² Thus, modern objective theory provides that “objective manifestations of intent of [a] party should generally be viewed from

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1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 242 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (“The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”).

2. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 129-30 (2000) (describing the history of the development of objective theory).

the vantage point of a reasonable person in the position of the other party.”³ Most of the jurisdictions of the world follow a basic objective theory of contract formation.⁴ This nearly universal adherence to objective theory follows from the obvious pragmatism of the rule;⁵ however, on a more fundamental level, it also serves many of the philosophical underpinnings of contract law, such as principles of fairness and protection of reliance, freedom of contract, and personal autonomy.⁶

There appears to be one major nation in the world where the prevalence of the objective theory is in some question—France.⁷ For English-speaking common law scholars, the French position on the subjective theory of contracts is revealed through the recurrent repetition of statements like this one from the Calamari and Perillo hornbook on Contracts: “[T]he subjective theory dominates thinking about contract [in France].”⁸ Or this one: “For a contract to exist in French law there must be a subjective agreement as to its terms; in English law an objective agreement suffices.”⁹ Or this one from Williston’s venerable treatise on contracts, otherwise discussing the prevalence in the common law of the objective theory:

3. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.2, at 27 (5th ed. 2003) (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760-61 (2d Cir. 1946) (Frank, J., concurring)).

4. See 1 PIERRE BONASSIES ET AL., FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 147 (Rudolf B. Schlesinger ed. 1968) (“With the possible exception of French law, all systems under consideration agree, as a matter of principle, that communication of acceptance is necessary to bring about a contract.”); see also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) (describing common law rejection of the subjective approach).

5. Perillo, *supra* note 4, at 428-29. Professor Perillo states that the permanent dominance of the objective theory in the United States occurred when most jurisdictions changed the rules of procedure to allow litigants to testify for themselves. *Id.*

6. See PERILLO, *supra* note 3, § 1.4, at 6-13.

7. BONASSIES ET AL., *supra* note 4, at 147; see also *id.* at 113 (“All systems under consideration, with the possible exception of the French, agree that such undeclared revocation is ineffective if it does not come to the notice of the offeree.”). The Schlesinger comparative study considered a large number of representative nations, including a number of communist countries (including the then-existing Soviet Union), England, Australia, Canada, New Zealand, France, Austria, Germany, Switzerland, India, Italy, Poland, and South Africa.

8. BONASSIES ET AL., *supra* note 4, at 1316-19; PERILLO, *supra* note 3, § 2.2, at 27; A.G. Chloros, *Comparative Aspects of the Intention To Create Legal Relations in Contract*, 33 TUL. L. REV. 607, 613-17 (1959).

9. Anne de Moor, *Contract and Agreement in English and French Law*, 6 OXFORD J. LEGAL STUD. 275, 279 (1986) (citing BARRY NICHOLAS, FRENCH LAW OF CONTRACT 34 (1982)).

It would indeed be possible for a system of contractual law to adopt as a principle the subjective theory that wherever the parties intended legal obligation, then, and then only, the law would create one, and such an idea seems to have developed and to have had considerable acceptance on the Continent of Europe.¹⁰

Williston was assuredly referring to France and the system of contract law under the Napoleonic Code—the French Civil Code. Thus, it seems clear that there is a perception that France espouses a subjective theory of contracts, which runs quite contrary to the objective theory that prevails not only in the common law, but in most of the rest of the world.

The question that this Article raises is, Does the French subjective theory, while conceptually distinct from the objective theory, produce significantly different outcomes in actual disputes? While France would alone be a significant enough world citizen to warrant consideration of this question, the reality is that the French Civil Code has been widely adopted and copied in many of the civil law nations throughout the world.¹¹ So, it affects a significant portion of the world's jurisdictions, beyond that of just the sovereign nation of France. Therefore, this Article will undertake an examination of the objective theory of contracts, as well as the evidence of the French subjective theory, and ascertain whether there is a profound difference in their application and results of legal disputes in the two systems. Part II will discuss the principles of the objective theory of contracts. Part III will discuss the French subjective theory of contracts, some of its distinctive rules, and a comparative analysis of those rules when compared with Anglo-American objective theory. Part IV will conclude with the observation that the differences in philosophy between the two sets of systems at issue, while certainly not irrelevant, do not result in the exceedingly different outcomes that one might otherwise initially suspect.

10. SAMUEL WILLISTON & GEORGE J. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 21, at 18 (rev. ed. 1938). Williston went on to say that the subjective theory was "foreign to the common law and, it may be added, is intrinsically objectionable." *Id.*

11. See MICHAEL H. WHINCUP, CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS 33 (4th ed. 2001) ("The basic rules of contract in French law are in the Civil Code, the great Napoleonic Code of 1804, model of the Codes of Belgium, Holland, Luxembourg, Switzerland, Italy, Spain, Portugal, Egypt, Louisiana, Quebec, and the states of South America.").

II. THE OBJECTIVE THEORY OF CONTRACTS

Contracting is, above all else, a consensual activity.¹² Contract has been defined as a “legally enforceable agreement.”¹³ The Restatement (Second) of Contracts defines agreement as “a manifestation of mutual assent on the part of two or more persons.”¹⁴ The traditional steps for determining whether mutual assent has occurred are the offer and acceptance.¹⁵ But, the ultimate issue in contract law is whether the parties have mutually agreed to some exchange.

There are two planes on which mutual assent can be analyzed—the objective and the subjective. By objective, we mostly mean the external communications of assent as perceived by the other party, whereas subjective assent has little to do with external perceptions, but rather is concerned with whether the parties each subjectively intended to make the contract.¹⁶ Courts and commentators struggled philosophically throughout the history of the development of contract doctrine to identify the appropriate manner of determining assent.¹⁷

12. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296-300 (1986).

13. PERILLO, *supra* note 3, § 1.1, at 2.

14. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

15. *Id.* §§ 17-70.

16. See *Newman v. Schiff*, 778 F.2d 460, 464 (8th Cir. 1985) (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760 (2d Cir. 1946) (Frank, J., concurring); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 180-88 (Oxford Univ. Press 1992) (1977); Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85, 85 (1919)); see also 2 *Derecho general de las obligaciones*, in 1 JOSÉ PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL 92-99* (1959); ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 106, at 156 (1952)) (“It is arguable whether the parties are bound according to their real will, or according to their will as manifested, in cases where differences are apparent between what was really intended and what was actually declared. It is easy to understand that this argument reflects the long-standing dispute between the subjective and objective approach to contract.”); 6 SAÚL LITVINOFF, *LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS* § 135, at 223 (1969) (citing Paul Esmein, 1 *Obligations*, in 6 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 109 (2d ed. 1952)).

17. See *Newman*, 778 F.2d at 464; *Ricketts*, 153 F.2d at 760-61 (Frank, J., concurring) (“In the early days of this century a struggle went on between the respective proponents of two theories of contracts, (a) the ‘actual intent’ theory—or ‘meeting of the minds’ or ‘will’ theory—and (b) the so-called ‘objective’ theory.”); 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.6, at 208 (3d ed. 2004) (“This question provoked one of the most significant doctrinal struggles in the development of contract law, that between the subjective and objective theories.”); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 30, at 62 (4th ed. 2001) (“[A] great deal of controversy was spawned over the question of whether the actual mental assent (subjective) of the parties was required, or whether the *expression or manifestation* of that assent (objective) would control regardless of any alleged subjective intention.”); PERILLO, *supra* note 3, § 2.2, at 26-27 (“A debate has raged as to whether the assent of the parties should be actual mental assent so that there is a ‘meeting of

The first plane is the subjective approach, or “meeting of the minds.” This approach is concerned with the actual, literal intentions of the parties.¹⁸ “The subjectivists looked to actual assent. Both parties had to actually assent to an agreement for there to be a contract.”¹⁹ External manifestations of assent are taken merely as evidence of the actual intent of the contracting party.²⁰ Proponents of this subjective theory exalt the freedom of contract above all other principles—they only wish to bind those who clearly and subjectively intended themselves to be so bound.²¹

The second plane is the objective approach. This approach analyzes the external evidence of the parties’ intentions as the only relevant consideration. Judge Learned Hand memorably described objective theory as follows:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it

the minds’ or whether assent should be determined solely from objective manifestations of intent—namely what a party says and does rather than what a party subjectively intends or believes or assumes.”); Herman Oliphant, *The Duration and Termination of an Offer*, 18 MICH. L. REV. 201, 201 (1920) (“Professor Williston has recently pointed out the change which the law of the formation of simple contracts underwent during the first century of its development. The change is fundamental. Originally the courts thought of a simple contract as involving an actual concurrence of the minds of the parties. Gradually this conception was supplanted by the notion that the objective and not the subjective state of mind of the parties is controlling.” (citing Williston, *supra* note 16, at 85)).

18. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 898 (1992) (“A ‘will theory’ traces the obligatory nature of contracts to the fact that parties have subjectively chosen to assume an obligation. According to this conception of consent, when one does not subjectively consent one has not ‘really’ consented.”).

19. *Newman*, 778 F.2d at 464 (citing *Ricketts*, 153 F.2d at 760 (Frank, J., concurring); *Horwitz*, *supra* note 16, at 180-88; Williston, *supra* note 16, at 85); see also LITVINOFF, *supra* note 16, § 135, at 223-24 (“One classic theory enhances the predominance of the real—the subjective,—will, and asserts that the declaration or manifestation of it has only a secondary importance. It is necessary, then, to scrutinize carefully the real will in order to learn whether the contract was actually formed, and, if that is the case, to interpret it.”). As Professor Farnsworth states in his treatise:

The subjectivists looked to the actual or subjective intentions of the parties. The subjectivists did not go so far as to advocate that subjective assent alone was *sufficient* to make a contract. Even under the subjective theory there had to be some manifestation of assent. But actual assent to the agreement on the part of both parties was *necessary*, and without it there could be no contract. In the much-abused metaphor, there had to be a “meeting of the minds.”

FARNSWORTH, *supra* note 17, § 3.6, at 208-09.

20. *Newman*, 778 F.2d at 464.

21. See LITVINOFF, *supra* note 16, § 135, at 224.

were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.²²

Similarly, Oliver Wendell Holmes Jr. stated that “[t]he law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”²³ Dean Langdell observed that “[i]n truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the required physical act has been done, only a physical act can undo it.”²⁴ “The real will of the parties, according to this theory, only exists in their soul and, therefore, cannot enter the field of the law.”²⁵ More recently, Judge Easterbrook has observed that “‘intent’ does not invite a tour through [plaintiff’s] cranium, with [plaintiff] as the guide.”²⁶

Ultimately, as demonstrated by the jurisprudential observations above, in Anglo-American jurisdictions, objective theory became the dominant method by which mutual assent to contract was determined.²⁷ Though the common law courts undoubtedly assimilated

22. *Hotchkiss v. Nat’l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911). Professor Allan Farnsworth described Hand’s famous quote this way: “Note that Hand, with typical crusader’s zeal, denied not only the *necessity* of a ‘meeting of the minds,’ but even its *relevance*.” E. Allan Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 YALE L.J. 939, 943 (1967).

23. HOLMES, *supra* note 1, at 309.

24. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 244 (2d ed. 1880).

25. LITVINOFF, *supra* note 16, § 135, at 224.

26. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987).

27. *Newman v. Schiff*, 778 F.2d 460, 465 (8th Cir. 1985) (“By the end of the nineteenth century the objective approach to the mutual assent requirement had become predominant, and courts continue to use it today.” (citing E. ALLAN FARNSWORTH, CONTRACTS § 3.6, at 114 (1982))); *Ricketts v. Pa. R.R.*, 153 F.2d 757, 761-62 (2d Cir. 1946) (Frank, J., concurring) (“At any rate, the sponsors of complete ‘objectivity’ in contracts largely won out in the wider generalizations of the Restatement of Contracts and in some judicial pronouncements.” (citing *Hotchkiss*, 200 F. at 293; RESTATEMENT OF CONTRACTS §§ 70-71, 503 (1932); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 35 (rev. ed. 1936)). In his treatise on contract law, Professor Murray states the resolution in favor of objective theory as follows:

The controversy has been resolved. Contract law abandoned the theory of subjective intention as unworkable. A legion of cases support the view that the outward manifestations of the parties—their expressions—will be viewed as the exclusive evidence of the parties’ intentions rather than assertions of their subjective intention. . . . There can be no doubt . . . that the objective theory is clearly established throughout the country.

MURRAY, *supra* note 17, § 30, at 63-64 (citations omitted).

There is some dispute about whether Anglo-American law previously followed a subjective approach, prior to settling on a predominantly objective approach. Many standard

certain aspects of subjective doctrine, the objective test eventually prevailed.²⁸ “Objectivity prevailed because the courts, having regard for the external manifestations of agreement, were obliged to rule on whether or not an agreement had in fact been made, and ensure that commercial common sense was not adversely affected by the operation of a subjective ‘will theory.’”²⁹ The modern approach to objective theory has become more flexible by taking into account the superior knowledge of the person to whom contractual manifestations are made. This is achieved by a modern definition of objective theory which states that “[a] party’s intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean.”³⁰ This definition keeps the components of classical objective theory by analyzing assent from the perspective of the “reasonable person,”³¹ but it improves upon “pure” objective theory by taking into account some subjectivity and thereby incorporating the point of view of someone “in the position of” the one receiving the manifestation.

The objective theory of contracts has been well established in Anglo-American jurisdictions, and even in most other major jurisdictions in the world (with the notable exception of France), because of its logical pragmatism and vindication of many policy-oriented concerns of contract law. The objective theory deals with knowable evidence of external manifestations of assent and makes those the primary basis of concern for determining formation of contract. The objective theory also protects reliance induced by such external manifestations of contractual assent and therefore provides security and predictability to economic transactions.³² Further,

accounts of the history of American and English contract law suggest such a history. Perillo, *supra* note 4, at 427-29 (citing LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 87 (1965); GRANT GILMORE, *THE DEATH OF CONTRACT* 12 (1974); HORWITZ, *supra* note 16, at 180-81). Professor Perillo convincingly states, however, that the dominant approach has almost always been an objective one, with only a brief “flirtation” with subjective theory in the early to mid nineteenth century. Perillo, *supra* note 4, at 428.

28. Martin J. Doris, *Did We Lose the Baby with the Bath Water? The Late Scholastic Contribution to the Common Law of Contracts*, 11 *TEX. WESLEYAN L. REV.* 361, 372-73 (2005).

29. *Id.*

30. PERILLO, *supra* note 3, § 2.2, at 28.

31. See *Ricketts*, 153 F.2d at 761 (Frank, J., concurring) (“The objectivists transferred from the field of torts that stubborn anti-subjectivist, the ‘reasonable man.’”).

32. Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 *U. PA. J. LAB. & EMP. L.* 73, 111-12 (2005) (“The objective theory is strongly supported by those who place the basis of contract law upon the promisee’s justified reliance upon a promise or upon

objectivists argue that the objective theory furthers concerns of personal autonomy. When a party is entitled to rely on what can be objectively verified, as opposed to being required to guess at the internal thoughts of another person, there is a better capability to synthesize information and order one's affairs accordingly.³³

III. THE FRENCH SUBJECTIVE THEORY OF CONTRACT AND COMPARISON TO OBJECTIVIST RULES

A. Introduction

Mutual consent is at the heart of contract law, and this is no different in France than in the other nations of the world.³⁴ That English law (as well as others) should have this similarity to French law is unsurprising, “[f]or the philosophical, moral and economic presuppositions were the same on both sides of the channel.”³⁵ Though the requirement of mutual consent—a *consensus ad idem*—is common to French and English law, there are important conceptual differences.³⁶ One of the primary philosophical differences is in the way that the “consensus” is understood. English law, and most of the world, employs an objective appearance approach, which is practical and yields more certainty in transactions for commercial expediency.³⁷

the needs of society and trade. An objective test is believed to protect ‘the fundamental principle of the security of business transactions.’” (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 25 (2d ed. 1977) (quoting WILLISTON, *supra* note 27, § 35, at 96)); see also *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (Easterbrook, J.) (“[I]f intent were wholly subjective . . . no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business.”); *Ricketts*, 153 F.2d at 761 n.2 (“The ‘actual intent’ theory, said the objectivists, being ‘subjective’ and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the ‘objective’ standard as a necessary adjunct of a ‘free enterprise’ economic system.”); MURRAY, *supra* note 17, § 30, at 62 (“Under [the subjective theory], no system of contract law could ever prove workable since it would be impossible to prove the subjective intention of either party at any time.”).

33. See *Empro Mfg. Co.*, 870 F.2d at 425.

34. See THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 283 (1999) (“Contractual obligations are those which arise out of the agreement of the parties, and constitute the most important and numerous categories of obligations in modern civil law.”).

35. NICHOLAS, *supra* note 9, at 33.

36. *Id.* at 34. Allan Farnsworth has traced the origin of the phrase “meeting of the minds” in English law, dating back to a sixteenth-century case using the word “*aggreamentum*, which is no other than a union, collection, copulation, and conjunction of two or more minds in any thing done or to be done.” Farnsworth, *supra* note 22, at 943-44 (citing *Reniger v. Fogossa*, (1551) 75 Eng. Rep. 1 (K.B.)).

37. NICHOLAS, *supra* note 9, at 34.

French doctrine, on the other hand, “attaches the binding force to the subjective will.”³⁸ That is, French law inclines more toward the pure subjective “meeting of the minds” approach in theory, “though sometimes with a corrective which yields much the same practical result as the objective approach.”³⁹ Stated differently, a “subjective ‘internalisation’ of contractual obligations—the meeting of minds or concurrence of two or more independent wills—though evidently supported by external, objective elements became the cornerstone of the French natural law theory of contract.”⁴⁰

An important factor in the development of the subjective theory of French contract—the will theory—was almost certainly the freedom of the individual, which was the prevailing philosophy of the eighteenth century, especially in France in the time leading up to and following the French revolution.⁴¹ The French Republic’s motto—

38. LITVINOFF, *supra* note 16, § 135, at 224.

39. NICHOLAS, *supra* note 9, at 34; *see also* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 17 (Donald Harris & Denis Tallon eds., 1989) (“[T]he English lawyer will find that the French give a more subjective meaning than he does to the requirement of consent.”); Filip de Ly, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 WAYNE L. REV. 1825, 1853 (2000) (“The French subjective contract law theory is still based on a liberal assumption that parties should be free to decide whether, and to what extent, they want to be bound.”); Perillo, *supra* note 4, at 430 (“[T]he Will Theory . . . is alive and well in France today.” (citing NICHOLAS, *supra* note 9, at 35, 47-49)); Julian S. Waterman, *Book Review*, 47 YALE L.J. 1033, 1035 (1938) (reviewing GILBERT MADRAY, *DES CONTRATS D’APRÈS LA RÉCENTE CODIFICATION PRIVÉE FAITE AUX ÉTATS-UNIS* (1936)) (“[T]he ‘subjective’ theory . . . is regarded as the only true one in prevailing French doctrine.”).

40. Doris, *supra* note 28, at 367 n.33.

41. NICHOLAS, *supra* note 9, at 31 (“The treatment of contract in the *Code civil* echoes the philosophy of the eighteenth century. The starting-point is the freedom of the individual, which can be curtailed only by free will, either in the original social contract or, within society, by individual acts of will.”); *see also* WATKIN, *supra* note 34, at 307 (“The French *Code civil* was a product of the natural law school of jurisprudence associated with the eighteenth-century Enlightenment. The view of society upheld by the thinkers of that school was based upon the concept of the social contract, which regarded society as based upon an agreement made by individuals. Contract therefore was seen as central to human social existence and the individual freedom to enter into contractual arrangements as a basic social good.”); WHINCUP, *supra* note 11, at 33 (“[Article 1101] [e]xpress[es] the principles of eighteenth century French philosophers on the fundamental importance of free will”); Max Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575, 575-76 (1943) (“The ‘subjective’ theory as it was developed in nineteenth century Germany and France dealt with obligations in general. Its fullest statement is Ihering’s, who had much to say of the ‘primacy of the will.’ Men ought to be bound only when they deliberately chose to be and to the extent that they chose. Why this seemed a desirable ideal is not difficult to discover. It flattered the sense of individual self-sufficiency which was so large a part of the sense of freedom, as the eighteenth century had understood it and as Manchester had sought to effectuate it in the nineteenth century.”).

This is not to say that the spirit of the French Revolution was the only source for the development of the free will and French subjective theory. In fact, the concept of contracting only by consent was probably initially a product of canon law and that of “the sanctity of the

“*Liberté, Égalité, Fraternité*”—was the ideological framework behind the thinking of the day, and this spilled over into the law of contracts.⁴² This virtue of freedom of contract and free will was in part the result of “[a] gospel of freedom [that] was preached by both metaphysical and political philosophers in the latter half of the eighteenth century [I]t was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract.”⁴³ As Chloros aptly demonstrates:

[I]t can be assumed that natural law, rationalist philosophy, Kant’s notion of free will, must all have contributed to this transition from individual contracts to a general theory of contract. Thus, at the end of the eighteenth century the real intention of the parties had become sacrosanct. It had acquired the dignity of a political and legal principle which became known as the theory of the autonomy of will. This meant, in effect, first, that the real intention must prevail over form, secondly, that the will of the parties is superior to law⁴⁴

This theory of free will of parties to govern their affairs is reflected in article 1134 of the French Civil Code: “Agreements legally formed have the character of *loi* for those who have made them.”⁴⁵ This philosophy of the “autonomy of the will” was a natural companion to the idea of *laissez-faire* and the idea that that people are the best judges of their own interests.⁴⁶ “The theory [of the autonomy of the will] was taken for granted as the foundation of contractual doctrine in all Civil law countries in the nineteenth century.”⁴⁷

moral obligation to be bound by a promise.” Chloros, *supra* note 8, at 614; see also RENÉ DAVID, ENGLISH LAW AND FRENCH LAW: A COMPARISON IN SUBSTANCE 102 (1980) (“In France and on the continent of Europe on the contrary the reason why a contract should be recognized as legally binding is a moral reason, not an economic one. *Fides est servanda*: one is bound in conscience to keep his word; this is a principle affirmed by the Church, which the canonists have succeeded in introducing into the law.”).

42. See JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 306 (1998).

43. Doris, *supra* note 28, at 362 (quoting Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366-67 (1921)); see also Chloros, *supra* note 8, at 607 (“In time, particularly as a result of the influence of metaphysical and naturalistic thought during the seventeenth and eighteenth centuries, the principle of contract by consent acquired a rather elaborate and abstract meaning which gave rise to a large variety of theories.”).

44. Chloros, *supra* note 8, at 615 (citing 2 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 7 (3d ed. 1949)); see also DAVID, *supra* note 41, at 112 (“Legal philosophy in the 18th and in the 19th century, in France as well as in England, extolled the dogma of party autonomy (*autonomie de la volonté*) based on the philosophical assumption that the binding force of a promise, or of a contract, can only rest on the will of the parties.”).

45. NICHOLAS, *supra* note 9, at 31 (providing an English translation of the article).

46. *Id.*

47. *Id.*

All of these principles were taken for granted by the jurists in France at the time of the creation of the French Civil Code. Article 1101 of the French Civil Code defines contract as “an agreement by which one or more persons obligate themselves to one or more other persons to give, or to do or not to do, something.”⁴⁸ Article 1108 of the Code, in turn, provides four conditions essential to the validity of the agreement—the very first one, of paramount importance, is “the consent of the party who binds himself.”⁴⁹ This simple phrase became the bedrock of the consensualist theory of contract which still predominates in France.

The first source of contract law in France is, of course, the Civil Code itself. However, the writings of the French jurist Pothier were highly influential in the thinking behind the French Civil Code sections governing contracts.⁵⁰ In his introduction to the concept of consent in contracts for sale, Pothier stated that

[t]he consent of the parties, which is of the essence of the contract of sale, consists in a concurrence of the will of the seller, to sell a particular thing to the buyer, for a particular price, and of the buyer, to buy of him the same thing for the same price.⁵¹

Pothier recognized that determining such consent was not problematic when the two contracting parties were conducting negotiations in the presence of each other.⁵² However, when parties are contracting from a distance, as by the use of correspondence through the mails, Pothier asserted that “it is necessary that the will of the party, who makes a

48. C. CIV. art. 1101 (Fr.), *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 1167 (2d ed. 1977).

49. *Id.* art. 1108, *translated in* VON MEHREN & GORDLEY, *supra* note 48, at 1168. Article 1108 provides in full as follows: “Four conditions are essential to the validity of an agreement: the consent of the party who binds himself; his capacity to contract; a definite object which forms the subject matter of the agreement; a licit cause for the obligation.” *Id.*

50. Ronald J. Scalise Jr., *Why No “Efficient Breach” in The Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 741 (2007); *see also* NICHOLAS, *supra* note 9, at 33 (noting Pothier’s contributions to the French Civil Code, particularly to the sections relating to the theory of autonomy of the will); Doris, *supra* note 28, at 362 n.5 (“Traditional European legal historians and contract theorists commonly view the French theorists Jean Domat, the great initiator, to whom we owe the concept of ‘natural equity’ and Robert Pothier, whose analysis of contract formed the basis of the French Code Civil of 1804, as founders of the ‘will theory.’”). In the French Civil Code, as in most other civil law jurisdictions, the law of “contracts” is actually part of a greater body of law called “obligations.” Obligations consists of both consensual agreements (contracts), as well as “delictual” obligations (akin to common law torts). WATKIN, *supra* note 34, at 282-84.

51. R.J. POTHIER, *TREATISE ON THE CONTRACT OF SALE* 17 (L.S. Cushing trans., Boston, Charles C. Little & James Brown 1839) (1762).

52. *Id.*

proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition."⁵³ Pothier's views, sounding squarely in classical French subjective theory, were the basis for the consensualist philosophy of the French law of contracts in the Civil Code, and in French writings on contract law.

Though the French law of contracts undoubtedly sounds in subjective theory, an analysis of some specific rules in French contract law will reveal—through the interposing of some ameliorative doctrines to account for the results that otherwise occur from the initial application of these subjective rules—that the law in France is not so very different from that in the Anglo-American jurisdictions, which espouse a more objective theory of contracts, not to mention the majority of other world jurisdictions, which also follow an objective model of contractual consent.

B. Revocability of Offers

The French subjective theory of contract manifests itself in the accepted doctrine on revocation of offers. All legal systems, including France, require that an offer must be actually received by the offeree before it is operative to create the power of acceptance in the offeree.⁵⁴ Here, however, the concern is with the extent that the law requires communication and receipt of an offeror's revocation in order for it to be effective to terminate the power of acceptance. In objective theory, of course, though an offer may generally be freely revoked prior to acceptance, any such revocation is not effective to terminate the offeree's power of acceptance until the revocation is *received* by the offeree.⁵⁵ However, with the French subjective theory and pure "autonomy of will" philosophy, this is not the case. Rather, once the offeror changes his mind and revokes, the offeree's power of acceptance ends at that moment regardless of whether the offeree was instantaneously aware of the revocation (as long as there is some external evidence of the offeror's change of mind, for reasons of proof only).⁵⁶ The fact that there could not have been a subjective concurrence of the wills is conclusive.⁵⁷

53. *Id.* at 18.

54. See BONASSIES ET AL., *supra* note 4, at 104.

55. RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981).

56. NICHOLAS, *supra* note 9, at 63-64. French law, of course, also agrees with English and American law that if the offeree *learns* that the offeror no longer intends to be

A French case from the Cour d'appel in Montpellier is illustrative. A landowner offered to sell property to an offeree, but prior to the offeree's acceptance the owner contended there could be no contract because he had already sold the property to a third party in the intervening time period between the offer and the attempted acceptance.⁵⁸ The offeror's argument was rejected; not, however, because the offeree was not aware of the alleged sale to the third party (which would have been sufficient to terminate the power of acceptance under objective theory).⁵⁹ Rather, the court rejected the offeror's argument because it found factually that the offeror had not, in fact, sold the property yet at the time the offeree made an operative acceptance, and therefore there had not been an effective revocation.⁶⁰ Had there indeed been a sale to a third party, it appears from French doctrine that the court would have been satisfied that there had been a revocation even before the offeree came to have knowledge of such sale.

This French rule on revocability of offers being operative instantly, even prior to communication to the offeree, has its origins in pre-Code analysis by Pothier himself:

This will is presumed to continue, if nothing appears to the contrary; but, if I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; *and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain*, or if I die; or lose the use of my reason; *although the merchant, on the receipt of my letter, being in ignorance of my change of will*, or of my death or insanity, makes answer that he accepts the proposed bargain; *yet there*

bound, the power of acceptance is terminated at that point. See BONASSIES ET AL., *supra* note 4, at 812.

The French position on effectiveness of undeclared revocations seems fairly clear from the reported French cases discussing the problem of an undeclared revocation. See *id.* at 815-18. However, the French doctrine writers seem more divided on the subject, though they concede that the cases point towards a subjective view of the matter. *Id.*

57. NICHOLAS, *supra* note 9, at 63-64. Interestingly, a famous English case, *Cooke v. Oxley*, has been widely interpreted by most scholars as deciding the same principle under English law. (1790) 100 Eng. Rep. 785 (K.B.); see, e.g., Farnsworth, *supra* note 22, at 944-45. However, Professor Perillo has recently taken exception with this characterization and asserts that the case was decided purely on grounds of consideration. Perillo, *supra* note 4, at 436-38.

58. NICHOLAS, *supra* note 9, at 64 (citing a case which was upheld in Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction] Dec. 17, 1958, D. 1959, juris. 33).

59. See *Dickinson v. Dodds*, (1876) 2 Ch. D. 463 (U.K.) (holding that offeror's offer to sell was indirectly revoked by offeree's knowledge of intervening sale to a third party).

60. NICHOLAS, *supra* note 9, at 64.

*will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale.*⁶¹

Here lies the origin of much of the rhetoric in French contract law that subjective mutual assent is required, rather than merely objective assent. Pothier is saying that an offeror, who has created the appearance of a willingness to contract by his initial mailed offer, may nevertheless terminate the offeree's power of acceptance by the mere act of writing a subsequent revocation. And this appears to cut off the offeree's power to accept, regardless of whether the offeree has received the revocation or has knowledge of it. Pothier simply says that once the revocation is written (and perhaps dispatched; the text leaves some room for interpretation) there is no longer a possible "concurrence of wills" and therefore there can be no contract.⁶² The termination of the power of acceptance by either the intervening death or insanity of the offeror is a familiar concept to the common law.⁶³ However, Pothier's assertion that an offeror's unreceived revocation could terminate the offeree's power of acceptance is quite a divergence from the objective theory concept that a revocation is only effective when received by the offeree.⁶⁴ Though the offeror's revocation letter is some "objective" evidence of his internal intention no longer to be bound by his prior manifestation of assent, it is still purely "subjective" in the sense that at the moment the revocation is written and sent only the offeror knows about it. To the offeree, it is as though it has not occurred yet, because he has not become objectively aware of it. This is, therefore, a fairly clear illustration of the origins of the French subjective theory of contract.⁶⁵

61. POTHIER, *supra* note 51, at 18 (emphasis added). Pothier further mentioned his sources for these propositions, and noted a divergence from Roman law in the matter: "This is the opinion of Bartholus and the other jurists cited by Bruneman, who very properly reject the contrary opinion of the Gloss, *ad dictam legem*." *Id.*

62. *Id.*; see also Perillo, *supra* note 4, at 465 ("Pothier asserted that the mere dispatch of a letter of revocation (objective evidence of subjective intention) will revoke an offer subject to the offeror's liability to indemnify an offeree who takes concrete steps in reliance on the offer." (citing POTHIER, *supra* note 51, at 32)).

63. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 36 (1981).

64. See *id.* ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.").

65. See Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 287 (2005) ("Pothier espoused a subjective approach to contract law.").

Though this subjective approach to revocation appears philosophically at odds with the objective approach, which requires the offeree to become aware of the revocation before it operates to terminate the power of acceptance, there is a mitigating principle in French law that greatly reduces the difference in outcomes. In this case, the principle is that offers are not nearly as freely revocable in the first place as they are in common law jurisdictions. Though in principle an offer may be revoked prior to acceptance,⁶⁶ French doctrine provides that an offer usually must be held open—that is, it is irrevocable—for any period of time stated, or if no period of time is stated, then for a reasonable time.⁶⁷ The reason typically given for the French rule of temporarily-imposed irrevocability is that the offeree must be afforded sufficient time “to learn about the offer and to examine it.”⁶⁸ Classical French doctrine states that the rule making offers binding is necessary for commerce, and that “‘everybody’ recognizes the practical necessity of such a rule.”⁶⁹ Not everybody, of course, because the French rule is in contrast to the general rule in English and American law that offers are freely revocable, even if a

66. See BONASSIES ET AL., *supra* note 4, at 769-70.

67. NICHOLAS, *supra* note 9, at 64. In the Cour de cassation case described above, the court noted, prior to concluding there had been no revocation:

[W]hile an offer may in principle be revoked as long as it has not been accepted, the position is different where the offeror has expressly or impliedly undertaken not to revoke before a certain time; and in the present case the judgment of the court below notes that . . . [offeror], having tacitly obliged himself to keep his offer open [until after [offeree] had made his inspection], could not have revoked the offer [on the day alleged] without committing ‘a fault of a kind which would entail liability on his part.’

Id.; see also BONASSIES ET AL., *supra* note 4, at 772 (“The theoretical rule that in French law an offer normally is revocable is further attenuated by the general recognition of the presumption, or more exactly of a requirement, of temporary irrevocability.”); PARVIZ OWSIA, *FORMATION OF CONTRACT: A COMPARATIVE STUDY UNDER ENGLISH, FRENCH, ISLAMIC AND IRANIAN LAW* 448-57 (1994); 2 KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 39 (Tony Weir trans., 2d rev. ed. 1987).

68. BONASSIES ET AL., *supra* note 4, at 772 (citations omitted).

69. Artur Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920, 925 (1936) (citing 6 PLANIOL & RIPERT, *supra* note 16, at 172-73); see also Nussbaum, *supra*, at 925 (“Professor Vivante, though for conceptualistic reasons adverse to the giving up of revocation, confesses: ‘The practical exigencies outweigh the law.’” (quoting 4 CESARE VIVANTE, *TRATTATO DI DIRITTO COMMERCIALE* 42 (5th ed. 1929))).

Of course, the Anglo-American commentators and jurists cite the need for commercial expediency as the reason for the universe of objective theory-based rules on mutual assent, as well. See, e.g., *Ricketts v. Pa. R.R.*, 153 F.2d 757, 762 (2d Cir. 1946) (“Williston, the leader of the objectivists, insists that, as to all contracts, without differentiation, the objective theory is essential because ‘founded upon the fundamental principle of the security of business transactions.’” (quoting WILLISTON, *supra* note 27, § 35)).

period of time is stated in the offer, unless consideration has been paid to hold the offer open as an option contract, or some other exception is applicable (though, it should be noted, that a trend in the United States can be discerned towards making offers binding).⁷⁰

There is one other point to consider, then, and that is the effect of prematurely revoking the offer if it was supposed to have been held open for a period of time, and was thus irrevocable. In Anglo-American jurisdictions, the attempt to revoke is simply held to be ineffective.⁷¹ In France, on the other hand, a premature revocation is effective because of the subjective theory and “concurrency of wills” paradigm. However, it is nevertheless considered wrongful and will therefore result in some measure of liability, usually a reliance-based recovery of damages.⁷²

Pothier, too, addressed the possible injustice to an unsuspecting offeree who receives an offer and intends to accept it, only to

70. ZWEIGERT & KÖTZ, *supra* note 67, at 43 (“[T]he doctrine of consideration which is deeply rooted in [Anglo-American] contract law is strongly opposed to the binding force of offers. Nevertheless there is a clear trend in state legislation in the United States towards making offers binding and there are also extralegal factors which limit the capricious withdrawal of offers: withdrawal may be legally permissible but it is recognized to be unfair and commercial men consequently avoid it.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 25 (1981) (providing a general requirement that option contracts have all the requisites of an ordinary contract, which includes consideration); *id.* § 45 (providing for the irrevocability of certain offers where acceptance by performance has begun, even absent consideration); *id.* § 37 (providing that option contracts cannot be revoked prior to the time stated in the option); U.C.C. § 2-205 (2008) (providing that in an offer to sell goods by a merchant in writing, any commitment to hold the offer open is enforceable even without consideration).

71. RESTATEMENT (SECOND) OF CONTRACTS § 37.

72. *See* BONASSIES ET AL., *supra* note 4, at 771-72; *see also* NICHOLAS, *supra* note 9, at 64-67. There is some debate in the French doctrine and jurisprudence about the basis of recovery for an offeree aggrieved by a prematurely revoking offeror. Even in France, it seems clear that there is no basis for recovery in contract per se, because the offeror’s subjective revocation (albeit premature) prevented the “concurrency of wills” necessary for contract formation under French law. NICHOLAS, *supra* note 9, at 65. This leaves two approaches which are proffered. First, some commentators assert that the offeror’s liability is based on his “unilateral juridical act” of making the offer. *Id.* The effect of this approach is essentially to simply deny the effect of the revocation. *Id.* The other approach of French commentators is to allow the premature revocation to be effective to prevent contract formation, but nevertheless to declare that the offeror is liable on a “delictual obligation” (roughly akin to making it a “tort” in language accessible to the common lawyer). *Id.* The primary difference between the two approaches is in remedy—declaring the offeror has committed a “unilateral juridical act” will result in a contract, expectation-based measure of recovery; whereas, asserting that the revocation is a delictual wrong will usually result in a reliance-based measure of recovery. *Id.*; *see also* BONASSIES ET AL., *supra* note 4, at 775-76 (noting a division among scholars on the theoretical basis for remedy upon revocation); ZWEIGERT & KÖTZ, *supra* note 67, at 39-40 (comparing the two views of an offeror’s liability upon revocation).

subsequently discover that the offeror had unknowingly revoked the offer before the offeree's acceptance. Pothier recognized this problem, and provided the following commentary explaining the availability of an estoppel-type remedy in this event:

It must be observed, however, that, if my letter causes the merchant to be at any expense, in proceeding to execute the contract proposed; or if it occasions him any loss, as, for example, if, in the intermediate time between the receipt of my first and that of my second letter, the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price; in all these cases, I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity, that no person should suffer from the act of another: *Nemo ex alterius facto prægravari debet*. I ought therefore to indemnify him for the expense and loss, which I occasion him by making a proposition, which I afterwards refuse to execute.⁷³

Thus, Pothier is providing that in French doctrine, although there is technically no mutual assent, and thus no contract at the instant of intended revocation, the law must nevertheless protect the reliance of an offeree who proceeds on the basis that there is a contract without knowledge that the offeror's intention has ceased to exist. This estoppel-type remedy goes a long way toward ameliorating the harshness that would otherwise exist if the "pure" French subjective theory as stated in the first instance was the only applicable doctrine.

To see the comparison between the two systems of law in this regard, an example is illustrative. Assume that *A* writes an offer and sends it to *B* on January 1, and *B* receives it on January 3. The offer proposes to provide a certain service to *B*, at a particular price, and further states that *A* wishes to hear from *B* on the proposal by January 10. Under both systems, there will be an offer as of January 3. Now assume that on January 5, *A* writes a revocation and deposits it in the mail. On January 6, *B* (who does not know of *A*'s intent to revoke) decides to accept and deposits an acceptance in the mail, and further incurs certain expenses in the belief that a contract has been formed (or is imminent). On January 7, *B* receives *A*'s revocation, and on January 8, *A* receives *B*'s acceptance.

Under Anglo-American objective theory the case would be easily resolved. There is a contract, because *B*'s acceptance occurred upon

73. POTHIER, *supra* note 51, at 18-19.

dispatch under the "mailbox rule."⁷⁴ And, more importantly for present purposes, *A*'s attempt at revocation was ineffective because, though *A* was free to revoke at any point before acceptance, the attempt did not take effect upon declaration or even dispatch, but rather could only have taken effect upon receipt.⁷⁵ Therefore, *A*'s attempt at revocation was simply ineffective, and there is thus a contract.

Under French subjective theory, the case is a bit more complex. There would be no contract. First, it would appear that *A* did not have the right to try to revoke before a reasonable time, or more probably, the time stated in his offer to *B*.⁷⁶ Nevertheless, *A* still had the *power* to revoke, and he *did* in fact revoke by manifesting and declaring that he no longer wished to enter into the contract with *B*—a point crystallized by drafting the revocation and depositing it in the mail. Once the revocation took effect there could be no contract because there was no subjective "concurrency of wills" between the parties, and this was so from the moment of declaring and depositing the revocation—well before *B* even received the revocation and acquired knowledge of it. However, the French outcome is ultimately similar to the objective theory because *B* would have a delictual (tort) claim against *A* for the wrongful, premature revocation, and the damages recovered would approximate at least some portion of those which *B* would recover against *A* for a breach of contract in an objective theory jurisdiction.

As can be seen, the French rules—though at first seemingly at complete odds with the objective theory so prevalent in most of the rest of the world—in actuality produce little significant difference in results.⁷⁷ Under both theories in the example above, *B* will collect damages from *A*, though the path to this result is much different in the two systems; under objective theory it is simply by formation of a contract, whereas French law refuses to recognize a contract because of subjective theory, but nevertheless awards *B* recovery because *A*'s

74. See *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250 (K.B.); RESTATEMENT (SECOND) OF CONTRACTS § 63 ("Unless the offer provides otherwise, . . . an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . .").

75. RESTATEMENT (SECOND) OF CONTRACTS § 42.

76. NICHOLAS, *supra* note 9, at 64.

77. *Id.* ("It can be said that the law of delict is brought in to correct the subjective view of consensus which prevails in French law and which treats a manifested, even if uncommunicated, revocation as effective, whereas the less subjective approach of English law makes the requirement of communication do the work done in French law by the law of delict.")

revocation was a delictual wrong. Thus, the “subjective” rhetoric of French contract law does not produce irreconcilable differences with France’s Anglo-American brethren, a point very significant in the context of a desired global harmonization of law.

C. *Need for Communication of Acceptance*

Another significant rule of contract formation, which warrants analysis from an objective/subjective perspective, is whether acceptances must be communicated or not. Barry Nicholas states what one would initially expect the French subjective theory rule on acceptance to be

in accord with . . . the French attitude to consensus if it were sufficient that the offeree should decide to accept, or rather, for practical reasons of proof, should manifest this decision. For at that moment the two wills are at one, and communication of the acceptance can add nothing. And this (commonly called the theory of *émission*) has indeed been the predominant view of the writers. But others have argued that what is needed is not merely the co-existence of two wills, but mutual awareness of such co-existence, i.e. the communication of the acceptance (theory of *information*).⁷⁸

On the other hand, an early nineteenth-century French commentator, Merlin,⁷⁹ provided a colorful “acoustic vault” hypothetical to illustrate the limits of the subjective approach, even in France:

“A man has in his office an acoustic vault, made in such a manner that as a result of the various and extremely multiplied twistings of the pipes of which it is constructed, words spoken into one end arrive at the other only after five minutes. Suppose I am with this man in this very office. There after saying to me, ‘Will you buy?’ he adds, ‘Answer me by means of my acoustic vault.’ Thereupon we place ourselves at either end of the vault, and I say to him by means of his instrument, ‘I will indeed.’ But a moment later I change my mind, I run up to him, and before he is able to hear my answer, say to him ‘I do not want to.’ Could he claim, after hearing the answer which I originally made by means of his acoustic vault, that I could not retract it, because it was transmitted to him by means of pipes which he owns, and consequently

78. *Id.* at 69-70.

79. “Merlin had been from 1801 to 1814 *procureur général* at the *Cour de Cassation*. Having been a prominent participant in revolutionary actions, he was exiled after the restoration of the Bourbons.” Nussbaum, *supra* note 69, at 920 n.10.

became his property the moment it left my mouth? No, clearly no, a hundred times no!⁸⁰

This passage is illuminating in that it demonstrates that the French subjective theory, even in early nineteenth-century France, was not as dogmatically inflexible as some historians assume. In this hypothetical, theoretically the initial instant at which the offeree voiced his acceptance "into the vault" there was a subjective concurrence of wills, such that a contract could be said to have been formed under pure subjective theory. But even French law did not ever go this far, as demonstrated by the hypothetical.

Turning to the modern law in France, there are a few instances in the French Civil Code that require an express acceptance to be communicated by the offeree to the offeror. This has to do with certain very specific and narrowly applicable areas, such as gifts and leases of farm land.⁸¹ It is also clear that in France, as in most other jurisdictions, the offeror is empowered to waive the requirement that the acceptance be communicated.⁸²

Beyond these specific instances, however, modern French law on the necessity of communicated acceptances (by correspondence) is somewhat murky.⁸³

No statutory provision of general application governs the subject. It is impossible to derive a general principle from particular provisions. . . . [However, it appears that in] France the prevailing tendency is to hold as a rule that communication of acceptance is not, in itself, necessary to the formation of a contract.⁸⁴

80. *Id.* at 920-21 n.11 (quoting 36 M. MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE (5th ed. 1828)).

81. *See* BONASSIES ET AL, *supra* note 4, at 1314-15. Article 932 of the Code provides that "a gift is effective as to the donor only when the act of acceptance is made known to him." *Id.* at 1314. Further,

[a]rticles 790 ff. of the Rural Code (arts. 1 ff. of the ordinance of 17 Oct. 1945), relating to leases of farm land, provide that the lessee shall have a pre-emption right at a fair price if the owner of rural property wishes to sell it. . . . [After the owner sends the lessee the intent to sale by registered letter, t]he lessee has two months to make known his acceptance or refusal. . . . [T]he acceptance must be communicated to the owner "in the same form" as the offer, that is, by registered mail, return receipt requested.

Id.

82. *Id.* at 1315 (citing 1 *Sources des Obligations*, in 2 RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL § 557, at 181 (1923)).

83. *Id.*

84. *Id.* The problem, of course, only generally arises when contracts are entered into by correspondence, as opposed to contracts negotiated in person. *See* P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY 73 (1994) ("For contracts

This is less clear from reading French doctrine and commentators on the subject, though it appears to be more clear from French cases.⁸⁵

Though there are some objectivists among French commentators, the subjectivist view appears to hold more sway. Ripert and Boulanger state the objectivist view: “It is not the acceptance that concludes the contract, but the offeror’s knowledge of the intention to accept.”⁸⁶ But the predominant view among French writers is a more subjective one that theoretically does not recognize a need for the acceptance to be communicated and received by the offeror:

On the other hand, it seems that for the writers who hold that the contract is formed at the moment the acceptance is dispatched, communication of acceptance is not in itself an element necessary to perfection of the contract. According to these authors, the significance of sending the acceptance lies merely in the fact that it proves with sufficient certainty the intention to accept. When such proof can be deduced and is in fact deduced by the court from other circumstances, such as performance or other conduct, no communication of acceptance is necessary.

. . . “The essential element of the contract . . . is intention; if that can only be demonstrated by its exteriorization, it is because that is necessary to make the intention perceptible; but from the moment an external manifestation of the intention has taken place, it ought to be effective. *To require that the intention of the acceptor be made known*

which are formed between people who are present together, which would also include as regards the time at which the contract was concluded those formed by a telephone conversation, French law is the same as English. The acceptance must be communicated.”); NICHOLAS, *supra* note 9, at 70 (stating that problems with offer and acceptance usually arise in contracts by correspondence); ZWEIGERT & KÖTZ, *supra* note 67, at 36 (“No difficulty arises when the contract is concluded between persons who are in the same place or who, though separated, are in immediate communication, by telephone or otherwise. . . . It is when a contract is to be concluded at a distance, *inter absentes*, by the exchange of letters or other embodiments of the parties’ declarations, that the problems arise.”).

85. BONASSIES ET AL., *supra* note 4, at 1316-21.

86. *Id.* at 1316 (quoting 2 GEORGES RIPERT & JEAN BOULANGER, TRAITÉ DE DROIT CIVIL D’APRÈS LE TRAITÉ DE PLANIOL § 331, at 133 (1957)). Schlesinger notes that another commentator, Demogue, has the same basic view. *Id.* (citing DEMOGUE, *supra* note 82, § 557, at 540). Within the population of French commentators, two different theories of objective indication of contractual intent have been discussed. The theory of *reception* provided that the acceptance was operative at the moment that it physically arrived at the offeror’s address. However, the theory of *information* provided that the acceptance was not operative until the moment that the offeror became actually aware of the acceptance. *See id.* at 1449-50; NICHOLAS, *supra* note 9, at 70; *see also* WATKIN, *supra* note 34, at 308 (describing the two theories regarding when acceptance becomes effective). As neither of these objective views of acceptance efficacy have been very influential in the French literature, they will not be discussed further.

*to the offeror is arbitrarily to add a new element to the intention and to the contract.*⁸⁷

Other French commentators are equally clear on this subjectivist stance. Thus, Mazeaud states:

“A contract is formed by the mutual consent of the parties; this consent exists as soon as there is a meeting of the minds, that is to say, an offer and an acceptance. *To require knowledge of the acceptance is to add a condition for the formation of contracts which the law does not require.*”⁸⁸

And, Colin adds: “*The fact that the acceptance is made known to the offeror adds nothing to the legal consequences of the acceptance.*”⁸⁹ And the French cases appear generally to support this subjective stance dispensing with the need for the acceptance to be communicated.⁹⁰

The primary instance in which the French cases have not recognized the validity of an uncommunicated acceptance seems to be those in which the offeror either expressly, or by implication, required the acceptance to be communicated as a condition to the formation of the contract.⁹¹ One illustrative case on this point involved owners of a building who leased it to a company. The lease contained an option for the tenant to purchase the property, which was required to be exercised and ratified at a stockholders' meeting on or before October 1st. The owners made several inquiries as to whether the option was being exercised and received no response, whereupon the owners purported to revoke. In fact, they later learned that the tenant company had attempted to exercise the option but did not notify the owners until

87. BONASSIES ET AL., *supra* note 4, at 1316 (quoting 1 *Les Obligations*, in 2 GABRIEL MARTY & PIERRE RAYNAUD, DROIT CIVIL § 111, at 95 (1962) (emphasis added)).

88. *Id.* at 1316 (quoting 2 HENRI ET LÉON MAZEAUD & JEAN MAZEAUD, LEÇONS DE DROIT CIVIL § 146, at 120 (2d ed. 1962) (emphasis added)).

89. *Id.* (quoting 2 AMBROISE COLIN & H. CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS (4th ed. 1924) (emphasis added)).

90. *Id.* at 1317-18. As Schlesinger notes, one case even enforced a contract in which there had been no communication of acceptance at all, but rather the offeree was held to have tacitly accepted the offer for a sale of goods by the beginning of performance. *Id.* at 1318 (citing Cour d'appel [CA] [regional court of appeal] Afrique Équatoriale Française, Sept. 10, 1921, *sous* Chambre des requêtes [Cass. req.], April 1, 1924, S. 1925, juris. 371). Of course, this is actually not so very far away from American law on the subject of potential acceptance by performance. See U.C.C. § 2-206 (2008) (specifying that a seller may accept an offer to buy goods by either promising to ship (i.e., communicating acceptance) or by promptly shipping (i.e., performing)); RESTATEMENT (SECOND) OF CONTRACTS § 54 (1981) (specifying manner in which offeree may accept by performance).

91. BONASSIES ET AL., *supra* note 4, at 1319.

January. The court held the acceptance was not timely because it had not been communicated by October 1st.⁹² The case illustrates that

it is . . . permissible for the offeror to require that the acceptance be communicated to him as a condition of formation of the contract. Such a condition may be expressly stated in the offer. It may also be interpolated by the judges on the basis of the terms of the offer, interpreted in the light of the circumstances of the case.⁹³

French cases tend to interpret the offer's reference to a particular date for acceptance as meaning that the offeror intended to require that the acceptance be communicated and received by such date.⁹⁴ Thus, in such instances, communication of the acceptance is required. But if no such intention is ascertained—and the offer is instead a general, “open” offer, open simply for a reasonable time under the circumstances—the French subjective position instead prevails and receipt of the acceptance is unnecessary for contract formation.

Once the concept of a subjective theory of acceptance in France is conceded, there is still a further point of clarification to be made. The French writers have, at various times, discussed two different theories of acceptance effectiveness. The most subjective theory that has ever been discussed in France is the theory of *emission*.⁹⁵ That is,

if it is mutual consent which makes the contract, only declaration of the acceptance, *i.e.*, consent of the acceptor added to that of the offeror, ought to be necessary to perfect the contract. From this it would follow that the acceptance, once declared, becomes effective immediately, regardless of whether and when the declaration is dispatched (or expedited) to the offeror.⁹⁶

As appealing as it is to purists in the French subjective tradition of mutual assent, it appears that the *emission* theory is not seriously considered as operative in French law: “[A]lthough several of the writers do not explain their ideas very clearly, they seem to be unanimous in rejecting the pure theory of declaration.”⁹⁷

Instead, the majority of French commentators and cases appear to follow the theory of *expedition*—that is, the acceptance is effective upon dispatch of the acceptance so that it is put out of the offeree's

92. *Id.* (citing Cour de cassation [Cass. 1e civ.] Feb. 2, 1932, S. 1932, juris. 68; *cf.* Cour de cassation [Cass. 1e civ.] Dec. 21, 1960, D. 1961, juris. 417, note Malaurie).

93. *Id.*

94. *Id.*

95. See NICHOLAS, *supra* note 9, at 70; see also WATKIN, *supra* note 34, at 308 (describing the development of the theory of *emission*).

96. BONASSIES ET AL., *supra* note 4, at 1449.

97. *Id.*

possession.⁹⁸ As opposed to the more purely subjective *emission* theory,

[t]he followers of the expedition theory assume, in effect, that only the dispatch of the acceptance establishes the reality of the legal will (consent) of the acceptor; and it is definitely this theory of declaration-dispatch (*i.e.*, dispatch necessary to prove declaration of the acceptance) which is generally postulated by consensualism.⁹⁹

Though the French doctrine and cases can appear at times to vary from this general preference for the theory of *expedition*, it appears that when such variation occurs it is usually because the court, as a question of fact, has interpreted the offer to require that any acceptance be actually communicated to, and received by, the offeror in order to be effective.¹⁰⁰

The above principles notwithstanding, the problem of when and to what extent communication of acceptance is required in France is still complicated by at least two factors. First, the Cour de cassation has left this decision to the lower courts as a pure question of fact (rather than one governed by clear code sections or doctrine).¹⁰¹ This is evidenced by the Cour de cassation's admonition that "the time of effective acceptance depends on the circumstances of the individual

98. *Id.* at 1448, 1455-63; see also BELL ET AL., *supra* note 42, at 312 ("[T]here seems to be a preference both in the courts and the jurists for placing acceptance at the time and place of sending."); F.H. LAWSON ET AL., AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 157 (3d ed. 1967); OWSIA, *supra* note 67, at 563 ("On balance, those presently in favour of expedition theory appear to be in the majority."); WHINCUP, *supra* note 11, § 2.53, at 57 ("As regards the time of acceptance, the question whether a contract is made when acceptance is posted or when the offeror receives it (which is important in determining whether the offer can still be revoked) has occupied the French courts more than the battle of the forms. The issue is still treated case by case, although the courts tend generally to hold that acceptance is given, and thus the contract made, when it is posted . . ."); P.H. Winfield, *Some Aspects of Offer and Acceptance*, 55 L.Q. REV. 499, 507 (1939); cf. Perillo, *supra* note 4, at 430 ("[T]he French subjective theory explains why in France there is no definitive rule on whether an acceptance is effective on dispatch or on receipt. This is because, under the subjective approach, the meeting of the minds frequently is a question of fact.")

99. BONASSIES ET AL., *supra* note 4, at 1449.

100. *Id.* at 1459-62 ("The basic rule, however, that the contract is formed by dispatch of the acceptance, does not have to be made absolute. The offeror may be allowed the right to condition his offer. In particular, he may provide that the contract becomes effective only upon the double condition that the acceptance be communicated to him and that he has not revoked the offer in the meantime.")

101. NICHOLAS, *supra* note 9, at 70-72. French law has generally decided that the issue of whether the offer requires the acceptance to be communicated is one of fact. BONASSIES ET AL., *supra* note 4, at 1320. To many commentators from other jurisdictions "such an approach is unsound. A legal system which seeks to promote enforceability and certainty of contracts, needs a *rule* (though not necessarily a cogent one) concerning the moment when a contract is concluded." *Id.*

case, especially on the intention of the parties, and is therefore not a proper question for the highest court."¹⁰² There are no code rules in this area, other than the one that provides that there simply must be an agreement and consent to the agreement.¹⁰³ Therefore,

[w]hether there is or is not an agreement is a matter of fact which (leaving aside questions of defective consent) is wholly within the *pouvoir souverain du juge du fond*. it escapes the control of the *Cour de cassation*. All that that court can do is to say whether or not the court below, in exercising its *pouvoir souverain*, has so far misinterpreted the facts as to 'denature' them.¹⁰⁴

The second complicating factor is, as stated above, that the lower courts will often decide, as a factual matter in the case at hand, that the particular offer at issue can be interpreted so as to require that the acceptance be communicated.¹⁰⁵

However, notwithstanding these two complicating factors, it appears that the residual, default rule applied by the majority of cases and commentators in France is that an offer may be accepted, unless otherwise specified, upon dispatch of the acceptance in the mail. The French courts do treat the question as one of fact, variable by the parties through a demonstration of their intention to contract around the default rule. However, in spite of this, it is generally believed that the French courts reach equitable results under this regime.¹⁰⁶

No need for comparative analysis exists here. The rule in Anglo-American jurisdictions is the same. The *expedition* rule developed under the subjective theory of French law, whereby the acceptance is effective from the moment of dispatch even though the offeror does not yet know of its existence, is in fact the same as that followed in Anglo-American jurisdictions. We know the rule as the "mailbox rule."¹⁰⁷ Like the *expedition* theory, the mailbox rule makes the acceptance operative from the moment it is placed in the mail, or

102. ZWEIGERT & KÖTZ, *supra* note 67, at 41.

103. NICHOLAS, *supra* note 9, at 59; *see also* MARSH, *supra* note 84, at 73 ("There is no article dealing directly with the point in the *Code Civil* . . .").

104. NICHOLAS, *supra* note 9, at 59; *see also* MARSH, *supra* note 84, at 73 ("[F]or a long time the *Cour de cassation* refused to give any ruling other than that the issue was to be determined as a matter of fact by *les juges de fond*").

105. NICHOLAS, *supra* note 9, at 70.

106. *Id.*

107. *See* Adams v. Lindsell, (1818) 106 Eng. Rep. 250 (K.B.); RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981) ("Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . .").

otherwise put out of the offeree's possession, even if the acceptance never reaches the offeror.¹⁰⁸ Therefore, the rule obviously allows formation of a contract by the offeree's dispatched acceptance before it has ever been received by the offeror.¹⁰⁹ The mailbox rule, quite incontestably, is inconsistent with the objective theory of contracts, and is instead a much more subjective rule. The seminal case of *Adams v. Lindsell*,¹¹⁰ which is usually credited with creating the rule in English law, was decided at the very same point in history that the autonomy of the will dominated global thinking about contract law and was in line with such thinking.¹¹¹ It is undoubtedly a subjective rule, and is undoubtedly the same basic rule as that of the French, notwithstanding the different paradigms each legal system otherwise espouses.

D. *Some Other Aspects of Formation and Interpretation*

The foregoing discussion illustrates that, although the paradigms of the objective and subjective systems are couched in distinct terms, in actual effect the rules in the two systems regarding contract formation—namely, regarding revocation of offers and communication of acceptances—come very close to each other in actual operation. In the remainder of this Part, I will briefly touch on a handful of other doctrinal areas in contract law where the objective theory system comes very close to approximating that of French subjective theory.

1. Death of Offeror

Another contract formation rule in France, which illustrates the subjective theory that pervades French contract law, is that the intervening death of the offeror—subsequent to the offer being made and prior to an effective acceptance being made by the offeree—will

108. RESTATEMENT (SECOND) OF CONTRACTS § 63(a); FARNSWORTH, *supra* note 17, § 3.22, at 337; *see also* Beth A. Eisler, *Default Rules for Contract Formation by Promise and the Need for Revision of the Mailbox Rule*, 79 KY. L.J. 557, 563 (1990) (citing *United Leasing, Inc. v. Commonwealth Land Title Agency, Inc.*, 656 P.2d 1246, 1250 (Ariz. Ct. App. 1982)). The benefit of this rule depends, however, on the acceptance being dispatched properly, such as to the correct addressee and with the proper address. *See* PERILLO, *supra* note 3, § 2.23(a), at 110 (“The [mailbox rule] prevails generally throughout the U.S., with the qualification that the acceptance must be dispatched in a proper manner.”). The mailbox rule is also the “default” rule, and the result is otherwise when the offer specifically provides that the acceptance must be actually received in order to be effective. *See id.* § 2.22, at 107.

109. *See* MURRAY, *supra* note 17, § 47(A), at 160.

110. (1818) 106 Eng. Rep. 250 (K.B.).

111. Williston, *supra* note 16, at 87; *see also* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 182 (1990) (stating “the subjective standard was reinforced” by *Adams v. Lindsell*, cited in Perillo, *supra* note 4, at 439 n.77).

terminate the offer, assuming the offer was generally revocable in the first place.¹¹² This is certainly applicable when the offered proposal is personal to one of the parties; that is, when the offer is made *intuitu personae*.¹¹³ This would include, for example, a partnership contract, or one to render services, such as with an architect.¹¹⁴ On the other hand, French law provides that death does not terminate the offer in the event it had become irrevocable before the offeror's death occurred.¹¹⁵

Once again, no comparative analysis is necessary here because the rule is the same in Anglo-American jurisdictions following objective theory. The applicable Restatement section provides: "An offeree's power of acceptance is terminated when the . . . offeror dies or is deprived of legal capacity to enter into the proposed contract."¹¹⁶ The primary rationale for the rule in American law seems to have been that one "cannot contract with a dead man."¹¹⁷

Whatever the rationale, one thing that is clear is that the rule is not consonant with objective theory, but rather is squarely a subjective-theory based rule. The drafters of the Restatement stated that the rule is "a relic of the obsolete view that a contract requires a 'meeting of minds,' and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent."¹¹⁸ The origins of the rule certainly appear to predate the founding of the American Republic, going back to the French civil law,

112. See BONASSIES ET AL., *supra* note 4, at 117.

113. *Id.* at 887.

114. *Id.*

115. *Id.* at 116.

116. RESTATEMENT (SECOND) OF CONTRACTS § 48 (1981). Section 48 also provides that the offer is terminated when the *offeree* dies as well. *Id.* I will not address this situation in this Article, because it does not necessarily implicate the same questions of objective theory and contract formation. Professor Ricks has made a similar conclusion:

Death of offeree cases differ from death of offeror cases both factually and theoretically. The death of offeree cases are thought to rest on the quite reasonable notion that the offer is personal to the offeree, and not assignable, so that the death of the offeree leaves no one left to accept the offer. Of course, difficulties with this rationale exist. The rationale might over-emphasize the "personalness" of the offer to the offeree. Moreover, an agent whose agency was coupled with an interest could accept on the offeree's behalf, even though the offeree had died. This brief discussion proves that the policies animating the results in cases of death of the offeree differ from those animating cases involving death of the offeror.

Val D. Ricks, *The Death of Offers*, 79 IND. L.J. 667, 672-73 n.14 (2004) (citations omitted).

117. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 198 (1917); see also Oliphant, *supra* note 17, at 210 ("The courts say that the reason the offer is terminated by the death of the offerer is obvious. A contract cannot be made with a dead man.").

118. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a.

and even probably to Roman law.¹¹⁹ Professor Perillo puts it more bluntly, stating unequivocally that the rule “was an import from the French subjectivists.”¹²⁰

2. Mistake and Misunderstanding

Mistake is considered a defect in the consenting process of contracting in France. Thus, article 1109 of the Civil Code provides that “[t]here is no valid consent if consent was only given because of error.”¹²¹ And article 1110 of the Code provides a further clarification of the mistake doctrine in France: “Error is not a ground for nullity of a convention unless it goes to the very substance of the thing forming the object of the contract.”¹²² French doctrine confirms that the presence of such a serious mistake or error, going to the whole substance of the subject matter of the contract, completely “vitiates[s] the will, and contaminate[s] the appearance of consent.”¹²³ Thus, for instance, Pothier commented that consent was absent if the parties were jointly in error about the main substance of a sale.¹²⁴ As an example of this, Pothier “put forth the case of a party who intends to sell a house for 9,000 *livres* while the other understands that the agreement is for a nine year lease at that price.”¹²⁵ Thus, French law provides that serious mistakes constitute defects in consent, and this precludes formation of a contract in the first instance. This is fully consistent with the subjective theory in France, and the autonomy of the will.

The area of mistake is, again, one in which very little comparative analysis need be undertaken, because the law is much the

119. Professor Ricks pinpoints the first mention of the rule in American case law to the 1830 case, *Mactier's Administrators v. Frith*. Ricks, *supra* note 116, at 673 (citing *Mactier's Adm'rs v. Frith*, 6 Wend. 103 (N.Y. 1830)). *Frith's* cited the French commentator Robert Joseph Pothier for the rule. *Id.* (citing ROBERT JOSEPH POTHIER, *TRAITÉ DU CONTRAT DE VENTE* (1806)). Professor Ricks, after an exhaustive tracking down of the origins of the rule, concludes that “[t]he dying offer rule appears to be a rather textbook example of the kind of borrowing from Roman, natural law, and medieval philosophy described by James Gordley.” *Id.* at 674 n.23 (citing JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 45-49 (1991)).

120. Perillo, *supra* note 4, at 464. Professor Perillo discusses an American admiralty case in 1847 that cited the rule from Pothier. *Id.* at 464-65 (citing *The Palo Alto*, 18 F. Cas. 1062 (D. Me. 1847) (No. 10,700)).

121. This same code section also refers to consent “extorted by force or procured by fraud.” C. CIV. art. 1109 (Fr.), *translated in* VON MEHREN & GORDLEY, *supra* note 48, at 1168.

122. *Id.* art. 1110, *translated in* VON MEHREN & GORDLEY, *supra* note 48, at 1168.

123. Perillo, *supra* note 4, at 469.

124. *Id.*

125. *Id.* (citing POTHIER, *supra* note 51, at 20).

same in Anglo-American jurisdictions. According to the Restatement, if the two contracting parties make a mutual mistake regarding the subject matter of the contract, the contract is voidable and thus may be unenforceable.¹²⁶ It turns out that this is a civil law concept which was imported into the common law of contracts. An illustrative case which reveals the heritage of the rule is *Iowa Loan & Trust Co. v. Schnose*,¹²⁷ in which the Supreme Court of South Dakota cited the general statement of the rule regarding mutual mistake, and then remarked:

Such was the civil law. The same rule has been adopted as a part of the common law, and is based upon the idea that in such cases no contract has been consummated; that the minds of the parties have never met in respect to the real subject-matter of the contract.¹²⁸

The seventeenth-century French scholar Jean Domat was cited for the origins of the mistake rule.¹²⁹ Domat's writings, like those of Pothier, were influential in the drafting of the French Civil Code. The mistake doctrine in contract law is another example of the common law importation of French contract law.

The one difference between French law and Anglo-American law on mistake, which does appear to be a minor implication of the differences in theory, is that in France a serious mistake in the contracting process totally vitiates consent. The result is that there is no contract at all; it never forms in the first place. In the United States, on the other hand, a mutual mistake will merely make the contract *voidable*.¹³⁰ This seems to be the result of the differences in subjective and objective theory. In France, the mistake doctrine under the subjective theory prevents contract formation because the minds of the parties have not met. However, in Anglo-American jurisdictions the mistake does not prevent the objective appearance of mutual assent. The mistake is a matter of internal cognition, not external appearances. Therefore, the mistake does not prevent formation of the contract, though as a practical matter the voidability of the contract at the adversely affected party's option accomplishes much the same thing. Therefore, any differences between the two approaches on this point become practically meaningless, if still rhetorically distinct.¹³¹

126. See RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

127. 103 N.W. 22 (S.D. 1905).

128. *Id.* at 24 (citing *Bedell v. Wilder*, 26 A. 589 (Vt. 1893)).

129. *Id.* (citing 1 JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL 494 (2d ed. 1696)).

130. RESTATEMENT (SECOND) OF CONTRACTS § 152.

131. Though French doctrine is uniform that the basis for mistake is the lack of consent, one will find more murkiness in common law and objective theory descriptions of

Reference should also be made here to the Anglo-American doctrine of "misunderstanding." Though this would appear to be subsumed within the French conception of "mistake" or "error," it has developed as a slightly different doctrine in the common law. The common law misunderstanding doctrine is usually associated with the famous case of *Raffles v. Wichelhaus*.¹³² In *Raffles*, two parties contracted for the sale of cotton, which was to arrive on the ship "Peerless."¹³³ It turned out there were two different ships called "Peerless," which arrived at different times of year, and each of the parties meant a different "Peerless" ship and were unaware of the other's meaning.¹³⁴ The court held there was no contract:

[T]he moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of shewing that the defendant meant one "Peerless," and the plaintiff another. That being so, there was no consensus [sic] ad idem, and therefore no binding contract.¹³⁵

The doctrine is also set forth intact in the Restatement, which provides in part: "There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other"¹³⁶

The misunderstanding rule is completely in accord with a subjectivist perspective of contract law and with French mistake doctrine, because it inquires into the subjective, internal understanding of the consent undertaken by the parties to the contract.¹³⁷ If such subjective analysis reveals that the parties did not have a "meeting of the minds," that is, the same subjective intent, the doctrine provides that there is no mutual assent and thus no contract in the first place.

the justification for the mistake doctrine. Some commentators base it on a subjectivist perspective, whereas other common law commentators provide other explanations, including failure of consideration. See, e.g., Perillo, *supra* note 4, at 467. Similarly, some nonsubjective justifications which have historically been offered for the defenses of fraud and duress include oppression and moral wrong. *Id.* at 467-69.

132. (1864) 159 Eng. Rep. 375 (Exch.).

133. *Id.*

134. *Id.*

135. *Id.*

136. RESTATEMENT (SECOND) OF CONTRACTS § 20(a) (1981). This Restatement provision also provides that if one of the parties knew or had reason to know of the "innocent" party's meaning, then there *is* a contract according to the meaning of the innocent party. *Id.* § 20(b).

137. See Perillo, *supra* note 4, at 469 ("American misunderstanding cases agreed with [the French doctrine of mistake].").

This is completely in accord with French mistake doctrine.¹³⁸ Justice Holmes once famously (and, some would say, audaciously) attempted to justify the *Raffles* holding under the guise of objective theory: “The true ground of the decision was not that each party meant a different thing from the other, as is implied . . . but that each said a different thing.”¹³⁹ But this observation by Holmes has not stood the test of time, as most commentators observe that *Raffles* and the misunderstanding doctrine is undeniably subjectivist in nature. Grant Gilmore had the last word on this when he remarked of Holmes’ attempt to objectify *Raffles*: “The magician who could ‘objectify’ *Raffles v. Wichelhaus* . . . could, the need arising, objectify anything. But why bother?”¹⁴⁰ So, we see that not only is the Anglo-American concept of mistake very much like the French doctrine (with the exception of the mere voidability of the consent in common law, compared to the complete lack of consent in France), but that the Anglo-American concept of misunderstanding is virtually on all fours with French doctrine in this area.

3. Rules of Interpretation

One other area in which French contract doctrine can be compared to common law objective theory rules is in the area of interpretation of written contracts. Specifically, the rules in France for interpreting a written contract can be compared to analogous rules in Anglo-American jurisdictions to determine whether the “subjectivist” French rules look very different from the more “objectivist” Anglo-American rules.

In a series of articles of the French Civil Code, rules are set forth for the interpretation of contracts, many of which look quite familiar to the common lawyer from an objectivist perspective. However, the first section in this series of rules in the French Civil Code is article 1156, which provides the following: “In interpreting agreements, one ought to seek the common intention of the contracting parties instead of adhering to the literal meaning of the words.”¹⁴¹ This rule of construction appears subjectivist in nature, as one would expect when dealing with French contract law. The provision states that, in the end for matters of interpretation, what the parties actually (that is,

138. *Id.*

139. HOLMES, *supra* note 1, at 242.

140. GILMORE, *supra* note 27, at 41.

141. C. CIV. art. 1156 (Fr.), *translated in* VON MEHREN & GORDLEY, *supra* note 48, at 1171.

subjectively/internally) intended is paramount, and the literal (that is, objective/external) meaning of the contract language is lessened in importance compared to the supreme goal of divining the actual, subjective intent of the parties in entering into the contract.

Undoubtedly, in Anglo-American jurisdictions, interpretation is primarily concerned with the objective meaning of contract language. However, there are numerous canons of construction at the disposal of common law judges, and one of them is that "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."¹⁴² While this rule is still primarily based upon objective notions of contract interpretation, it nevertheless makes reference to the conceptually distinct actual, or subjective, intent of the parties in making the agreement. In this, it approximates the standard set forth in article 1156 of the French Civil Code, and thus provides a commonality between the contract interpretative process in France and in Anglo-American jurisdictions.

IV. CONCLUSION

France has a law of contracts which is dominated (rhetorically, at least) by subjectivist thinking. Much of the rest of the world has a law of contracts which is dominated (rhetorically, at least) by objectivist thinking. However, as demonstrated herein, in practical application on a rules-based level, the systems converge in ways that one would not expect from the labels given to the respective systems. Therefore, though in France a revocation of an offer can theoretically operate without reference to whether it is ever sent to and received by the offeree (a rule which is at odds with the common law objective rule that such revocations must be received in order to be effective), the outcome in France is tempered by the fact that French doctrine provides that most offers are irrevocable for a reasonable period and if prematurely revoked, a delictual obligation is owed to the offeree. Further, the rules on communication of acceptance, death of offerors, mistake, and contract interpretation, are all quite similar to each other, regardless of the system from which they originate. What emerges from this analysis is a striking similarity in the ultimate effect of rules in each of the two systems, notwithstanding the different theoretical underpinnings. France, as it turns out, has components of its contract law that resemble our "objectivist" common law system. Perhaps even

142. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981).

more so, our supposedly “objectivist” common law system is not really purely objectivist in nature, but rather has many subjective components, many of them obviously borrowed from France.

And, on reflection, this does not turn out to be very surprising. It has been said that in truth, there is neither an existing pure “objective” theory of contract, nor a pure “subjective” theory of contract. Rather, there are elements of both ideas in both systems.¹⁴³ Therefore, neither of the theories can be “carried too far.”¹⁴⁴ As Professor Litvinoff (an academic of Louisiana civil law who is thus closely aligned to the French Civil Code) has observed:

The dispute between the subjective will and the declared will theories—the subjective and the objective approaches to contract—is no longer realistic. A will that is purely subjective, meaning that it was never expressed, is irrelevant in the eyes of the law. Only the will that is declared or manifested, that which materializes in an objective act, may start the operation of the legal mechanism. Once this occurs, an act of human conduct has taken place, and every person called to evaluate its meaning, for instance, a judge, will have to take the act as one single phenomenon, wherein a certain intention, a subjective element, is thoroughly blended with a certain utterance, an objective element. Either of those two elements, although susceptible of being analytically isolated, is incomplete and insufficient when not taken in the context of the whole. . . . The intention illuminates the declaration, in the same manner as the declaration purports to express the intention.¹⁴⁵

French contract law, while filled with the rhetoric of subjective intent and concern for the “pure” autonomy of wills, in the end comes close to achieving the same or similar results as its objective theory brethren around the globe:

The influence of this [autonomy of will] principle on the French Civil Code and French law in general was such that to this day there is, in theory, no clear cut distinction between the “real” intention and its

143. See *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760-69 (2d Cir. 1946) (Frank, J., concurring); see also OWSIA, *supra* note 67, at 220 (“[N]o legal system can be said to be, in an all-embracing manner, subjective or objective.”).

144. LITVINOFF, *supra* note 16, § 135, at 224.

145. *Id.* § 135, at 225-26 (citing BRUTAU, *supra* note 16, at 95-112; Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931)). As Professor Litvinoff further stated, citing French doctrine:

On the other hand, if it is asserted that the real,—the subjective—will is the true source of obligations, it is nonetheless necessary to take into account the declaration, the external manifestation of this will, because the declaration is the only social, objective fact on which the law can focus.

LITVINOFF, *supra* note 16, § 135, at 224 (citing 6 PLANIOL & RIPERT, *supra* note 16, at 109).

manifestation. . . . Clearly the necessities of commercial life demanded that some value should be placed on outward behaviour. It is not surprising that French writers were compelled to devise a theory which gives effect to outward behaviour while appearing to adhere to the principle that only the "real" intention of the parties counts. This theory maintains that there is no conflict between "real" and apparent intention inasmuch as outward behaviour is a means whereby the "real" intention may be deduced. The argument, no doubt, appears artificial for it ignores a possible clash between real and apparent intention by assuming that the former must necessarily correspond with the latter. [*But i*]n practice, the test adopted by French law is not very different from the objective test of English law.¹⁴⁶

The difference between the French subjective system, versus the more objective system espoused by most of the rest of the world, "is only a matter of emphasis, since all legal systems have to work with exteriorized indications of inner psychological elements in order to appraise and evaluate their legal effects."¹⁴⁷

It is indeed interesting to note that, though the French law and the remainder of the objectivist world come at contract law from different perspectives on contractual intent, the result of actual cases in France tends to be similar to those achieved in other, more objectivist, jurisdictions.¹⁴⁸ Therefore, "[u]nderneath these substantial differences [of contract paradigms], there is . . . a lot of pragmatism in applying principles to concrete cases, and the differences in practice are less substantial than the different paradigms would tend to predict."¹⁴⁹

The fact, therefore, that French contract law is subjectivist in its philosophical origins and underpinnings, whereas Anglo-American contract law (along with that of most of the rest of the world) is more pragmatically objective in its philosophy, turns out not to present any significant impediment to any contemplated participation between the two legal systems, whether towards future globalization of the law or otherwise. The different objective and subjective systems "come, in

146. Chloros, *supra* note 8, at 615-16 (citing PLANIOL & RIPERT, *supra* note 44, at 69) (emphasis added).

147. OWSIA, *supra* note 67, at 219; *see also id.* at 434 ("[Even in France,] [a]n intention which is not manifested does not exist in law; and an intention may be treated as not manifested when it is not manifested to the very one who is required to know of such intention.").

148. De Ly, *supra* note 39, at 1848.

149. *Id.* at 1853; *see also* OWSIA, *supra* note 67, at 226 ("It is noteworthy that the two systems [French and English law], notwithstanding their conceptual differences, come in certain areas closer to each other by applying the test of 'reasonableness' and taking into account custom and usage for the interpretation of expressions used.").

their functioning, strikingly close to each other but through a labyrinthine maze of theoretically varied routes.”¹⁵⁰ After the comparison of the details of rules in the two systems of contract formation and interpretation, “the impression that remains is that of the similarity of the attitude of courts to legal problems—an attitude which transcends historical differences and differences between codified and case-law systems.”¹⁵¹ There is, in other words, much that unites the French law of contract with that of the rest of the world’s contract law and much less divides it than what may be thought based on the theoretically distinct underpinnings. The commonalities appear to transcend the differences, and this is all to the good for future harmonization of the law.

150. OWSIA, *supra* note 67, at 569.

151. Chloros, *supra* note 8, at 620.
