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The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment

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THE COUNTERPOISE OF CONTRACTS: THE REASONABLE PERSON STANDARD AND THE SUBJECTIVITY OF JUDGMENT

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"[T]he law that is in us by nature is nothing else than the *reasoning creature's* sharing in the eternal law."
Saint Thomas Aquinas**

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** Thomas Aquinas, *Summa Theologiae*, *in* THOMAS AQUINAS SELECTED PHILOSOPHICAL WRITINGS 419 (Timothy McDermott trans., 1993) (emphasis added).

I. INTRODUCTION

Who is this all-knowing arbiter of reasonableness known as the reasonable person? From what organic and metaphysical antecedents has this person evolved? Is the reasonable person one and the same with Kant's rational being[1] or tort's reasonably prudent man[2] or Lord Denning's officious bystander?[3] How do courts go about creating this contractual mystic? How

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1. *See generally* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis Beck trans., 1969) (highlighting his views of the rational being).

2. *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 32-33, at 149-80 (4th ed. 1971) (detailing the attributes and capacities of the reasonably prudent man standard and how courts should apply it). Professor Eisenberg describes the difference between the reasonable man of tort and the reasonable person of contract as one of perception. The reasonable person perceives the likelihood of certain consequences stemming from the actions in question. In tort, the reasonable person must perceive only a low degree of probability to hold a person accountable for wrongdoing. In contract, a higher degree of probability is necessary.

> "In the case of a *breach of contract*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract, would *contemplate* them as being of a very substantial degree of probability . . . .
>
> In the case of a *tort*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of the tort committed, would *foresee* them as being of a much lower degree of probability."

Melvin Aron Eisenberg, *The Principle of* Hadley v. Baxendale, 80 CAL. L. REV. 563, 580 n.48 (1992) (quoting H. Parsons Livestock Ltd. v. Uttley Ingham & Co., [1978] Q.B. 791 (C.A. 1977) (opinion of Lord Denning, M.R.)). The concept of the reasonable person can be seen elsewhere in the law. *See, e.g.*, Robert A. Levy, Note, *The Prudent Investor Rule: Theories and Evidence*, 1 GEO. MASON L. REV. 1 (1994).

3. *See generally* LORD DENNING, THE DISCIPLINE OF LAW (1979) (criticizing the strict

can the use of the objective reasonable person be reconciled with the subjective, discretionary nature of judicial decision-making? Cardozo's notion of judge as creator,[4] Llewellyn's reference to the *leeways* of the law,[5] and Roscoe Pound's notion of judicial intuition[6] all smack of a process ripe with the fruits of subjectivity. The advancement of the objective theory's reasonable person must pass through this subjective filter of the judicial mind. How can the objective theory better incorporate the fact that subjective elements play an inherently important role in the interpretation of objective reality? These questions are addressed in this article.

This article will first attempt to uncover the ancestral roots of contract law's reasonable person by analyzing three fields of study: theology, philosophy, and psychology. The next part will investigate the material utilized by the courts in constructing the ad hoc reasonable person. The focus will be upon use of custom, trade usage, and commercial practice as the genetic building blocks of the reasonable person. The final two parts will look to the role of subjectivity in the creation and the application of the reasonable person. Just how objective is the reasonable person given the reality of judicial discretion?

A. The Twentieth Century Revolution: Subjectivism Versus Objectivism

The rise of the reasonable person standard and the objective theory of contract during the twentieth century was not without ancestral roots. The use of formality to provide objective guidance for assessing contractual liability can be traced back to Roman times. Roman contract law was structured upon objective formality, not subjective agreement. "[C]ompletion of the proper formalities, rather than consent, was determinative."[7] Our Anglo-American tradition is filled with similar formality. Examples include the sealed instrument, livery of seisin, and the Statute of Frauds. The seeds of the reasonable person as applied to manifestations of intent are found in these historical formalities. The Roman *stipulatio*, the giving of *sacramentum*, and in Germanic law, the giving of a thing or *arles*, were objective means upon which contractual liability was affixed.[8] Durkheim has written that it was

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constructionists' rigid adherence to precedent).

4. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103-04 (Yale Univ. Press 1965) (1921).

5. KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA (Paul Gerwitz ed. & Michael Ansaldi trans., 1989).

6. KENT GREENAWALT, LAW AND OBJECTIVITY 205 (1992) (examining the notion of legal objectivity and its relation to judicial intuition).

7. David P. Doughty, Comment, *Error Revisited: The Louisiana Revision of Error as a Vice of Consent in Contracting*, 62 TUL. L. REV. 717, 718 (1988).

8. For a concise and clear description of these ancient rituals and practices see generally

"these ceremonies that gave an objective character to the word and to the resolve of the promisor."[9] The notion of manifestation of intent can be seen as a modern substitute for these ancient rituals. Implicit in the notion of manifestation of intent is the need to measure and judge that manifestation. In order to fairly attribute legal consequences to a person's manifestations, a neutral, third party arbiter was needed. This fair-minded, all-knowing figure had to be available to judge a potentially infinite number of factual situations. This desideratum was the impetus for the development of the reasonable person standard.

The revolution transforming contract law towards an objective pole is often associated with Holmesian jurisprudential thought. "The central tenet of Holmes's jurisprudential thought was that the . . . rules of law [constantly move] *toward* an end point at which the original moral content of a given rule will have quite disappeared and the subjective state of mind of the [parties] will have become irrelevant."[10] This tenet espouses an inevitable movement toward the rule of the objective reasonable person. Professor Gilmore reconfigured the common law's paradigmatic conversion from the subjective to the objective as a changing of the decisional matrix from resolving questions of fact to questions of law. The subjectivity of the factual inquiry was replaced by the application of rules through the medium of the reasonable person. A party's conduct, not a party's intent, would determine contractual liability. The facts were used to decide, as a matter of law, whether the action in question should be considered "permissible [or] impermissible 'conduct.'"[11]

The revolutionary movement from the subjective theory to the objective theory of contracts has been a relatively universal phenomena. A commentator on Australian law notes that in "the nineteenth century it was common to regard a contract as resulting from the true meeting of the minds . . . . The modern tendency is to determine the existence of agreement on a more objective basis . . . ."[12] English law in the area of contractual interpretation has evolved in the same manner. One treatise writer explains that the "general

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EMILE DURKHEIM, DURKHEIM AND THE LAW 196-200 (Steven Lukes & Andrew Scull eds., 2d ed. 1983).

9. *Id.* at 213.

10. GRANT GILMORE, THE DEATH OF CONTRACT 41 (1974).

11. *Id.* at 42.

> If . . . the "actual state of the parties' minds" is relevant, then each litigated case must become an extended factual inquiry into what was "intended," . . . . If, however, we can restrict ourselves to the "externals," . . . then the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedents about recurring types of permissible and impermissible "conduct." By this process questions, originally perceived as questions of fact, will resolve themselves into questions of law.

Id.

12. R.B. VERMEESCH & K.E. LINDGREN, BUSINESS LAW OF AUSTRALIA 133 (2d ed. 1973).

principle of interpretation of contracts was, in the older view, to ascertain the actual intention of the parties to the contract. The modern view is to ascertain '*what each [party] was reasonably entitled to conclude . . . of the other.*'"[13] The rise of the reasonable person standard and the objectification of contract law was forewarned by Henry Sumner Maine in his often cited *Ancient Law.*[14] Maine saw the movement of law towards an objective basis as a natural progression. He wrote: "Lastly, the Consensual Contracts emerge, in which the mental attitude of the contractors is solely regarded, and external circumstances have no title to notice except as evidence of the inward undertaking."[15] The malleability and popularity of the reasonable person approach and the objective theory was duly noted by Professor Gilmore. "[T]he 'objective theory of contract' became the great metaphysical solvent—the critical test for distinguishing between the false and the true."[16]

B. The Domain of the External

Justice Holmes saw legal development as the inevitable movement toward objectivity.[17] The rise of the reasonable person standard was a gradual development. At first, the will theorists viewed the reasonable person standard as merely providing evidence of the subjective understandings of the parties.[18] Morton Horwitz exposed the fallacy of viewing the reasonable person as a device for approximating the subjective intent of the contracting parties.

> In the process of formalizing and generalizing the system of contract law, the legal rules came to bear a more and more tenuous relationship to the actual intent of the parties. What once could be defended and justified as simply a more efficacious way of carrying out the parties' intentions came eventually to be perceived as a system that subordinated and overruled the parties' will.[19]

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13. CLIVE M. SCHMITTHOFF & DAVID A.G. SARRE, CHARLESWORTH'S MERCANTILE LAW 191-92 (14th ed. 1984) (quoting McCutcheon v. David Macbrayne Ltd., [1964] 1 W.L.R. 125, 128 (H.L. 1964) (opinion by Lord Reid)) (alterations in original) (emphasis added).

14. HENRY SUMNER MAINE, ANCIENT LAW 328 (Henry Holt & Co. 1883) (1861).

15. *Id.*

16. GILMORE, *supra* note 10, at 42-43.

17. Justice Holmes succinctly stated: "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." OLIVER WENDELL HOLMES, THE COMMON LAW 242 (Mark DeWolfe Howe ed., 1963).

18. The meeting of the minds, or will theory, held that a "man is not bound by a contractual duty unless he willed it so." ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 106 (1952). The theory under its purest form requires a finding of actual subjective intent and not the mere objective manifestation of intent. Furthermore, there must be a communal or mutual subjective consent or *consensus ad idem. Id.*

19. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 35

The difficulty in proving actual intent can be seen as the impetus for the reasonable person to interpret contracts based upon community standards of fairness and custom. "Problems of intentionality . . . seem soluble if one puts aside their subjective aspect."[20] Professor Fried noted that "it seems as if contractual relations depend not on the will of the parties but on *externally* imposed substantive moral judgments of what the relations between the parties should be."[21] This illustrates the normative persona of the reasonable person. In contrast, the descriptive reasonable person simply is placed in the shoes of the parties to determine their intended meanings. The fairness of those meanings is of little concern. The normative reasonable person acts as a surrogate for society, whose mandate is not the discovery of what the parties reasonably intended, but the discovery of what society believes they should have intended.

Professor Atiyah describes this tension between the descriptive and the normative reasonable persons. It can also be seen as a battle between the competing notions of freedom of contract and fairness in the exchange.

> The extent to which the courts and the law are prepared to go in treating promises . . . merely as prima facie rather than conclusive evidence of the fairness of an exchange, is . . . determined by the degree of paternalism which commends itself to . . . the judiciary in question. A society which believes in allowing the skilful and knowledgeable to reap the rewards of their skill and knowledge is likely to have a higher regard for the sanctity of promises than a society which wishes to protect the weak and foolish from the skilful and knowledgeable.[22]

The reasonable person, either under the banner of sanctity of contract or that of fairness, is used to fill gaps in otherwise inchoate contracts. The mechanism for this effort is the application of the gap-filling or default rules of contract. Professor Barnett, in his work on default rules, states that "when parties fail to exercise their power to alter the law of contract for their transaction, their silence has a normative consequence as well."[23] That normative consequence is the use of the reasonable person to impose the background rules of contract law.

(1992).

20. THOMAS NAGEL, MORTAL QUESTIONS 201 (1979).

21. CHARLES FRIED, CONTRACT AS PROMISE 75 (1981) (emphasis added).

22. P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 209 (1978).

23. Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 427 (1993). Professor Barnett argues that default rules are nonetheless consensually based. "[A] manifested consent to be legally bound is what justifies a court in enforcing default rules on parties who made incomplete commitments . . . ." *Id.* at 429.

The externality represented by the imposition of default rules by the reasonable person was forcefully advanced by Oliver Wendell Holmes: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals."[24] These externals are found in the judicial mind-set pertaining to community standards of fairness and reasonableness. The implication of society's rules of fairness and reasonableness is generally accomplished through the courts' fabrication of the reasonable person. The reasonable person is the personification of contract law's externalities.

Some have seen the reasonable person as a subterfuge for court imposed standards. Professor Patterson recognizes a gap-filling duality consisting of interpretive and substantive types.[25] Interpretive completeness is the juxtaposing of the reasonable person into the shoes of the contracting parties. The court weaves a conclusion of implied intent based upon an analysis of the essential nature of the contract, along with its contractual context. Substantive completeness is not amenable to the fiction of second-order or implied intent. The party-focused reasonable person is discarded and replaced with a communal standard. "[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the [particular] bargaining process."[26]

C. Symmetry of Form and Cardozo's Objective Change

Formality is the reasonable person's closest ally. To the extent that contracting parties can channel their dealings into legally recognizable forms, the task of the reasonable person will be easier. Professor Fuller, in his seminal article *Consideration and Form,* exposed the benefit of the use of recognizable legal instruments and the formal rules of contract law. "[F]orm offers a legal framework into which the party may fit his actions, or, . . . it offers channels for the legally effective expression of intention."[27] A selection of a recognized

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24. HOLMES, *supra* note 17, at 242. Professor Corbin refers to the externals upon which contract law imposes liability as "based upon principles of justice, policy, and right, and not on the expressed will of the parties." Arthur L. Corbin, *Discharge of Contracts*, 22 YALE L.J. 513, 515 (1913). Learned Hand explained the role of the reasonable person as one of interpreter. The words or acts of the parties are only significant if they can be "reasonably interpreted." He defines reasonably interpreted as having "meaning to ordinary men." Hotchkiss v. National City Bank, 200 F. 287, 294-95 (S.D.N.Y. 1911). This determination is made by the court through its use of the reasonable (ordinary) person. "[T]he question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, however truthful, is material." *Id.* at 294.

25. *See* Dennis Patterson, *The Pseudo-Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235 (1993).

26. *Id.* at 249 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981)).

27. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941); *cf.* Charles

form or instrument provides strong evidence to the reasonable person regarding the parties intended legal obligations. The now archaic contractual seal provided such irrefutable evidence. It was a clear objective "form recognized by law or custom as sufficient for the creation of a valid power in the promisee."[28] The power thus created would be the ability to seek the help of the reasonable person in the area of enforcement and remediation.

There are different degrees of formality that can be found in the law of contracts. The instruments of custom and trade usage help formalize the meanings of certain words and practices. The formalities of consideration and of a writing provide evidence of the intended legal nature of a transaction or of a relationship. Formalities possess a direct relationship to the discovery of objective intent. They provide the facts upon which the reasonable person renders decisions. "[F]ormality . . . tends to effect a categorization of transactions into legal and non-legal."[29] The formalities of contract are simply categorizations of objective manifestations that the reasonable person uses as a sound evidentiary base for determining the intent and meaning of a contract.[30]

The normative grounding for the rules of contract is the quest for symmetry. The norms of certainty, predictability, and generality have been given as rationales for the application of contractual rules. The operational system used for the symmetrical application of contract doctrine and rules is the reasonable person. The reasonable person provides the software upon which the courts are able to objectively apply contract rules. The need to maintain symmetry and generality of law was advanced by Justice Cardozo within the conceptual framework of his method of philosophy. Cardozo concluded that a judge's standard for decision-making "must be an objective one."[31] His conception of law was firmly rooted in the importance of maintaining the generality of law. This conception maintains that the reasonable person must be wholly objective. The reasonable person must not give into the temptation to do justice in a particular case that would be in contradiction to a purely objective and generalized application of a rule of law.

L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 727 (1969) (discussing the *unchanneled* areas of contract where recognizable formalities are missing and observing that "contracts do not really spring, full-blown, from the collective brows of the parties").

28. George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 25 (1932).

29. Fuller, *supra* note 27, at 803.

30. The wider the acceptance of a contract form or of a contractual formality the more cautious the parties will be in utilizing them. Once utilized, however, the likelihood of misunderstanding is reduced. Formalities are deliberation-inducing devices that "tend . . . to make apparent to the part[ies] the consequences of [their] action[s]." *Id.* Those consequences are also likely to be apparent to the reasonable person from a retrospective view.

31. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 89 (1921).

This focus upon generality does not mean that Cardozo believed that the reasonable person was rigid, static, or unchangeable. Cardozo, to the contrary, believed in objective change rooted in custom, innovation, and pragmatism. These rudiments of change are anchored in external objectivity. "A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into . . . a jurisprudence of mere sentiment . . . ."[32] Cardozo concludes that nonadherence to objective standards such as the reasonable person would result in an "end to the reign of law."[33]

D. The Reasonable Person Standard

The objective theory dictates the use of an independent, mystical interpreter of the expressions of contract. Professor Slawson states that "[t]he objective theory of contracts . . . dictates that a contract shall have the meaning that a reasonable person would give it under the circumstances under which it was made, if he knew everything he should plus everything [he] actually knew."[34] A reasonable person must therefore be constructed on a case by case basis. This substituted contracting party possesses the intellect, sophistication, and good faith demeanor of the average reasonable person.[35] The issue in dispute is then resolved by the application of this reasonable party. The subjective intent of the parties is replaced by the intent of this reasonable person applied *ex ante*.

Lord Denning, in the 1974 English case of *Storer v. Manchester City Council*,[36] restated the external focus of the objective theory of contract:

> In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression . . . .[37]

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32. *Id.* at 106.

33. *Id.* at 136.

34. W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29, 38 (1993).

35. This demeanor of reasonableness has been codified throughout the Uniform Commercial Code. *See, e.g.*, U.C.C. § 2-305 (1989) (reasonable price at time of delivery); U.C.C. § 2-306 (1989) (no quantity unreasonably disproportionate); U.C.C. § 2-309 (1989) (time of delivery shall be a reasonable time); U.C.C. § 2-609 (1989) (reasonable grounds for insecurity).

36. [1974] 1 W.L.R. 1403 (C.A. 1974).

37. *Id.* at 1408. The definitive statement of the objective theory in American law was pronounced by Judge Learned Hand in *Hotchkiss v. National City Bank*, 200 F. 287 (S.D.N.Y. 1911).

It is for the reasonable person to affix contractual liability based upon an interpretation of the expressions of contract. In the traditional contracts model, the enforcement of bargains, this interpretive inquiry focuses upon the intent of the promisor. Reliance theory, however, requires the reasonable person to interpret the reasonable consequences of an unreciprocated promise.[38] The reasonable person standard is applied to determine if there has been reasonable reliance on the part of the promisee.[39] The expansion of contractual liability through reliance theory has been dramatic.[40] "The trend in contract law is to compensate '*any* detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances.'"[41] By necessity, the reasonable person's role has

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> 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 . . . which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .

Id. at 293. The subjective theory still maintains well recognized areas of importance. For example, the objective interpretation of outward manifestations will give way to the subjective knowledge of the promisee. "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981) [hereinafter RESTATEMENT] (preliminary negotiations).

38. "Section 90 of the Contracts Restatement provides in effect that serious reliance may under some circumstances make 'binding'" a promise for which nothing has been given or promised in exchange." L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 401 (1937) (footnote omitted).

39. RESTATEMENT, *supra* note 37, § 90 (detrimental reliance or promissory estoppel).

40. The first notable case to recognize detrimental reliance or promissory estoppel as a substitute for bargained for consideration was the 1927 case of *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927). Justice Kellogg's dissent describes the lineage of promissory estoppel:

> A so-called "promissory estoppel," although not so termed, was held sufficient by Lord Mansfield and his fellow judges as far back as the year 1765. Such a doctrine . . . is not a novelty. Therefore, I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement . . . .

Id. at 178 (Kellogg, J., dissenting) (citation omitted).

41. Kenneth J. Goldberg, Note, *Lender Liability and Good Faith*, 68 B.U. L. REV. 653, 669 (1988) (emphasis added) (quoting GILMORE, *supra* note 10, at 88); *see also* Nimrod Marketing (Overseas) v. Texas Energy Inv. Corp., 769 F.2d 1076 (5th Cir. 1985) (modern application of reliance theory); Larry A. DiMatteo & Rene Sacasas, *Credit and Value Comfort Instruments: Crossing the Line From Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 BAYLOR L. REV. 357 (1995) (enforceability of comfort instruments as the frontier of reliance liability); *cf.* Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263 (1994) (discussing judicial reluctance to apply theories of promissory estoppel despite widespread academic acceptance). *See generally* L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damage* (pts. 1 & 2), 46 YALE L.J. 52 (1936), 46 YALE L.J.

expanded to serve this duality of contractual liability: the interpretation of promise[42] and the determination of reliance.[43]

Section ninety of the *Restatement (Second) of Contracts* (Restatement) filters reliance recovery through the prism of the reasonable person in the position of the promisee and of the promisor. The reasonable person is called to make two determinations. First, was the promisee's reliance reasonable? Second, the reliance "must be of such a kind as a reasonable person in [the] position [of the promisor] would have foreseen when making the promise."[44] Section ninety thus places a dual burden upon the reasonable person. This dual role places a check upon unfettered reliance recovery. The court does not have unlimited discretion to award damages for any provable reliance. A plaintiff must show that a reasonable promisor would have foreseen such reliance.

E. The Reasonable Person's Predisposition Towards Intentionality

The reasonable person is supposed to be the neutral observer of external manifestations of intent. This is not to say that the reasonable person does not possess certain prejudices or predispositions. The reasonable person is a creature of contract and is believed by some to possess a natural inclination towards the finding of contractual intent. This presumption of intentionality is grounded in the belief that parties generally do not intend to create meaningless documents or to nonchalantly engage in contractual-type conduct. "[T]here is a normal assumption that a business transaction is not meaningless and that words have a purpose."[45] There are a number of reasons that support the notion of a presumption of intentionality. First, the burden is upon the party producing the manifestations to disprove that they were non-contractual in intent. Justice Hirst in the English case of *Kleinwort Benson Ltd. v. Malaysia Mining Corp.*[46] restated the presumption of intentionality. "'The onus of

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373 (1937) (discussing policy interests served by awarding reliance damages); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981) (discussing increased use of promissory estoppel theory).

42. *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); *cf.* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (evaluating various theories of contractual obligation). *See generally* FRIED, *supra* note 21 (theorizing on the evolution of contract law).

43. *See* RESTATEMENT, *supra* note 37, § 90; *see also* Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373 (tracing the historical development of reliance theory).

44. CORBIN, *supra* note 18, § 200, at 289. The promisor, "should [have] reasonably expect[ed] to induce action or forbearance." RESTATEMENT, *supra* note 37, § 90(1).

45. Chelsea Indus. v. Accuray Leasing Corp., 699 F.2d 58, 60 (1st Cir. 1983) (citing Cincinnati Enquirer, Inc. v. American Sec. & Trust Co., 160 N.E.2d 392, 398 (Ohio Ct. App. 1958)).

46. [1988] 1 W.L.R. 799 (Q.B. 1987).

proving that there was no such intention [to create legal relations] is on the party who asserts that no legal effect is intended, and the onus is a heavy one.'"[47] Second, the *contra proferentum* rule favors a finding of intentionality. This rule holds that in case of ambiguity when all other rules of construction fail, the doubt is removed by construing the document adversely against the drafter.[48] This generally results in a finding of intent by the reasonable person.

The reasonable person's predisposition towards a finding of intentionality is anchored in the notion of objective foreseeability. The notion of unforeseeability is the underlying principle for the doctrines of excuse including commercial frustration and impracticability.[49] If the issue or event in dispute is deemed to be have been unforeseeable by the reasonable person, then an excuse to liability may be granted. The event must have been unforeseeable both by the parties and by the reasonable person. If unforeseen, then the presumptions of intentionality and enforceability have been rebutted.

The reasonable person's presumption of intentionality also plays a key role in the construction of instruments that are highly negotiated and ambiguously worded. The use of comfort instruments[50] in the area of commercial and financial practice is a case in point. These instruments possess language of a contractual nature meant to assure a promisee, along with disclaimer-type language aimed at insulating the promisor from any liability for the assurance. The classically inclined reasonable person would look to the inherent ambiguity of the instrument and find against contractual liability. One can argue, however, that a more *reasonable* reasonable person would find it difficult to believe that two sophisticated parties would pursue extensive negotiations over the wording of a nonlegal instrument. Under reliance theory the perspective of the receiving party would be the focus of the reasonable person inquiry. "[U]nder the objective theory of contracts the test is whether a reasonable [person] in the position of the [receiving party] would conclude that the [sending party] had

47. *Id.* at 803 (quoting CHITTY ON CONTRACTS ¶ 123 (25th ed. 1983) (quoting Edwards v. Skyways Ltd., [1964] 1 W.L.R. 349, 355 (Q.B. 1964))).

48. *See* United States v. Seckinger, 397 U.S. 203, 216 (1970).

49. *See, e.g.*, U.C.C. § 2-615 (1989); RESTATEMENT, *supra* note 37, § 261; *see also* Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon"*, 135 U. PA. L. REV. 1123, 1148 (1987) ("[T]he Code's apparently *subjective* search for actual intent has not in fact displaced the centrality of *objective* foreseeability.").

50. The label "comfort instrument" or "comfort letter" is often used to refer to letters issued by various types of businesspersons or professionals. Examples include letters of intent, accountants' comfort letters or certifications, attorney opinion letters, and a parent company's letter of assurance or responsibility sent on behalf of a subsidiary. *See* Dimatteo & Sacasas, *supra* note 41; *see also* ROBERT A. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE (1993) (describing comfort letters in the real estate industry).

made a commitment."[51] The line between assurance and legally significant reliance is tenuous at best.

II. THE ROOTS OF THE REASONABLE PERSON

It was once said that "[i]n its origin law is religious."[52] The reasonable person's genesis can be traced to religious and philosophical foundations. "The great elementary conceptions of contract law came out of a Greek philosophical tradition grafted on to Roman law by moral philosophers."[53] The notion of a reasonable person residing in each human being can be found in the works of Saint Thomas Aquinas and Aristotle.[54] They believed in the "existence of natural virtues which incline men to act in accordance with right reason."[55] A look at the secularization of religious precepts into private law will add insight into the reasonable person standard. Furthermore, philosophy of law provides the rationales for the use and development of the constructs of the reasonable person and of the objective theory.

A. The Religious Reasonable Person

The interdependence of legal, religious, and philosophical thought can be traced to at least the twelfth century. Canon law was the preeminent force in juridical studies of that century. Both canonists and theologians utilized all three disciplines.[56] Beginning with Saint Augustine, law and philosophy were used to justify religion as rationally based. The natural law was an object of human will which could be found internally in communion with God. Augustine believed that the natural law was based upon reason that could be objectively proven. One can begin to see a possible source for the creation of the reasonable person of contracts. Its roots can be seen in the development of

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51. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-7, at 33 (2d ed. 1977).

52. JACQUES ELLUL, THE THEOLOGICAL FOUNDATION OF LAW 18 (Marguerite Wieser trans., 1960).

53. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 246 (1991); *see also* ROSCOE POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 31 (5th ed. 1943) (listing four foundational strains within his school of sociological jurisprudence as the historical, the sociological, the philosophical; and the analytical).

54. Aristotle saw law as a "neutral and impersonal . . . arbiter." W. VON LEYDEN, ARISTOTLE ON EQUALITY AND JUSTICE 110 (1985). It is in this impartial arbiter that we begin to see the rudiments of the reasonable person standard. "In being impersonal, . . . the rule of law can claim to be objective and incorruptible . . . it is a mean and neutral authority, like Adam Smith's 'impartial spectator' or a Kantian regulative idea." *Id.* at 97 (footnote omitted).

55. *Id.* at 89.

56. Often times "the same person combined the offices of a theologian and a canonist." MAURICE DE WULF, HISTORY OF MEDIAEVEL PHILOSOPHY 289 (Ernest Messenger trans., 1938).

the scholastic method of the twelfth century. The scholastic method's "primary task was the summation of the text, the closing of gaps within it, and the resolution of the contradictions."[57] It was used to reconcile the text of Roman law internally and also, externally with customary law. The notions of rationality and reasonableness became touchstones for both divine and secular laws.

The objectivity of contracts in turn began to be measured by religious morality. In the Middle Ages the convergence of canon and secular law was embodied in the rediscovery of Justinian's *Codex, Novellae, Institutiones, and Digestae.* This was the genesis of the idea of the existence of an autonomous device to judge private exchanges and relationships. "The Western legal tradition still stands for the belief that so long as law remains autonomous, so long as it conforms to reason and morality . . . it will continue to be able to resolve individual and social conflicts . . . ."[58] The reasonable person can be seen as an external, autonomous source, much in the order of this tradition.

The sanctity of contract can be traced to the day when religion and law were almost indistinguishable.[59] The equating of breach of promise to dishonesty in business "combined to give to contracts a measure of religious blessedness and to breaches of contract a mark of sinful or unethical aberration."[60] The morality of promise was the autonomous measure to which the contract breaker was to be held.

> The invocation of morality had the virtue of presenting a definition, which, if comprehensive, was without a coherent competitor and which could be used to discipline a quantity of refractory precedent. It escaped serious challenge for a generation and was not expelled from the law until the middle of the nineteenth century.[61]

The coherent competitor that arose in the nineteenth century was found in the objective theory of contracts as manifested in the reasonable person.

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57. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 38 n.3 (1993) (citing Gabriel Le Bras, *Canon Law, in* THE LEGACY OF THE MIDDLE AGES 321, 325-26 (C.G. Crump & E.F. Jacobs eds., 1926)).

58. *Id.* at 45.

59. "[T]he obligations of religion and of law in the field of promises were in medieval times almost indistinguishable." SIR DAVID HUGHES PARRY, THE SANCTITY OF CONTRACTS IN ENGLISH LAW 6 (1959). "[I]t was not surprising that contracts developed a juristic blessedness or halo and were so often regarded as sacred. Their sanctity is directly traceable to their early religious and ecclesiastical associations . . . ." *Id.* at 18.

60. *Id.* at 8; *see also* John Witte, Jr., *Blest Be the Ties that Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579, 595 (1987) ("[C]ovenant theology also provided the cardinal ethical principle of Puritanism that each person was free to choose his act, but once having chosen was bound to perform that act, regardless of the consequences.").

61. PARRY, *supra* note 59, at 13.

The replacement of the sacred rituals with the notion of objective manifestation does not mean that the reasonable person is of recent vintage. The genesis of the reasonable person can be seen in law's religious ancestors. Saint Thomas Aquinas saw law as evolving from human reason. "[C]ertain principles imprinted in [human reason] provide a general standard of measurement for everything human beings do."[62] One can see the reasonable person as the embodiment of Aquinas' notion of human reason. This human reason was to be found not only through divine intervention but also in the customs found within the human community. In *Summa Theologiae*, Aquinas asserts that "law starts with what nature produces, then by use of reason certain things become customs, and finally things produced by nature and tested by custom are sanctified with the awe and religious weight of laws."[63] The notion of collectivity as reflected in custom imbued early juridical thought with an aura of divine sanctity. One commentator states that "God had also created man as a communal being."[64] As members of a community, humans were thought to have a single consciousness. The reasonable person can be seen as a modern version of this notion of collectivity or community consciousness.[65]

The natural law theorists provide further support to the notion that the reasonable person's genesis was religiously based. Natural law theory holds that God has given all humans the ability to determine the rightness of an action. The reasonable person can be seen as a reflection of the innate, reasoning person that exists within all human beings. "Natural law would hold that human beings are logical and reasonable creatures. Thus, the concept of the 'reasonable person' has been a major guidepost for lawyers. Jurists perceive that human beings are autonomous and can choose rationally between courses of action, weighing costs, benefits, and sanctions."[66] This religious foundation depicts the reasonable person not as merely a passive receptacle of community values, but as somewhat of a zealot who's role is to advance legal and community values toward a divine ideal. One theologian asserts: "[W]hat good does

62. Aquinas, *supra* note **, at 421.

63. *Id.* at 420.

64. Witte, *supra* note 60, at 599.

65. As equally important as religion, was the belief in magic. "Institutions of private interest (i.e., personal property and the law of obligations) have developed under the protection . . . of magic." PIERRE DE TOURTOULAN, PHILOSOPHY IN THE DEVELOPMENT OF LAW 181 (Martha McC. Read trans., Augustus M. Kelly Publ'rs 1969) (1922). In short, "the law is collective in its religious and magical roots." *Id.* at 190. The magical embodiment of the reasonable person was the medieval sorcerer. The sorcerer became a creation of the collective consciousness. Both the sorcerer and the reasonable person are community driven beliefs used to support the juridical function.

66. IRWIN A. HOROWITZ & THOMAS E. WILLGING, THE PSYCHOLOGY OF LAW: INTEGRATIONS AND APPLICATIONS 22 (1984).

a law do when it merely interprets social conditions without giving them direction?"[67]

The reasonable person of contract can be seen as a secularized form of the divine reason or rationality advocated by Augustine and Aquinas. This secularization or "spiritual commercialism"[68] was accelerated by a number of fundamental philosophical shifts beginning in the eighteenth century. These secularizing shifts included the decline in faith which lessened the value attached to ritual formalities,[69] the rise of the common law courts, the separation of church and state, and the demise of the ecclesiastical courts. This paved the way for the shift away from the search for the divine law and towards a search for law as a simple reflection of commercial reasonableness.

Two fundamentally non-religious developments also precipitated the rise of the reasonable person standard. The dramatic rise of mass production with the advent of the industrial revolution, along with the corresponding rise of consumerism and the modern market economy, made it impractical for parties to formalize every detail of their contractual exchanges. The flexibility of the common law and its receptiveness to ever-changing custom made for a compatible fit with the new market economies. "The distinctive features of common law were its evolutionary character, its reliance on custom and precedent as set forth in written legal decisions, and its flexibility."[70] Flexibility can be seen as a close relative to practicality. The market economy dictated practicality and reasonableness in a legal system. Practicality in a modern economy required the enforcement of reasonable expectations. Roscoe Pound explained that the "more highly specialized the division of labor the more each individual must be secured in the reasonable expectations involved in his relations with others."[71] A closely associated development was the political and economic rise of individual rights. John Locke[72] and Adam

67. ELLUL, *supra* note 52, at 128-29.

68. Witte, *supra* note 60, at 589.

69. DURKHEIM, *supra* note 8, at 210.

70. RONDO CAMERON, A CONCISE ECONOMIC HISTORY OF THE WORLD: FROM PALEOLITHIC TIMES TO THE PRESENT 209 (1989). This is not to argue that other legal systems are unable to provide the needed elements of practicality, flexibility, and reasonableness. The Napoleonic Code of 1804 was "[w]ritten by middle-class lawyers and jurists" and "specifically sanctioned freedom of contract and gave valid contracts the force of law." *Id.* at 211.

71. 5 ROSCOE POUND, JURISPRUDENCE 199 (1959).

72. *See generally* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Scholar Press 1970) (1690). The reasonable person can be seen as an egalitarian concept--a reflection of human reasonableness equally applied to all members of society. For Locke the state of nature was a "state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another." John Locke, *Two Treatises of Civil Government, in* THE GREAT LEGAL PHILOSOPHERS 137, 137 (Clarence Morris ed., 1959). In the case of dispute between the equal members of society, it is the community that serves as neutral arbiter. "And thus all private judgment of every particular member being excluded, the community comes to be umpire . . . ."

Smith[73] provided the literature; the industrial revolution and the rise of democracy provided the means by which the individual took center stage in the political, economic, and legal arenas. Standards of conduct were no longer to be provided by God or the king but by the ordinary, reasonable man.

The religiously based sacred rituals and formalities were replaced by the consensual contract.[74] Businesspersons in a market economy needed to quickly enter into bilateral agreements with the expectations that they would create mutually binding and enforceable obligations. "The consensual contract alone was able at a single stroke to create the two-way track of bonds that we find in any reciprocal agreement."[75] Sacred formality was no longer seen as an end but as a means to an end. The end was the finding and interpretation of the consensual wills. Initially this search was focused upon the notion of *consensus ad idem* or the actual meeting of the minds. In the twentieth century the subjective meeting of the minds was objectified into the reasonable person principle.

B. The Philosophical Reasonable Person

Ihering intimately connected the law with that of general philosophy.[76] The objective theory of contract is one attempt at developing a unifying philosophy for all of contract law. A philosophy of true objectivity would place all fact patterns into existing decisional constructs. Oliver Wendell Holmes "provided an apparently convincing demonstration that it was possible to reduce all principles of liability to a single, philosophically continuous series and to construct a unitary theory which would explain all conceivable single

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Id. at 147. The reasonable person is the community's umpire in the field of contract law.

73. *See generally* ADAM SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). "As Adam Smith pointed out more than two centuries ago, division of labor involves specialization, and specialization leads to greater efficiency and technological progress." CAMERON, *supra* note 70, at 25.

74. A contract was formed in the middle ages with the use of formal, sacred rituals. "If the solemn ritual [was] lacking, there [was] no contract." DURKHEIM, *supra* note 8, at 200. The idea of consensual contract was made possible by the sanctifying presence of religious morality. The solemn nature of contract from Roman times to the Renaissance was religiously based. Contract was in essence a type of sacrament. To breach one's promise was "committing sacrilege, because [one is] breaking an oath, . . . profaning a sacred thing, . . . committing an act forbidden by religion." *Id.* at 209.

75. *Id.* at 216-17.

76. "The history of law becomes the history of juridical aims, that is, the history of the philosophy of law." ELLUL, *supra* note 52, at 32.

instances."[77] The courts merely had to objectively slot each case into one of the existing constructs.

The will theory of contract failed to prevent the advance of the objectivists. The will theory's insistence upon the actual subjective assent of the two parties was open to a number of criticisms. It failed to philosophically explain why the will of the parties justified, by itself, the intervention of courts. Why is the will to exchange morally different than the will to give? If the will as expressed in a promise is the basis of contractual obligation, then why does there have to be a communication of that will? "If all promises were binding, it was not clear that a promise needed to be accepted"[78] These shortcomings of the will theory can essentially be explained as evidentiary problems. The inherent subjectivity of actual assent makes the burden of proof regarding *consensus ad idem* almost insurmountable. It is this burden of proof that led to the reasonable person's reign over the realm of contractual interpretation.

At first there was an attempt to reconcile the subjective and objective approaches to mutual assent. The objective theory was offered as an evidentiary tool for proving the subjective will of the contracting parties. Objective manifestations could, through a process of reasoning by analogy, provide insight into a person's actual state of mind. This connection between the mental and the physical is philosophically known as *interactionism*. It is the "commonsense view . . . that mental and physical events mutually influence one another."[79]

Earlier attempts to solve this evidentiary dilemma were posed by the Romans and subsequently by Thomas Aquinas. The Romans abandoned any hope of creating a general theory of contract. Instead, they embarked on a mechanical effort of categorizing contracts. The Romans fashioned different laws of contracts around each of their different categories. A verbal contract was made so by the expression of the *stipulatio*. A promise of a public donation, a *pollicitatio*, became another category of enforceable promise. The formalities used in making a promise needed to fit into one of the categories for it to be enforceable. The will of the parties was wholly irrelevant.

In the thirteenth century, Thomas Aquinas categorized agreements based upon their *essence*. The essence or soul of a contract provided a vehicle to interpret ambiguities or to fill in any gaps in the agreement. A rationalization

77. GRANT GILMORE, THE AGES OF AMERICAN LAW 56 (1977). For an in-depth explanation of Holmes' principles of liability, see HOLMES, *supra* note 17, at 5-33. *See also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) (discussing whether evidence of intent or circumstances should be allowed when interpreting construction of a writing). *See generally* Robert L. Birmingham, *Holmes on 'Peerless':* Raffles v. Wichelhaus *and the Objective Theory of Contract*, 47 U. PITT. L. REV. 183 (1985) (explaining Holmes' reasoning in the *Raffles* decision).

78. GORDLEY, *supra* note 53, at 79.

79. JOHN HOSPERS, AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS 254 (3d ed. 1988).

took hold that although the parties had not willed or assented to a contract term, they had assented to a certain type of contractual relationship. This relationship in turn had a soul or essence by which questions of interpretation or enforcement could be judged.[80] The contract was to be interpreted not by way of the reasonable person but by way of the presumed intent of the parties. Lord Justice Bowen, in the 1889 case of *The Moorcock*, made a case for this will theory of implied terms, deciding that in all cases of implied warranties of covenants in law "'the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as *both parties must have intended.*'"[81]

The rule of the will theory of implied terms eventually gave way to the implication of terms through the reasonable person of the objective theory. The implied terms were primarily an imposition of community standards as constructed by the reasonable person and not necessarily a reflection of the general will of the parties. Lord Denning described the potential conflict between the will theory's implication of intent and the use of the reasonable person: "Is it right only to imply a term when it is 'necessary' to effectuate the intent of the parties? or is it permissible to imply it when it is 'reasonable' so to do in order to do what is fair and just as between the parties?"[82] Twentieth century contract law has exhibited a willingness to imply reasonable terms not intended by the parties. Contract law has become, at least partially, to reflect what society believes is fair. The important jurisprudential result is that contract has moved from the domain of purely private law to a quasi-public law. The reasonable person has become its unelected constable.

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80. "The parties willed a certain normative relationship . . . ." *Id.* at 241. The philosophy of contractual essence can be seen at work in the 1936 English case of *Hain Steamship Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597 (H.L. 1964). The issue was whether a route deviation of a chartered ship amounted to a material breach. Lord Atkin held that "the departure from the voyage contracted to be made is a breach . . . of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the *root of the contract.*" *Id.* at 601 (emphasis added). *See also* Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26, 37-38 (1961) (citing *Hain Steamship*, but deciding Lord Atkins was dealing solely with deviation). *See generally* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970) (proposing a new way of thinking about consumer-transaction contracts).

81. DENNING, *supra* note 3, at 35 (quoting The Moorcock, 14 P.D. 64, 68 (C.A. 1889)).

82. *Id.* at 40-41. Lord Denning sees the doctrine of presumed intent as an attempt to rectify this conflict. The doctrine presumes that the parties would have intended the implication of the same term as that provided by the reasonable person. The congruency between the implied intent of the parties and reasonable person intent is likely to increase proportionally with the parties' knowledge of community or trade standards. Assuming such knowledge, one may imply that the parties *willed* these standards into the contract. The rationalization is simple. If the parties found the generally accepted standards to be contrary to their desires, then they would have opted out by fashioning specific contractual language dictating otherwise. *See id.* at 41-53 (discussing the expansion of presumed intent).

The difficulty in determining the general will of the parties and the essence of the contract opened the door for the reasonable person to pass. The implication of parties' intentions for terms never contemplated began to be discarded. External standards of fairness and reasonableness were substituted for the implied will of the parties.[83] This movement toward the intent of the reasonable person represented a shift from the *is* of contract to the *ought.* The role of the courts shifted from the discovery of the mystical general will to the creation of fair and reasonable contracts.

Through its application in the reasonable person standard, the objective theory can be said to be both descriptive and normative. It focuses on what the parties actually did and not what they should have done. The devices of custom and usage provide a descriptive base for contractual interpretation.[84] Professor Greenawalt asserts, however, that legal interpretation is akin to theological interpretation and is essentially normative. The reasonable person is applied through the mind of the judicial interpreter. "The interpreter typically will engage in some normative evaluation when aiming to provide a descriptive account [of the contractual event]."[85] This normative filtering has at times been described as the notion of sympathy. "When we sympathize with the other, we open our hearts to his or her subjective predicament, rather than our minds to his or her behavioral [objective] choices and preferences."[86] The reasonable person can be defined as being both descriptive and normative.

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83. *See* DURKHEIM, *supra* note 8, at 227 ("A just contract is not simply any contract that is freely consented to . . . it is a contract by which things and services are exchanged at the true and normal value, in short, at the just value."); Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982) (addressing the growing willingness of courts to modify contracts) [hereinafter Speidel, *Spirit of Contract*]; Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970) (discussing unconscionability as a defense to enforcing consumer contracts) [hereinafter Speidel, *Unconscionability*]. *See generally* P.S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1 (1985), *reprinted in* P.S. ATIYAH, ESSAYS ON CONTRACT 329-54 (1986) (discussing in modern concerns for fairness in contracts).

84. In philosophical terms custom and trade usage can be connected to the notion of behaviorism. Behaviorism holds that "thoughts are *tendencies* to behave in certain ways, or *dispositions* to behave." HOSPERS, *supra* note 79, at 248. Businesspersons possess the tendency to behave in acceptable, uniform ways, which have been codified into a behavioral code, the customs and usages of their specific business, trade, or profession.

85. GREENAWALT, *supra* note 6, at 75.

86. Robin West, *Disciplines, Subjectivity, and Law*, *in* THE FATE OF LAW 119, 153 (Austin Sarat & Thomas R. Kearns eds., 1991). *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Augustus M. Kelley Publ'rs 1966) (1759) (exploring the long history of the role of sympathy in the law). Emile Durkheim saw sympathy as an underlying cause for the development of doctrines and rules that negate contract enforcement. These rules can be found in the areas of capacity, illegality, and reality of consent. "The feelings of sympathy that we usually have for our fellow-creatures are outraged when suffering is inflicted on someone when it is in no way deserved." DURKHEIM, *supra* note 8, at 223.

Although descriptively based, the reasonable person is subject to a normative application. The application to specific parties is both a confirmation of what they intended and what society believes they should have intended.

The effectiveness of the reasonable person rests upon the human ability to quantify knowledge. The reasonable person is premised upon the certainty of knowledge. Bertrand Russell in *The Problems of Philosophy* stated the problem of reasonableness: "Is there any knowledge in the world which is so certain that no *reasonable man* could doubt it?"[87] In order to determine what is reasonable, we must first begin with a knowledge of acceptable behavior. The problem is the divergence between appearance and reality. "In daily life, we assume as certain many things which, on a closer scrutiny, are found to be so full of apparent contradictions that only a great amount of thought enables us to know what it is that we really may believe."[88] The success of the reasonable person is based upon the ability to narrow the gap between reality and appearance.

Immanuel Kant's notion of the reasonable person shifts the focus away from external objectivity and towards an inner subjectivity. He perceived the reasonable person as embodied within the rational being existing in all of us. For Kant, a purely objective reasonable person was a diminishment of the complete human. Kant "based his solution on inner experience, on the subjective consciousness of duty or obligation."[89] The abstracting of a reasonable person from manifestations of reality remains a facsimile of that reality.[90] By accommodating subjectivity within the reasonable person, the gap between apparent and actual may be narrowed. Kant's incarnation of the reasonable person is the impartial spectator who like the reasonable person, is a disinterested judge who's aim is to produce harmonious relationships. John Rawls updated the notion of an impartial spectator with his notion of the *veil of ignorance*.[91] The reasonable person should hide behind a veil of anonymity applying community standards to prince and pauper alike.

John Finnis in his work on natural law theory speaks of *practical reasonableness* as a basic human value. This value dictates that all human beings should seek "to bring an intelligent and reasonable order into one's own

87. BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 7 (1969) (emphasis added).

88. *Id.*

89. DAVID GRANFIELD, THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY 21 (1988).

90. One faction in modern philosophy holds that objectivity is a myth. The subjectiveness of human perception cannot be divorced from the interpretation of objective facts. Professor Frug has called into question the philosophical soundness of a pure objective theory of contract. "[O]ne can never discover 'facts' without simultaneously engaging in an act of interpretation." Gerald E. Frug, *A Critical Theory of Law*, 1 LEGAL EDUC. REV. 43, 47 (1989).

91. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

actions and habits and practical attitudes."[92] Each one of us should conform our decisions to the reasonable person that dwells in each of us. The internal reasonable person acts to influence a person's behavior so that it conforms to the standards of the external reasonable person. Both the internal and external reasonable person suggest that their human personages honor their contractual obligations.

C. Psychoanalyzing the Reasonable Person

The reasonable person can be seen as a product of psychology[93] and, therefore, subject to psychoanalysis. The creation of the reasonable person is an intentional activity. The process of contractual interpretation is guided by the courts' intent to give meaning to a transaction or a relationship. The psychology of human perception necessarily makes this process a selective one. The intent of the interpreter will determine the variables on which the reasonable person's attention is focused. "An intention is a turning of one's attention toward something. . . . The selective . . . character of perception is one aspect of intentionality: I cannot look at one thing at this instant without refusing to look at another."[94] Thus, there is a binary relationship between the objective facts of a contract and how those facts are seen and interpreted by the reasonable person. We "cannot *perceive* something until [we] can *conceive* it."[95] The interpreter, through the reasonable person's conception of contract, will determine how to perceive a given contractual event or fact pattern.

Pierre de Tourtoulan argued that psychological influences upon the law work at both the individual and collective levels. The notion of reasonableness is a product of a collective consciousness. The tools used to construct the reasonable person, such as usage, custom, and language, are products of this group consciousness. "The group can have but a single mind, a single consciousness. From it the individuals imbibe their beliefs, and consequently these beliefs are always allowable and even obligatory."[96] The complexities of human personality are also reflected in the personality of the reasonable person. Psychologist Henry Murray examines the complexity of individuality in his notion of personology.[97] Part and parcel to the notion of personology is the need for roleship. The role to be fulfilled by the reasonable person is

92. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 88 (1980).

93. DE TOURTOULAN, *supra* note 65, at 207 ("Law is a psychological product. If we abandon the attempt to study it through psychology, we abandon the attempt to understand its true nature in order to content ourselves with observing its various manifestations.").

94. ROLLO MAY, LOVE AND WILL 236 (1969).

95. *Id.*

96. DE TOURTOULAN, *supra* note 65, at 184.

97. *See generally* CALVIN S. HALL & GARDNER LINDZEY, THEORIES OF PERSONALITY 194 (2d ed. 1970) (discussing Murray's theory of personology).

pivotal to the way the reasonable person is fabricated and applied. Is the reasonable person's role primarily to determine what the parties intended or what they would have intended if aware of a contractual issue when forming the contract? Or is the reasonable person's role to look to society, to determine what feels reasonable, and apply that standard to the fact pattern regardless of the intent of the parties?

The terminology of psychology can be applied to the law of contracts. For example, many of the thematic symbols of contract can be seen as iconic images. Once the icons of contract are learned they continue to render a strong afterimage in the judicial mind. The reasonable person standard is one of the icons of contract. The fabrication of a reasonable person is supposed to be performed on an ad hoc basis. Once constructed, however, the reasonable person continues as an afterimage in the judicial mind. A reasonable person thus becomes a culmination of previous fabrications. The earlier fabrications provide the basis for mutation by the idiosyncrasies of the pending case. Once brought to the conscious mind, the ghost of a past reasonable person triggers a preconceived bundle of beliefs and rationales.[98] The tools of imagery, such as analogues, coding, symbolization, iconic memory, and masking, are used to bring a degree of coherence to the complexity and the enormity of contract law. It is the symbolization of contract law that allows the practitioner and the jurist to structure law's content into a functional form. The symbolic litany of contract includes *consensus ad idem,* freedom of contract, infant incapacity, good faith, unconscionability, and the reasonable person. The reasonable person is a symbol of impartiality, of contracts' objectivity, and of community values. The formulation of the reasonable person is an attempt to bridge the gap between external manifestation and private internalization of manifestation through perception. "The problem is to find a way of correlating these symbols . . . with the objects attributed to the world external to the perceiver."[99] The reasonable person can be seen as a coding system for ordering the external world of contracts. If the law is viewed as an object, then the benefits of psychological research can be utilized to better understand the mechanics of the reasonable person.

Despite the relevancy of psychological insight, the relationship between psychology and law has been a hostile one. The basis of this conflict is the perceived divergence of their philosophical underpinnings.[100] June Tapp, in summarized the differences in methods utilized by various fields, noting that "law is deductive, psychology is inductive; law is doctrinal, psychology is

98. This phenomenon is called masking. Masking is the process by which "perceptions continue although external stimulation has ceased." Paul A. Kolers, *Perception and Representation,* 34 ANN. REV. PSYCHOL. 129, 136 (1983). In the case of the reasonable person, the image is internal and continues internally beyond its original application.

99. *Id.* at 155.

100. HOROWITZ & WILLGING, *supra* note 66, at 18.

empirical."[101] Horowitz and Willging distinguish the methods employed by each as follows:

> Common law prefers decisions easily justified to a public that sees courts as having a limited role in making policy. Judges, therefore, show decided preference for custom and history. Psychological science tends to pay much less attention to historical precedents; its acceptability to courts, for these and other reasons, is somewhat tentative.[102]

For the psychologists, the law's characterization of itself as objective is more of a fiction. It can be argued that the ad hoc objectiveness of psychology poses a threat to law's adherence to precedent and to the flexible use of its reasonable person standard to render justice in a particular case. Nonetheless, if contract law is to be true to its self-proclaimed creed of objectivity, it will have to continue to incorporate the work product of applied psychology and the other social sciences.

D. The Judicial Mind and the Reasonable Person

The reasonable person is intimately connected with the judicial mind, for it is in this mind that the reasonable person is concocted. Within the judicial mind, the parameters of reasonableness are formed. For Oliver Wendell Holmes, this dictated an objective assessment of community standards and values. In Holmes' community-dictated approach, the roles of the judge and the reasonable person were to objectively determine which community values and standards applied. It is the rule of the majority as determined by the majority. This approach places the role of the judge within a very cold, objective world. The progress of contract law is measured by its ability to reach a set of legal rules in which liability "must go by externals," being formal, objective standards.[103] Justice Holmes can be seen as the patron saint of the reasonable person standard.

The reasonable person can also be seen as a product of an interpretive community. The reasonable person is not so much the creation of a judge but of the community of judges.

> Legal decision-makers operate within a legal system that they both inherit and construct. The fact that they inherit it means that their decisions cannot adequately be understood as subjective, and the fact that they construct it means that their decisions cannot adequately be understood as objective. The relationship between legal decision-makers and the legal system is far

101. *Id.*
102. *Id.* at 19.
103. HOLMES, *supra* note 17, at 242; *see* GILMORE, *supra* note 77, at 49.

> too complex to be captured by either the concept of objectivity or subjectivity.[104]

Professor Owen Fiss asserts that judges are part of an interpretive community that influences each judge's interpretive processes. Each judge's construction of the reasonable person is constrained by institutional rules found within the judicial community. The objective reasonable person is one constrained by a bounded objectivity.[105] The constraints of the institutional rules of contract interpretation and the judicial community act to transform "the interpretive process from a subjective to an objective one."[106] De Tourtoulan concisely states that "law is a social affair." The fabrication of the reasonable person is a phenomena of both individual and collective psychology.

III. FABRICATING THE REASONABLE PERSON

Professor Corbin stated some eighty years ago that in the "law of contract as in the law of tort, men are expected to live up to the standard of the reasonably prudent man."[107] Professor Prosser notes that the reasonable person of tort is a hypothetical personification of the "community ideal of reasonable behavior."[108] Although stemming from the same family tree, the reasonable person of contract differs in make-up and disposition. In tort the reasonable person is a more universalized personage, reflective of the general duties of care owed to fellow human beings. The reasonable person of contract is a more specialized creature, possessing all of the idiosyncratic features of the contracting parties viewed within the context of their interaction.[109] The

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104. Frug, *supra* note 90, at 52-53; *see also* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (describing the judging process as a conflict between the law and a judge's desired end position).

105. *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). Fiss states that "[b]ounded objectivity is the only kind of objectivity to which the law . . . ever aspires." *Id.* at 745.

106. *Id.* at 745. Fiss states that interpretation "makes law possible . . . [and there is] the possibility of an inter-subjective meaning rooted in the idea of disciplining rules and of an interpretive community." *Id.* at 750.

107. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 205 (1917); *cf.* PROSSER, *supra* note 2, §§ 32-33 (the reasonable person of tort).

108. PROSSER, *supra* note 2, § 32, at 151.

109. It should be noted the subjective idiosyncrasies of the person involved in a tort are also taken into account.

> [T]he courts have made allowance not only for the external facts, but sometimes for certain characteristics of the actor himself, and have applied . . . a more or less subjective standard. Depending on the context, therefore, the reasonable person standard may, in fact, combine in varying measure both objective and subjective ingredients.

reasonable person is not often a reflection of the ordinary, reasonable person. Instead, the reasonable person is more concerned with what people actually do in a specific marketplace. Courts look to a number of sources in constructing the contractual reasonable person. These sources include the characteristics of the parties, the totality of the circumstances surrounding the formation of the contract, and evidence of pertinent custom and trade usage. In essence, the reasonable person is constructed from the *background* of the transaction or relationship. Philosopher John Dewey studied the importance of background to interpersonal meaning and understanding. "If two persons can converse intelligently with each other, it is because a common experience supplies a background of mutual understanding upon which their respective remarks are projected."[110]

This background gives meaning to contracts and allows the reasonable person to be constructed. A properly constructed reasonable person enables the court to complete the spaces of an incomplete contract. Through the reasonable person the court can extrapolate a second-order intent.[111] This second-order intent stems from the primary intent expressed by the parties or it may be derived from the courts imposition of an appropriate solution. This second-order intent is determined by imbuing the reasonable person with the knowledge of what the parties knew and what they should have known. "[A] contract shall have the meaning that a reasonable person would give it under the circumstances under which it was made, if he knew everything he should plus everything the parties actually knew."[112] We now turn to an analysis of how the courts determine what the parties knew and what they should have known.

A. The Parties and the Totality of the Circumstances

In determining what a reasonable person in the position of the contracting parties would have intended, the courts first look to the specific characteristics of the parties and the circumstances surrounding the formation of their contract. The sophistication of the parties, including their personal or institutional understanding of the meaning of a particular contractual event, will generally be the first level of analysis. A Canadian court in *Lloyd's Bank Canada v.*

William Prosser, *The Law of Torts*, *in* THE NATURE AND PROCESS OF LAW 450 (Patricia Smith ed., 1993). The courts often take into account the physical attributes, mental capacity, age, and education of the alleged tortfeasor.

110. JOHN DEWEY, HOW WE THINK 214 (Prometheus Books 1991) (1910).

111. Professor Dennis Patterson describes a spectrum of intentional states ranging from primary (express) to second-order intent. The secondary intentional states are derived from what is "consistent with the composite of secondary intentions associated with the community or practice." Patterson, *supra* note 25, at 252.

112. Slawson, *supra* note 34, at 38.

Canada Life Insurance Co.[113] stated that "it is not only the meaning of the [words] but the understanding of the . . . meaning of the[m] . . . that is relevant."[114] The sophistication, knowledge, and experiences of the contracting parties become pivotal elements in the construction of the reasonable person. In *Hoosier Energy Rural Electric Cooperative v. Amoco Tax Leasing*,[115] the United States Court of Appeals for the Seventh Circuit placed a strong emphasis upon the sophistication of the parties in precluding the introduction of evidence of an alternative *reasonable* meaning. The fact that the parties were large, specialized corporations represented by sophisticated law firms who drafted "a complex and detailed fifty-seven page contract" narrowed the reasonable person.[116]

The sophistication and expertise of the contracting parties includes not only actual but also imputed knowledge. A typical source of imputed knowledge derives from the fact that most commercial transactions rarely proceed without the benefit of legal counsel. The timing and content of legal advice should be an added ingredient in the fabrication of the reasonable person. More broadly, the cumulative knowledge of the different members of a company, including all types of professional advice, should enter into the reasonable person inquiry. The reasonable person is a creation of both inter-party (between contracting parties) and intra-party (within a contracting party) communications. This type of analysis becomes increasingly important as the party-specific analysis moves from dealings between individuals to those between large corporations.

Beyond the four corners of the contract and the party-specific analysis, the courts often look to the totality or surrounding circumstances of the contract. "One rule of construction . . . is to give effect to the intention of the parties in light of all the *surrounding circumstances*."[117] The court in *In re Westing-*

113. No. 18929/87, 1991 Canada LEXIS 1015 (Ont. C.J. Oct. 11, 1991).

114. *Id.* at *12.

115. 34 F.3d 1310 (7th Cir. 1994).

116. *Id.* at 1317. *See also* Zidenburg v. Greenberg, No. 70300/912, 1993 Canada Lexis 2157 (Ont. C.J. Aug. 24, 1993) (experienced and sophisticated parties).

117. Kreis v. Venture Out In America, Inc., 375 F. Supp. 482, 484 (E.D. Tenn. 1973) (emphasis added). "[T]he Courts cannot only look to the language of the contract but must ascertain, if possible, the intention of the parties and make a construction that is fair and reasonable." *Id.* The notion of *totality* has long been a part of contract law. "'The intention of the parties can only be deduced from the *totality of the evidence*.'" ROBERT LOWE, COMMERCIAL LAW 92 (6th ed. 1983) (quoting Heilbut, Symons & Co. v. Buckleton, [1913] App. Cas. 30, 51 (1912) (appeal taken from Eng.) (emphasis added). "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content *according to the circumstances and the time in which it is used*." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) (emphasis added); *see also* RESTATEMENT, *supra* note 37, § 20 cmt. b ("[M]aterial differences of meaning are a standard cause of contract disputes, and the decision of such disputes necessarily requires interpretation of the language and other conduct of the parties in the *light of*

house Electric Corp. Uranium Contracts Litigation[118] stated the party-specific, event-specific analysis the courts typically look to in fabricating the reasonable person. The reasonable person is to be "determined by the *totality of the circumstances,* including the comparative abilities of the parties to make informed judgments . . . [party-specific]; each party's interest . . . ; and the extent to which that interest was a factor in the negotiation of the contract [event-specific]."[119]

The reasonable person is cut from the fabric of facts and is thus intimately connected with the totality of the circumstances. It is from this totality that the facts are distilled. The totality timeline of modern contract law is much more expansive than the one found in classical contract theory. Classical contract's fixation with the moment of creation limited the scope of sources used in constructing the reasonable person. Modern contract law has expanded the reasonable person's viewfinder to include any event that may shed light upon contractual intent. The courts look to the facts of prior dealings,[120] to pre-contractual negotiations,[121] along with post-formation inquiries into the course of performance,[122] and to contractual modification.[123]

The reasonable person's analysis of the totality of the circumstances begins with the contract itself. If the contract is facially unambiguous, then the objective theory mandates that the words of the contract be given their plain and ordinary meaning.[124] "A written contract which is expressed in clear and

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the circumstances.") (emphasis added).

118. 517 F. Supp. 440 (E.D. Va. 1981).

119. *Id.* at 456 (emphasis added); *see also* The Sale of Goods Act, 1979, ch. 54 (Eng.). In determining the passage of title the courts shall pay regard "to the terms of the contract, the conduct of the parties and the circumstances of the case." *Id.* § 17(2).

120. The *Restatement* expressly adopts the use of prior dealings, agreements, and negotiations as an aide to interpretation. *See* RESTATEMENT, *supra* note 37, § 202; *see also* U.C.C. § 1-205(1) (1989) (defining course of dealing as the "sequence of previous conduct between the parties . . . which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct").

121. *See* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); *see also* G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221 (1991) (regulation of precontractual opportunism and a new cause of action called "Opportunistic Breach of the Bargaining Relationship").

122. Section 2-208(1) of the Uniform Commercial Code defines course of performance as "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." U.C.C. § 2-208(1) (1989). Such acceptance may constitute a waiver of a contractual term. *See* U.C.C. § 2-208(3) (1989).

123. *See* Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985); *see* Speidel, *Spirit of Contract*, *supra* note 83, at 193; Ronald M. DeKoven, Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967); Robert W. Reeder, III, Comment, *Court-Imposed Modifications*, 44 OHIO ST. L.J. 1079 (1983).

124. Artex, Inc. v. Omaha Edible Oils, Inc. 436 N.W.2d 146, 150 (Neb. 1989) ("There is a

unambiguous language is not subject to interpretation or construction."[125] The paradigmatic, fully-integrated written contract limits and at times eliminates the workings of the reasonable person. As we move away from the fully-integrated instrument to more informal writings and oral contracts, the clarity of the words becomes increasingly suspect.[126] The totality of the circumstances as seen through the eyes of the reasonable person will be used to give legal consequence to the words of the contract. An Official Comment to Section 1-205 of the Uniform Commercial Code states that the language found in a contract shall be "read and interpreted in the light of commercial practices and other *surrounding circumstances.*"[127]

Contextual evidence stemming from course of dealings, pre-contractual negotiations, and course of performance may be used to determine the meaning of the contract. The Restatement provides that courts may look at the transaction "in all its length and breadth" in fabricating the reasonable person.[128] Prior dealings can be used to determine if the parties have created a common understanding unique to their relationship. Through the use of the reasonable person standard, the courts will often recognize such tacit understandings by supplying omitted terms. "[T]acit agreement or a common tacit assumption" may provide enough interpretive guidance for a court to imply a missing term.[129] Prior dealings, in effect, become a part of the transaction in question.

The objective meaning of a contract's language can give way to a different meaning procured from a totality analysis. "Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed."[130] The circumstances of course of dealing, pre-contract negotiations, and course of performance provide the bases for a more specific, inter-subjective meaning. The Uniform Commercial Code acknowledges that the performance phase of a contract may provide the reasonable person insight into this alternative meaning.[131] Course of perfor-

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strong presumption that a written instrument correctly expresses the intention of the parties to it.").

125. *Id; see, e.g.*, Bedrosky v. Hiner, 430 N.W.2d 535, 539 (Neb. 1988); Fisbeck v. Scherbarth, Inc., 428 N.W.2d 141, 150 (Neb. 1988); Lueder Constr. Co. v. Lincoln Elec. Sys., 424 N.W.2d 126, 128 (Neb. 1988).

126. Statements may be categorized into four groups: mere puff (noncontractual), condition precedents, representations, and contractual terms. *See* LOWE, *supra* note 117, at 92-102.

127. U.C.C. § 1-205 cmt. 1 (1989) (emphasis added).

128. RESTATEMENT, *supra* note 37, § 212 cmt. b.

129. *Id.* § 204 cmt. c. The parties often create a language unique to their relationship. Through a course of dealing they imply a "tacit recognition" to a specific meaning pertaining to contractual language. *See id.* § 223 cmt. b.

130. *Id.* § 214 cmt. b.

131. *See, e.g.*, U.C.C. § 2-208(1) (1989). The rationale for the use of course of performance evidence was aptly explained in this comment. "The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of

mance conduct can serve an evidentiary function in proving one party's knowledge of the other party's understanding. The Restatement concludes that "[s]tatements of a contracting party subsequent to the adoption of an integration are admissible against him to show his understanding of the meaning asserted by the other party."[132]

Section nineteen of the Restatement speaks of the "operative meaning" of a particular contract or transaction. This is not a meaning implied by society, law, custom, or usage. It is the meaning found within the context or totality of the transaction. "[T]he operative meaning is found in the transaction and its context rather than in the law or in the usages of people other than the parties."[133] One can argue that it is a step back from a purely objective theory of interpretation. The impartial reasonable person is not simply viewing the transaction from without. The reasonable person is allowed to affix a meaning from within the transaction. It is not so much a diminishment of the reasonable person, but a recognition of a number of different fabrications of the reasonable person. Operative meaning is only possible when the totality of the circumstances or context of the transaction provides insight into a unique meaning or common understanding. The reasonable person can be used to determine the existence of that meaning or understanding. In essence, the undefined operative meaning allows the reasonable person to weigh both objective and subjective elements of evidence. If subjective elements or special circumstances fail to uncover an operative meaning, then the court will fall back to the more traditional reasonable person analysis which finds guidance in external standards such as "the usages of people other than the parties."[134]

The sweep of the totality of the circumstances analysis and its resultant input into the fabrication of the reasonable person has been the center of debate. Should the analysis be limited to the circumstances surrounding the formation of the contract? May subsequent events be used as an aid in contractual interpretation? The House of Lords addresses this issue in the case of *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*[135] This is a case of a technical breach of contract at variance with an implied modification of the term being breached by subsequent conduct. The contractual term in question required the selling agent to visit prospective purchasers on a weekly basis as a condition of the agency contract. In fact, the agent's practice varied regarding the frequency of such visits. Lord Wilberforce determined that "evidence may be admitted of surrounding circumstances or in order to explain technical expressions or to identify the subject matter of an agreement or . . . to resolve

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what that meaning was." U.C.C. § 2-208 cmt. 1 (1989).

132. RESTATEMENT, *supra* note 37, § 212 cmt. c.

133. *Id.* § 212 cmt. a.

134. *Id.*

135. [1974] App. Cas. 235 (1973) (appeal taken from Eng.).

a latent ambiguity."[136] The facts of the case did not fit into any of the categories created by Lord Wilberforce in his tripartite classification of situations in which surrounding circumstances may be entered into evidence.

Lord Simon argued for an expanded totality of the circumstances analysis as a *new* general rule of contracts. He argued that modern contractual relationships require a loosening of the overly pedantic evidentiary rules. Extrinsic evidence should be more widely admitted to prove both contractual intent and whether there has been a modification of that intent.

> [T]he distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements.[137]

The long-term nature of many modern day contracts makes it necessary for courts to view all of the evidence before making their determinations. Contractual formation in the relational context becomes only one event in a long-term contractual process. This evolutionary process continuously refines, expands, and modifies the contractual relationship. The truncating of the reasonable person inquiry to the moment of contract formation may be conducive to the discovery of intent in the transactional contract situation, but it results in a disservice in the context of long-term, relational contracts. The most attractive attribute of the reasonable person standard is its inherent flexibility. The standard is constructed on a case by case basis in the search for truth and reasonableness. This flexibility should be coupled with an opening of the evidentiary floodgates in order for the reasonable person standard to maintain its vitality in the modern age of contract.

The totality analysis encompasses all the sources of contractual evidence. In *Williams v. Walker-Thomas Furniture Co.*,[138] Judge Skelly Wright

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136. *Id.* at 261. Lord Reid agreed with Lord Wilberforce that evidence of subsequent misconduct should be excluded. "I find no substantial support in the authorities for any general [rule for] permitting subsequent act[s] of the parties . . . to be used as throwing light on [a contract's] meaning." *Id.* at 252. His rationale was that such a rule would open the floodgates of extrinsic evidence and lead to the demise of the sanctity of the written contract. The floodgate argument was made by the plaintiff's attorney.

> If subsequent conduct is admissible, it may be asked why not admit [evidence of the] negotiations between the parties? To adopt such a policy would entail the law embarking on a *slippery slope* on which there is no halting place. It would be the end of certainty in relation to the construction of documents.

Id. at 241 (emphasis added).

137. *Id.* at 268.

138. 350 F.2d 445 (D.C. Cir. 1965).

described the interrelationship of the facts and circumstances of the case, the language of the contract, and the importance of usage and practice.

> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in the light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."[139]

This review envisions a hierarchy of analysis beginning with the written terms of the contract, along with the circumstances surrounding its formation as viewed against the backdrop of usage and practice.

An Aside: The Main Purpose Doctrine

The reasonable person is not only utilized to determine the issue of reasonableness but also the issue of materiality. The area of breach of contract often focuses upon the difference between fundamental and minor breach.[140] One test that has been utilized is whether the breach affects the root or main purpose of the contract. The court in *Cehave N.V. v. Bremer Handelsgesellschaft*[141] dealt with the issue of fundamental breach. The contract provided for the delivery of citrus pellets to be shipped in "good condition." A portion of the shipment was damaged. Lord Denning invoked the guidance of the *commercial man* in making his determination on the issue of merchantability. It was for the commercial man to determine if the nonconformity fundamentally affected "the purpose for which goods of that kind [were] commonly bought" or used.[142] Denning focused upon the fact that the goods were resold and used for the same purpose as anticipated in the contract. The court concluded that to the reasonable commercial person the "breach did not go to the *root* of the contract."[143]

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139. *Id.* at 450 (quoting U.C.C. § 2-302 cmt. 1 (1989)).

140. This area of contract also includes the notion of anticipatory breach. Is the party anticipating a breach reasonable as to that anticipation? What type of information is required for the reasonable person to properly anticipate a breach? When is it reasonable for a party to require adequate assurances before commencing with performance? What type of assurances are to be considered adequate and reasonable? *See generally* U.C.C. § 2-609 (1) (1989) ("When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.").

141. [1976] Q.B. 44 (C.A. 1975).

142. *Id.* at 62.

143. *Id.* at 61 (emphasis added). *But see* Arcos Ltd. v. E.A. Ronaasen & Son, 149 L.T.R. 98 (H.L. 1933) (stating the presumption of reasonableness as to breach and merchantability can be

The courts have essentially expanded the reasonable person analysis from a literal interpretation of contractual language towards an ever expanding totality analysis. The main purpose or root of a contract can have an impact upon how a court interprets or constructs individual contractual terms. This principle was enunciated over one hundred years ago in the case of *Glynn v. Margetson.*[144] In the process of judicial construction a court is to look "at the whole of the instrument, and seeing what one must regard . . . as its *main purpose*, one must reject words . . . if they are inconsistent with what one assumes to be the main purpose of the contract."[145] The clear meaning of a contract term may be discounted under the fiction of presumed intent. The parties could not have intended to incorporate a term that goes against the essence or root of their contract.[146] The court stated that "the contractual intention is to be ascertained—not just grammatically from words used, but by consideration of those words in relation to commercial purpose (or other purpose according to the type of contract)."[147] This is the presumed intent not of the parties but that of the reasonable person.

B. Custom and Trade Usage: The Reasonable Person Is a Working Person

The reasonable person can be said to be mainly a creature of custom.[148]

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preempted by express agreement of the parties). The courts are likely to strictly construe any such language that allows for rejection of a reasonable performance. This rule of strict construction was aptly explained by Lord Reid in *Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1966] 1 Lloyd's List L. Rep. 529 (H.L. 1966). "Such clauses must be construed strictly and if ambiguous the narrower meaning will be taken. . . . But if some limitation has to be read in it seems reasonable to suppose that neither party had in contemplation a breach which goes to the *root* of the contract." *Id.* at 544. (emphasis added). That is, it would seem reasonable to the reasonable person. Thus, to overcome the presumption of reasonableness the parties must make "no room in [their] contract for any elasticity." *Arcos Ltd.*, 149 L.T.R. at 99. The parties may thusly convert a minor breach into a fundamental one by making it a fundamental term in the contract. For an explanation of the distinction between *fundamental breach* and the breach of a *fundamental term* see *Suisse Atlantique*, [1966] 1 Lloyd's List L. Rep. at 541.

144. 69 L.T.R. 1 (H.L. 1893).

145. *Id.* at 3 (emphasis added).

146. "One may safely say that the parties cannot . . . have contemplated that the clause should have so wide an ambit as in effect to deprive one party's [performance] of all contractual force . . . ." *Suisse Atlantique*, [1966] 1 Lloyd's List L. Rep. at 562. One may fashion an argument upon another rationale. A literal construction would render the contract illusory. If one party can be insulated from any liability for failure to give reciprocal performance, then the contract is not a contract at all.

147. *Id.* at 564.

148. This is true because the reasonable person is a legal person. Contract law itself, especially in its common law garb, is a reflection of community customs and values. "[T]he law of contracts reflects, in an imperfect way, the needs and values of the communit[y] it serves." Richard E.

As such, the reasonable person is not one of static intellect. This is because custom and trade usage is forever changing.[149] Savigny's historical school viewed law as a mirrored reflection of custom. "This school saw the law as an expression of the 'folk spirit' and it was the task of state law to capture [what] had been exhibited in the freely developed customs of the community."[150] The reasonable person is required to continue to learn about the customs and usages of a given community.[151] The court in *Larwin-Southern California, Inc. v. JGB Investment Co.*, observed that "custom and usage within [a] trade may . . . properly be used in clarifying what, on the face of a contract, appears to be an ambiguity."[152] Section 1-205 of the Uniform Commercial Code states that a "usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[153] It is the knowledge that all reasonable persons are expected to possess. Through this knowledge, "provisions . . . unclear or ambiguous to a layman [are] nevertheless clear and succinct to those cognizant of the customs, practices, usages and terminology" in a particular industry.[154]

Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 822; *see also* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (reviewing the mingling and evolution of custom, reason, and the common law from their ancestry in the middle ages to the time of the American Revolution). For an example of the role of custom and trade usage in the supranational arena, see Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989).

149. For an example of the notion of trade usage in a particular industry, see Robert S. Miller, *America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business*, 74 KY. L.J. 781, 796 (1986) ("[T]he sovereign . . . is free to recognize that the 'imperfect communities' that operate beneath the umbrella of the greater community have a role to play in their own governance.").

150. Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 446 (1986).

151. Custom and trade usage can reach back to Roman Law, to the Law Merchant, and to the usages developed by the specific parties. "Usages change over time, and persons in close association often develop temporary usages peculiar to themselves." RESTATEMENT, *supra* note 37, § 219 cmt. a. This is the language of business that allows the parties to communicate.

152. 162 Cal. Rptr. 52, 57 (Ct. App. 1979).

153. U.C.C. § 1-205(2) (1989); *see* Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981); *see also* Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986) (examining various approaches courts have adopted in interpreting § 1-205(4)).

154. Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375, 388 (S.D. Tex. 1974); *see also* Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968) ("An 'ambiguous' word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who . . . is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.").

The reasonable person provides needed flexibility in a contracts regime that often emphasizes strict rule application. The result is a duality of change. Change may be engineered through a reformulation of common law contract rules by way of judicial manipulation or by statutory preemption. Alternatively, the personage of the reasonable person may be reinvented to reflect changes in custom and society in general. Either way the end result is a fundamental change in the common law's decisional matrix. The court in *Lipschutz v. Gordon Jewelry Corp.* acknowledged this duality of change when it declared that "[a] custom [is] a practice which by its universality . . . has acquired the force and effect of law."[155]

1. A Reason to Know: The Restatement (Second) of Contracts and the Reasonable Person

The imprimatur of the reasonable person can be seen throughout the Restatement and the Uniform Commercial Code. It can be seen wherever reference is made to the fact that a party had *reason to know* or *should have known*. A comment to Section 19 of the Restatement states a person has a *reason to know* any "information from which a person of [similar] intelligence would infer that the fact in question does or will exist."[156] In contrast, the term *should know* is generally associated with a legal duty to obtain certain knowledge. "'Should know' imports a duty to others to ascertain facts."[157] The determination of whether a party had *reason to know* is accomplished within the framework of a totality of the circumstances analysis. It is a factual determination based upon the circumstances and information available to the parties.[158] The *should know* is a judicial determination of what is a reasonable level of knowledge given the parties and the circumstances. The reasonable person wears two hats in the *reason to know-should know* duality. The first is a party-specific objectivity; the second is a community focused objectivity. In the community-based gaze of the reasonable person, "it may be reasonable to hold a nonmerchant to mercantile standards if he is represented by a mercantile agent."[159] Thus, the circumstances of a contract may not only be used to imply through the reasonable person what the parties had reason to know, but

155. *Lipschutz*, 373 F. Supp. at 387.

156. RESTATEMENT, *supra* note 37, § 19 cmt. b; *see also* Jay M. Feinman, *Promisory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 712-16 (1984) (reason to know as a mediating concept).

157. RESTATEMENT, *supra* note 37, § 19 cmt. b. *Should know* knowledge is relatively unconcerned with the actual knowledge of the contracting parties.

158. "'Reason to know' depends not only on the words or other conduct, but also on the circumstances, including previous communications of the parties and the usages of their community or line of business." *Id.* § 26 cmt. a.

159. *Id.* § 221 cmt. b.

also what they should have known. The parties should know those practices and usages that are "regularly observed" in their business or trade.[160]

Section 41 of the Restatement provides an example of the codification of the reasonable person into law and the relationship between the reasonable person and existing custom. It provides guidance regarding the determination of whether a certain lapse of time has rendered an offer inoperative and attempts to answer the issue of what is a reasonable time for an offer to remain viable.

> The circumstances to be considered have a wide range: they include the nature of the proposed contract, the purposes of the parties, the course of dealing between them, and any relevant usages of trade. In general, the question is what time would be thought satisfactory to the offeror by a *reasonable man* in the position of the offeree . . . .[161]

In many ways the reasonable person is the alter ego of custom. Some practice or usage that has risen to the level of custom is likely to become embodied in the reasonable person. "[C]ommercial acceptance by regular observance makes out a prima facie case that a usage of trade is reasonable."[162] Custom and trade usage are ready-made characteristics of the reasonable person.

2. The Reasonable Person as a Precursor

Change in the law of contracts may first enter through the back door. Commercial reality as exhibited through usage and custom will often be reflected in the fabrication of the reasonable person. This transformation of the reasonable person is likely to precede the reformulation of the rules of contract. Custom and usage as reflected in the reasonable person can be seen as a vehicle by which the common law has amended itself to accommodate changing times. Justice Turley in the 1842 case of *Jacob v. State*[163] described the grassroots metamorphosis of contract law through changes in custom.

> [The] sources [of the common law] are to be found in the usage, habits, manners, and customs of a people. . . . The common law of a country will . . . be modified, and extended by analogy, construction and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society.[164]

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160. *See id.* § 222. The *Restatement* states that "[a] usage of trade is [something] having such *regularity of observance* . . . as to justify an expectation that it will be observed. . . . [It] gives meaning to or supplements or qualifies [an] agreement." *Id.* § 222(1), (3) (emphasis added).

161. *Id.* § 41 cmt. b (emphasis added).

162. *Id.* § 222 cmt. b.

163. 22 Tenn. (3 Hum.) 493 (1842).

164. *Id.* at 514-15; *see also* Dale Beck Furnish, *Custom as a Source of Law*, 30 AM. J. COMP.

The relationship between contract law and custom is reciprocal in nature. Custom and usage affects, and is affected by, the law. As previously described, the reasonable person acts as a receptacle for customary practice. The formal rules of contract are affected by the staying power of custom and trade usage. Longevity is a key factor in determining whether a certain custom or usage is to reach maturity. When it has reached maturity, it will be utilized in the fabrication of the reasonable person. Aristotle recognized the influence that formal law has upon customary law. "[The] function of the law is to lay down sound and balanced principles of character-formation . . . to *accustom* various kinds of people, each in different ways, to refrain from greed . . . ."[165]

Justice Holmes saw law creation as a gradual translation of the morality of the community. "[W]hile the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."[166] The morality of the community can be seen in its customs, usage, and practices. The reasonable person will likely exhibit the same morality. In this sense the reasonable person can be seen as a precursor to changes in the formal rules of contract. The morality of the community as reflected in the custom and usage of business are transmuted into the reasonable person. Eventually, the transmutation gains general acceptance and is formally accepted into the common law.

3. Llewellyn's Double-Barreled Objectivity

The eyes of the reasonable person can be said to possess two lenses. Karl Llewellyn speaks of these two perspectives as "double-barreled objectivity."[167] First, the reasonable person views a transaction from an interpretive background. This interpretive background is the mix of custom, usage, and practice that the two parties bring to the contract.[168] "The background of trade practice gives a first indication; the line of authority rejecting unreasonable practice offers the needed corrective."[169] The *needed corrective*

L. 31 (1982) (noting how custom and usage serve as a basis for modern law).

165. VON LEYDEN, *supra* note 54, at 82. A modern day example of this phenomena is the doctrine of unconscionability. The doctrine of unconscionability has been formally adopted by the *Restatement* and the Uniform Commercial Code. *See* RESTATEMENT, *supra* note 37, § 208; U.C.C. § 2-302 (1989) (unconscionable contract or clause). A proactive court may disregard a recognized practice or usage as being unconscionable.

166. HOLMES, *supra* note 17, at 33.

167. KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

168. The parties are held to intend those practices, usages, and meanings of their custom or trade that are regularly used. Custom and usage may act to "supplement or qualify" an agreement. RESTATEMENT, *supra* note 37, § 220 cmt. a. Furthermore, "if the law merely supplies a term in the absence of contrary agreement, usage can have the same effect as contrary agreement." *Id.* § 221 cmt. c.

169. LLEWELLYN, *supra* note 167, at 367 (quoting Karl Llewellyn, Book Review, 52 HARV.

involves the interpretation of the words of a contract through the lens of reasonableness as embodied in custom and practice. The second lens of the reasonable person is the determination of whether the parties attached a variant meaning than one that would be implied by custom, usage, or practice. The words of a contract are to be interpreted "first in the light of trade usage, second in the light of the common meaning [attached by] the hearer and the course of dealing of the parties."[170]

The importance and complexity of trade usage and commercial practice led Llewellyn to believe that the reasonable person as applied by a judge or jury was ill-equipped to make such determinations of fact. "'[F]ew judges have the specialized skill in such matters . . . and juries are notoriously out of touch with such matters.'"[171] The reasonable person does not possess the highly technical and specialized knowledge needed to determine what was considered a reasonable practice or usage in a given trade or profession. Llewellyn believed that such decisions should be abdicated to a merchant tribunal or to expert arbitrators. His idea for a merchant tribunal was never adopted despite his strong advocacy. The reasonable person remains the final arbiter of commercial reasonableness.

The use of custom, usage, and practice as barometers of commercial reasonableness illustrates that the fabrication of the reasonable person is both a descriptive and a normative undertaking. The barometer of custom and usage provides insight into the *is* of what the parties intended. It also provides a measurement for what the community believes the contractual terms *should* mean. "Those who make law try not to stray too far from the community's moral sense" of reasonableness.[172] Kent Greenawalt asserts that there is a direct relationship "between the interpreter [the reasonable person] and what is being interpreted and between the interpreter and the community in which he is situated."[173] This analysis has suggested that the reasonable person serves a number of roles or functions. These different roles are suggested by the "should have known-reason to know" duality, by Llewellyn's "double-barreled

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L. REV. 700, 702-03 (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937))).

170. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J 704, 722-23 n.45 (1931). In practice this priority of interpretation is reversed. The Uniform Commercial Code states that "course of performance shall control both course of dealing and usage of trade." U.C.C. § 2-208(2) (1989); *see also* U.C.C. § 1-205(4) (1989) ("course of dealing controls usage of trade").

171. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 513 (1987) (quoting Revised Uniform Sales Act 1941 (Report and Second Draft), Introductory cmt. to §§ 59-59-D).

172. GREENAWALT, *supra* note 6, at 166. Reasonableness can be seen as a product of a society's sense of morality. Greenawalt reviews the relationship between law and cultural morality. *Id.* at 165-70.

173. *Id.* at 77.

objectivity," and the descriptive-normative sides of the reasonable person's personality.

4. The Language of the Reasonable Person

The reasonable person's task is to discern the contracting parties' intent. The tools of this undertaking are the words and conduct of the parties. "The intention of the act of promising is the world represented by the terms of the promise, *interpreted in accordance with the conventions of the relevant language community* . . . ."[174] Words are initially taken at their common meanings "*unless a special meaning is attributed . . . by trade custom or local usage.*"[175] Whether of common or technical meaning, the language of the reasonable person is both elucidating and limiting in its effect. The language of the reasonable person is the language of contract. It is used to understand and describe the events of contract. In this regard it is essentially descriptive in its import. The clarity of this descriptive enterprise is in constant need of sharpening. James Boyd White explained the descriptive nature and shortcomings of language as follows: "The description of an event can go on forever and still be incomplete. What is said is only part of what happens."[176] Ambiguity in contract occurs when the parties fail to speak or write in the language of the reasonable person.

> An "ambiguous" word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.[177]

Justice Holmes in his *Theory of Legal Interpretation* defined the language of contract as that of the ordinary reasonable person.

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174. Steven J. Burton & Eric G. Andersen, *The World of a Contract*, 75 IOWA L. REV. 861, 864 (1990) (emphasis added).

175. HARVEY MCGREGOR, CONTRACT CODE § 111, at 47 (1993) (model code prepared on behalf of the English Law Commission).

176. JAMES BOYD WHITE, THE LEGAL IMAGINATION 3 (abr. ed. 1985). John Dewey explained the clarifying objective of language: "Speech forms are our great carriers . . . by which meanings are transported from experiences that no longer concern us to those that are as yet dark and dubious." DEWEY, *supra* note 110, at 175.

177. Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375, 388 (S.D. Tex. 1974) (quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968)). The importance of context in giving meaning to words was recognized by Aristotle. "Just as each meaning of the word can live and survive in its own context, separately from the rest [of its meanings], none is more relevant or 'essential' than any of the others." VON LEYDEN, *supra* note 54, at 108.

> [T]he normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.
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> . . . .
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> . . . For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English . . . .[178]

The ordinary and technical meanings of words provide the vocabulary for the reasonable person.[179] They are the means of interpretation by which a court may imply contractual intent and meaning to a transaction.[180] The interpretation of a contract by the reasonable person is thus "bounded by the words-in--language in which they are made, and the social conventions those words invoke."[181] The language of the reasonable person is a sort of social literature, a way of talking about people and their relationships.[182] To the extent that parties are able to rein in or limit the meaning of their words, the closer the convergence of the actual intended meaning of the parties and the interpretive meaning implied by the reasonable person will be.

C. *From Who's Perspective Does the Reasonable Person View the Contractual Landscape?*

From what viewpoint does the reasonable person analyze an issue of contract? Is it from the perspective of the promisor, the promisee, or neither? The common law has generally framed its objective theory from the perspective of the promisee. Pollock's 1902 treatise defines the test of contractual liability

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178. Holmes, *supra* note 77, at 418-19; *see also* L. Schuler A.G. v. Wickman Mach. Tool Sales Ltd., [1974] App. Cas. 235, 240 (1973) (appeal taken from Eng.) ("If an established meaning is given to a word, the courts should adhere to it, for it is presumed that that is the meaning that the parties have given to it.").

179. At times there may be both a common and a technical meaning that may be attributed to a word. The common meaning will generally be invoked unless it is clear that the parties intended to invoke the technical meaning of the word. "[I]t is incumbent upon the parties to make it abundantly plain that the parties intended it to have that technical legal meaning, or otherwise the court will give the word its popular meaning." *Wickman Tools*, [1974] App. Cas. at 243.

180. *See, e.g.*, Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 206 (1986) ("The circumstances and context of the utterance assume great importance in deciphering the meaning of such speech acts.").

181. *Wickman Tools*, [1974] App. Cas. at 272; *see also* The Mihalis Angelos, [1971] 1 Q.B. 164 (C.A. 1971), *cited in Wickman Tools* [1974] App. Cas. at 240 (stating that courts adhere to a word's established meaning because it is presumed the parties have also given the word the same meaning).

182. *See* WHITE, *supra* note 176, at 109.

as "what expectation the promisor's words . . . would have created in the mind of a *reasonable man* in the *promisee's place.*"[183] After reviewing the reasonable person from the promisee's perspective, we will look at the alternatives--promisor objectivity and third-party objectivity.

1. The Reasonable Person as Promisee

Often times the key issue in granting a contractual remedy is whether the promisee *reasonably* relied upon the conduct or promise of the other party. Was the reliance consistent with an objectively reasonable person's reliance? The promisee perspective dominates most of the objective theory of contract. The Restatement places strong emphasis upon the promisee's reliance, expectation, and interpretation.[184] The Restatement's rejection of the subjective approach fundamentally shifted the perspective from the promisor to the promisee.[185] The growth in the popularity of promissory estoppel supports the importance of promisee objectivity in contractual interpretation. Section Ninety of the Restatement is generally viewed as a vehicle to protect the expectation and reliance interests of the promisee. It focuses the courts' attention upon the reasonableness of the promisee's reliance.[186] "Measuring intent from the point of view of the reasonable hearer . . . favors the reliance interest of the hearer over the speaker's interest in being bound only when the parties truly have reached agreement."[187] It is only in the case of ambiguity and mistake that "the speaker can make a legitimate argument that his subjective illocutionary [sic] intent should prevail over his objective intent as perceived by a reasonable person in the position of the hearer."[188]

2. The Reasonable Person as Promisor

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183. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 245 (7th ed. 1902), *quoted in* J.P. Vorster, Comment, *A Comment on the Meaning of Objectivity in Contract*, 103 L.Q. REV. 274, 277 n.24 (1987) (emphasis added).

184. "[T]he expectation and understanding of the [promisee] must also be taken into account." RESTATEMENT, *supra* note 37, § 200 cmt. b. *See generally* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964) (discussing an overview of contract interpretation).

185. Professor Gardner analyzed the promisor-promisee perspectives within his concept of *actual promise* and apparent promise. *See* Gardner, *supra* note 28, at 4-8.

186. It can be argued that the vast amount of literature on reliance theory is generally premised upon the promisee perspective. *See supra* notes 38-44 and accompanying text. *But see* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that courts use Section 90 to hold people to their promises rather than to compensate promisees for their losses in reliance).

187. Tiersma, *supra* note 180, at 229.

188. *Id.* at 229-30.

Despite the tortification of contract as championed by Professor Gilmore,[189] numerous commentators still hold firm to the promissory basis of contract.[190] The reasonable person is directed under this school to determine liability and remedial issues based upon the expectations of the promisor. The litmus test becomes not the fact of actual reliance, but the foreseeability of the promisee's reliance from the perspective of the promisor. The proceedings to the *Restatement (First) of Contracts* illuminate the promissory perspective. "We have confined [Section Ninety] to the case where a *reasonable person* would say that the promisor expected the man to do just what he did or that he ought to have expected it."[191]

Professor Vorster argues that to pigeonhole the reasonable person into the role of promisor or promisee is counter-productive. Blame can equally be placed at the foot of either the promisor or the promisee.

> It may be argued that as a promisor knows what he wants to promise, he should be under a duty to ensure that his intention is correctly understood and that the promise should accordingly be viewed from the perspective of a *reasonable promisee.* However, it may be argued with equal force that a promisee knows what he wants from the promisor and that the promisee is therefore bound to make sure the promisor understands what he wants from him.[192]

The reasonable person is a product of the creative efforts of the promisor and promisee.[193] As such, neither perspective alone can adequately serve the interpretive mandate of the reasonable person.

3. The Reasonable Person as a Third-Party

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189. GILMORE, *supra* note 10.

190. *See, e.g.*, FRIED, *supra* note 21 (examining various principles of contract including promise).

191. Yorio & Thel, *supra* note 186, at 126 (emphasis added) (quoting *Proceedings at Fourth Annual Meeting,* 4 A.L.I. PROC. 93 (1926)). Professor Charles Fried has more recently championed the promisor perspective for Section 90 liability.

> There is a category of cases that has become famous in the law under the rubric of promissory estoppel or detrimental reliance. In these cases there has indeed generally been a promise, but the basis for *legal* redress is said to be the [promisee's] detrimental reliance on the promise. . . . [T]hese cases should be seen for what they are: a belated attempt to plug a gap in the general regime of enforcement of promises . . . .

FRIED, *supra* note 21, at 25 (footnote).

192. Vorster, *supra* note 183, at 283 n.51 (emphasis added).

193. A contract "is the product of a joint creative effort." Arthur Allen Leff, *Contract as Thing,* 19 AM. U. L. REV. 131, 138 (1970).

An alternative to the reasonable person being party-based is the reasonable person as being detached or community-based. Instead of focusing upon the intent of the parties, the reasonable person evaluates the reasonableness or fairness of the exchange.[194] This view of the contracting process from the view of a third party has a number of formulations. One will be referred to as detached and a second as the communal reasonable person. The former focuses upon the issues of interpretation from the perspective of a neutral third-party observer or witness to the "operative acts" of the contract.[195] The detached reasonable person is a fictional witness informed with all available information and exposed to the totality of the circumstances.[196] It is from this fully informed detached eyewitness that the intentions of the parties are discerned and interpreted.

The notion of the communal reasonable person acknowledges that this third-party observer may not be unbiased. The reasonable person's detachment is clouded by a communal mind-set preconditioned to view the acts and circumstances of the contract from the vantage of community and commercial standards.[197] The reasonable person's assessment of the parties' intentions is likely to be impacted by certain contractual externalities. These externalities include the courts' personal[198] and the community's notions of justice, fairness, and unconscionability. The result is an interpretation which may not only be rooted in the intention of the parties but also rooted in the reasonable person's search for a fair and reasonable interpretation.

The communal reasonable person can be seen at work in the 1834 case of *Britton v. Turner*.[199] The case involved a contract for labor for a period of one year. The contract clearly expressed that payment was due only upon the completion of one year of labor. After nine months of labor, the worker left his employment without the consent of the employer. The issue is whether the employer under contract law owes pro rata compensation for the time served. A detached reasonable person would likely answer in the negative. The contract and the manifestations of the parties clearly expressed that compensation would only be due upon the completion of the one year period of service. Instead, the court applied the communal version of the reasonable person. "We have abun-

194. For a more complete examination of the notion of exchange fairness, see generally ATIYAH, *supra* note 83 (discussing contract law and ideas of fairness in exchange) and Atiyah, *supra* note 22 (examining the classic contract model).

195. For reference to the "operative acts" of contracts see RESTATEMENT, *supra* note 37, § 1 cmt. d.

196. *See supra* notes 112-38 and accompanying text (discussing the parties and the totality of the circumstances).

197. *See supra* notes 147-54 and accompanying text (discussing custom and trade usage).

198. *See infra* notes 233-40, 255-68 and accompanying text (discussing subjectivity of judgment).

199. 6 N.H. 481 (1834).

dant reason to believe, that the *general understanding of the community* is, that the hired laborer shall be entitled to compensation for the services actually performed . . . and such contracts must be *presumed* to be made with reference to that understanding."[200] The communal understanding of reasonableness is used to overcome the intentions of the parties and that of detached objectivity. Lord Denning sees the reasonable person not as the detached "officious by-stander,"[201] but as a proactive tool to be used by the courts to ensure reasonableness in transactions. The reasonable person is to be used as an interpretive device to filter even clear contractual language. Denning believes that it should be exceedingly difficult for contract language to preempt a reasonable person's interpretation. Are the words of the contract "to become tyrannical masters" or should they be qualified in order to bring them within the "true scope of the contract" as determined by the reasonable person?[202] For Denning the reasonable person is not so much concerned with contractual intent as she is concerned with contractual justice. The reasonable person is "no more than the anthropomorphic conception of justice."[203]

IV. IMPLEMENTING THE REASONABLE PERSON STANDARD

Once constructed, the reasonable person is used as an interpretive tool in determining the meaning to be given to the contracting parties' manifestations. The reasonable person must decide if the parties had an intent to create a contract and to give meaning to that intent. The reasonable person is used to imply a general intent to contract and specific intent as to the terms of the contract. The objective theory of contract mandates that it is the task of the court to objectively construct and apply the reasonable person standard. However, the subjective leanings of a judge also play a role in the fabrication of the reasonable person. The subjectivity of judgment plays a role in the application of the reasonable person and in the interpretation of manifestations of intent.

A. The Manipulation of the Reasonable Person

Professor Ian Macneil asserts that subjectivity plays a large role in the fabrication and implementation of the reasonable person. The subjectification of the reasonable person can be seen in a number of scenarios. First, the manifestation of intent is manipulated to conform not to what the reasonable

200. *Id.* at 493 (emphasis added).

201. DENNING, *supra* note 3, at 32-53.

202. *Id.* at 42. "Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect." *Id.*

203. *Id.* at 38 (quoting Davis Contractors Ltd. v. Fareham Urban District Council, [1956] App. Cas. 696, 728 (1956) (appeal taken from Eng.)).

person would interpret it as, but to conform to the court's notion of the parties actual subjective intent. This manipulation represents an effort by the court "to effectuate what it thinks was the real or subjective intention of both of the parties."[204] A related manipulation of the reasonable person is the conforming of manifestations to the type of contract involved or to its essential nature. "[T]he court manipulates manifested intention in order to achieve what *it thinks* were the basic purposes of the parties in carrying on the contractual relationship."[205] There is an anthropomorphizing of the contractual document. It is viewed as a person or thing from which an interpretation may be drawn regarding an ambiguity, a missing term, or the underlying intent of the parties.[206] The notions of the essence of contract or contract as thing are convenient theoretical devices for conforming judicial constructionism with the traditional reasonable person analysis. The focus of the reasonable person is not on the direct, objective interpretation of the parties' manifestations. The focus is the court's subjective view of what it believes the parties intended, or alternatively, an attempt to conform the manifestation to the court's belief regarding the purpose of the contract.

The common law doctrine of mistake is an area in which external manifestations are not formalistically applied. A purely objective application of the reasonable person standard would hold a party liable for the reasonable interpretation of the party's outward manifestations.[207] The common law doctrine of mistake gives relief even though the parties manifested intentions indicate the formation of a contract.[208] Relief through reformation or rescis-

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204. IAN R. MACNEIL, CONTRACTS 279 (1971).

205. *Id.* (emphasis added). The notion of interpreting a contract through its *essence* was discussed earlier in this article and has a long history. In philosophy there is a "tradition going back to ancient Greece that to explain a phenomenon is to provide its essential nature." Warren Schmaus, *Explanation and Essence in the Rules of the Sociological Method and the Division of Labor in Society*, 38 SOCIOLOGICAL PERSPECTIVES 57 (1995).

206. Professor Atiyah connects *contract as thing* with the classical contract model, which views "contract [as] a *thing*, which has some kind of objective existence prior to any performance or any act of the parties." Atiyah, *supra* note 22, at 197; *see also* Leff, *supra* note 193 (proposing a new way of thinking about consumer-transaction contracts); *cf.* Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073 (1988) (arguing that the essence of a contract is an inadequate technique for determining if a breach is material). Theorist Lon Fuller also believed that a contract had an essential nature that could be used in the interpretive enterprise. He referred to this nature as the "internal rationality" of contract. *See* Robert S. Summers, *Lon L. Fuller's Jurisprudence and the Possibility It Was Much Influenced by G.W.F. Hegel*, CORNELL L.F., June 1983, at 9. Fuller believed "contractual processes . . . have a distinctive inner order of their own—an integrity—to be discovered and respected by those who have responsibility for their functioning." *Id.* at 12.

207. The formalistic application of rules and of legal formalities characterized the legal system of ancient Rome. "In the formalistic stage . . . a legal system which has come to enforce contracts will enforce them as made, and will not give relief for mistakes." Hoffman F. Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41, 41 (1984).

208. For a look at the notion of error in the civil law, see generally David P. Doughty,

sion allows the subjectivity of fairness to hold sway over pure objectivity. Professor Hoffman Fuller describes the doctrine of mistake as a "meaningless shelter [in which] a court is free to do as it chooses, set loose to sail on an ocean of subjectivity."[209]

1. The Reasonable Person and the Consumer Form Contract

The role of the reasonable person has expanded with the advent of form contracts.[210] The standardization of contracts has removed the narrow focus of the reasonable person from the four corners of the contract.[211] The rationalization of this narrower focus was premised upon the sanctity of the written contract and the duty of the contracting parties to read any instrument upon which they affix their signatures. This traditional focus holds that the act of signing a standard form is evidence that the signer intended to accept all of its terms. The full totality of the circumstances analysis is shunted. The reasonable person determines contractual consent based solely upon a four corners reading of the contract.

This approach became increasingly untenable when it became apparent that in reality there was no such actual consent. A rational application of the reasonable person standard would recognize the flaw in this notion of consent. The fact of the matter was that at least one of the parties did not read or understand the fine print of the preprinted form. There is no true manifestation of intent because there has been no conscious agreement to accept the unread terms. This unawareness of the forms' content is akin to the doctrine of mistake where one party is unaware of a certain fact. It became increasingly difficult for the reasonable person to conclude that the parties had consented to all the terms in the form. The role of the reasonable person was thus

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Comment, *Error Revisited: The Louisiana Revision of Error as a Vice of Consent in Contracting*, 62 TUL. L. REV. 717 (1988) (comparing the 1870 Civil Code to the revised code of 1984 that increased flexibility in solving problems of mistake in contracting).

209. Fuller, *supra* note 207, at 91.

210. *See, e.g.*, Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-AM. L. REV. 255 (1986) (suggesting that adhesion contracts are fair as they serve the public interest); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990) (discussing the elimination of assent when determining conscionability of contract terms) [hereinafter Meyerson, *Efficient Consumer*]; Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263 (1993) (proposing the application of the objective theory of contracts to solve the problem of form contracts) [hereinafter Meyerson, *Reunification*]; W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) (discussing how parties' reasonable expectations give meaning to contracts); Speidel, *Unconscionability*, *supra* note 83, at 359 (discussing the elimination of assent when determining unconscionability of contract terms).

211. For a look at the first major work on the standardization of contracts, see Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).

expanded to determine what reasonable terms would be included and what unreasonable terms would be jettisoned from the contract. In order to accomplish this task the reasonable person was placed in the shoes of the recipient of the form, generally the ordinary consumer, to determine the person's reasonable expectations regarding the intent of the terms to be found in the form.[212] "[C]ourts must examine the circumstances surrounding the transaction to determine the consumer's objective understanding."[213] The reasonable expectations of the ordinary consumer are used to supplement the actual writing in the courts enforcement decisions. Professor Meyerson asserts that this reasonable expectation analysis can also be performed from the perspective of the form-giver. "[A] consumer's assent to a contract should be determined by how a *reasonable person* in the other party's position would ascertain the consumer's intent as manifested through words and deeds."[214] Whether from the perspective of the consumer or the form-giver, the final guide to enforcement is not the written form but what the signing party knew and what a reasonable consumer would have known.[215]

Professor Llewellyn devised a solution to the dilemma of determining the reasonable intention of the parties in the area of form contracts. He bifurcated form contracts: the dickered deal and the supplementary boilerplate deal.[216]

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any *not unreasonable* or indecent terms the seller may have on his form, which do not alter or eviscerate the *reasonable meaning* of the dickered terms.[217]

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212. The notion of reasonable expectations can be seen throughout the law of contracts. *See, e.g.*, E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963) (suggesting that the UCC's obligation of good faith be extended by analogy to other types of contracts); Calvin R. House, *Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author's Reasonable Expectations*, 51 BROOK. L. REV. 95 (1984) (proposing that damages be awarded to authors whose reasonable expectation of publication are justified); Meyerson, *Efficient Consumer*, *supra* note 210, at 608-23 (discussing the doctrine of reasonable expectations).

213. Meyerson, *Reunification*, *supra* note 210, at 1300.

214. *Id.* at 1325-26 (emphasis added).

215. "[C]ourts should examine both what the consumer *actually knew* and what knowledge is properly *attributable to the consumer*." *Id.* at 1326 (emphasis added); *see also supra* notes 155-59 and accompanying text (discussing the reason to know-should know duality of the reasonable person).

216. LLEWELLYN, *supra* note 167, at 371.

217. *Id.* at 370 (emphasis added).

The reasonable person is given two tasks in Llewellyn's dichotomy: (1) to interpret the meaning of the terms expressly negotiated by the parties,[218] and (2) to determine what non-dickered terms are to be reconstructed or expelled due to unreasonableness or what reasonable terms are to be implied to fill in gaps.

The notion of blanket assent was reanalyzed by Professor Fried. He asks whether it is the task of the courts to construct "a kind of nonconsensual penumbra around the consensual core."[219] The reasonable person can perform this task by looking to the type or essence of the contract. For purposes of determining reasonableness, the reasonable person looks to the terms generally found in such contracts. The test becomes "whether the consumer, as a reasonable man, should have been aware of the material risk allocated to him"[220] or whether the terms of the form contract were "*fundamentally* different in its purport from what [a reasonable person would have] believed to be the case."[221] The reasonable person is called on to conform the boilerplate terms to the spirit of the contract as represented by the dickered terms and the *type* of transaction being undertaken. A second-order conformity is often performed as well. This is the conformity best engineered by the communal reasonable person. It is based upon the assumption that the parties blanket assent was made with the implied understanding that the other party's boilerplate did not contain any unreasonable or unfair terms.[222] This indicates a transformation of the reasonable person from being a creation of objective fact to being a creation of values.[223] The focus is not on what was considered to be reasonable at the time of formation as perceived by the contracting parties. Instead, the focus has shifted forward to what the reasonable person considers to be reasonable from the perspective of the court. Professor Horwitz

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218. The importance of interpreting terms consistently with other terms of the contract was recently noted by the United States Court of Appeals for the Seventh Circuit when it decided an issue "[m]indful of the maxim that an agreement must be interpreted as a whole and all parts harmonized as far as possible so that no part is rendered surplusage." Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 630 (7th Cir. 1993); *see also* Peiffer v. Allstate Ins. Co., 187 N.W.2d 182, 185 (Wis. 1971) ("[T]he agreement must be considered as a whole and all parts harmonized as far as possible."); Marion v. Orson's Camera Ctrs., Inc., 138 N.W.2d 733, 735 (Wis. 1966) ("It is not the office of a judicial tribunal to find a meaning which is contrary to the language used in an agreement.").

219. FRIED, *supra* note 21, at 72.

220. Spiedel, *Unconscionability*, *supra* note 83, at 363.

221. PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 316 (12th ed. 1989).

222. "[T]he boiler-plate is assented to en bloc . . . on the implicit assumption . . . that . . . its terms are neither in the particular nor in the net manifestly unreasonable and unfair." LLEWELLYN, *supra* note 167, at 371.

223. *See, e.g.*, Stephen Hedley, *Keeping Contract In Its Place*—Balfour v. Balfour *and the Enforceability of Informal Agreements*, 5 OXFORD J. LEGAL STUD. 391, 397-99 (1985) (discussing three main theories which courts apply in determining the intent of the parties).

summarized this conversion of the reasonable person: "Objectivism was the legal expression of this quest for uniformity. It shifted legal inquiry away from a focus on actual intent or will toward a concern with reasonable, average, or customary practices."[224]

2. The Relational Reasonable Person

Classical contract's paradigm is the discrete, one-shot transactional exchange. The reasonable person is propelled back into time to the moment of the formation of the contract. The reasonable person analyzes the language of the contract, the characteristics of the parties, and the surrounding circumstances at the time of the formation in order to determine contractual intent and the meaning of the contract.[225] Modern contracts have become increasingly complex multi-event happenings incapable of being analyzed by a static reasonable person whose fixation is upon the mystical moment of formation. The modern contractual relationship is often a long-term evolutionary phenomenon. The evolving and open-ended nature of many modern day contracts led one commentator to proclaim that "[t]he complexity of most modern agreements insures that such will rarely be fully completed."[226] In this framework the normal application of the reasonable person is ill-equipped. The search for specific intent regarding a contractual term or event may be difficult to uncover using a traditional reasonable person analysis. "When rights and obligations cannot be traced to an express contract, but instead relate back to an informal and often long-term relationship . . . it is difficult to find real consent to the duties imposed by courts . . . ."[227]

Professor MacNeil poses a response to this divide between transactional and relational contracts: "[One] response is to develop an overall structure of contract law of greater general applicability than now exists and to merge both the details and the structure of transactional contract law into that overall contract structure."[228] The inherent flexibility of the reasonable person makes it open to modification in order to account for reasonableness in the context of a long-term relational contract. The arsenal of facts used to fabricate the

224. HORWITZ, *supra* note 19, at 48.

225. The courts interpretive analysis is likely to center upon "the practices of actors and on their usages, customs, and interpretations that *mediate* between [their] actual patterns of conduct and the formal juridical instruments that are deemed to govern them." Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 568 (1983).

226. Thomas P. Egan, *Equitable Doctrines Operating Against the Express Provisions of Written Contract (Or When Black and White Equals Gray)*, 5 DEPAUL BUS. L.J. 261, 312 (1993).

227. Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 142.

228. Ian R. Macneil, Commentary, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 597 (1974).

reasonable person will need to be expanded to include the elements often found in long-term relationships—trust, cooperation, and informality.

In the relational context, the reasonable person must work within an expanded totality of the circumstances analysis. The application of the reasonable person standard to a specific contractual act may yield a different conclusion than one which views that specific act as only a single event within a more expansive relationship. Within such an expanded relational framework, it may be more likely for the reasonable person to find a binding obligation. This broadened perspective will make the reasonable person more adaptable and useful in the interpretation and enforcement of relational contracts. The key additional circumstance of this broadened analysis is the nature of the relationship itself. The reasonable person must decide whether the "parties willed a certain normative relationship."[229] If so willed, then the contractual issue or term for which the reasonable person has been called upon to address should be interpreted in a way conducive to that normative relationship.

B. Reliance Theory and the Reasonable Person

In a more traditional role, the reasonable person's primary task is to determine whether a party intended to enter into a binding legal obligation. Once such contractual intent is found, the reasonable person must determine the meaning of what the party intended. The reasonable person reviews the outward manifestations in the search for contractual intent and contractual meaning. The reasonable person is not concerned with what the promisor actually intended, but is only concerned with intention as manifested in the promisor's words and conduct. Professor Eisenberg describes the objective perspective of the reasonable person.

> [Objectivity] is congruent with moral norms because a person who intends something other than the reasonable meaning of his words has used language carelessly. It is congruent with policy because the security of transactions (and therefore the ability to plan reliably) would be undermined if a person could escape contractual liability by convincing a fact finder that he had subjectively attached some special, unreasonable meaning to his expressions. It is consistent with the body of the law because the law often measures conduct by a *reasonable-person standard.*[230]

There is a second area of contractual liability in which the reasonable person plays a pivotal role. It is the area where liability is affixed not upon the basis of contractual intent but on the basis of reliance by the promisee. The

229. GORDLEY, *supra* note 53, at 241.

230. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 6 (1988) (emphasis added).

reasonable person is not utilized to determine if a promisor intended to be bound, but to determine whether a promisee reasonably relied upon the promise. This is the realm of reliance theory. The promissory basis of contract is generally premised upon the notion of contractual intent. Reliance-based liability is not concerned with a party's intent but whether the party's manifestations have caused harm. Professor Atiyah describes this vein of contractual liability as based upon "something else."[231] That something else is the element of reasonable reliance. What is considered to be reliance? It is what the reasonable person standing in the shoes of the promisee believes to be grounds for reliance.

The 1871 case of *Smith v. Hughes*[232] illustrates the relationship between promise and reliance. Two parties from different trades had contracted for the sale of a specific quantity of oats. The purchaser acted upon the belief that he was purchasing seasoned oats when in reality the oats were of a newer harvest. Nonetheless, the court decided the contract was enforceable under the reasonable person standard. Even though the parties were not in agreement as to the age of the oats, they were in agreement regarding the specific batch of oats in question. If the seller knew of the purchaser's illusion regarding the age of the oats, then he could have been held accountable based upon the reliance theory. Since this was not the case, the purchaser was held to be liable because "whatever a man's real intention may be, [if] he so conducts himself that a *reasonable man* would believe that he was assenting to the terms proposed by the other party, . . . the man thus conducting himself would be equally bound."[233]

V. THE SUBJECTIVITY OF JUDGMENT

The reasonable person is the personification of the objective theory of contracts. The jural rudiments of the reasonable person can be traced to the disciplines of philosophy, psychology, and theology. The goals of the reasonable person are often premised in the language of freedom of contract. A law based upon objective interpretation of external manifestations is likely to promote predictability, certainty, generality, and, ultimately, fairness in the rule of law. Despite the elaborate development of the reasonable person standard, the fact remains that the mantle of objectivity must be viewed

231. Atiyah, *supra* note 22, at 203. It should be made clear that their is often a very close relationship between intent and reliance in a given factual situation. The clearer the manifestation of intent, the more likely it is a reflection of actual intent and the more reasonable will be the reliance. "If the promisee's reliance is reasonable, it is likely also to be within the reasonable contemplation of the promisor." Yorio & Thel, *supra* note 186, at 123. Thus, reliance can be seen as the flipside of intent.

232. 6 L.R.-Q.B. 597 (Q.B. 1871).

233. *Id.* at 607 (emphasis added).

through the subjective gaze of the judicial mind. In order to better understand the interpretive value of the reasonable person standard we must look into that mind. "[A] map reader who wishes to find out where he is located . . . tries to discover something about himself, not something about the map . . . ."[234]

Cardozo's adage that the role of judge is one of creation underscores the subjectiveness of the judicial decision-making process.

> [W]ithin the limits [of precedent and custom] thus set, within the range over which choice moves, the final principle of selection for judges . . . is one of fitness to an end. . . . We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will . . . determined the form and tendency of a rule which at that moment took its origin in one creative act.[235]

The fabrication of the reasonable person can be seen as one of these creative acts. A judge sweeping the landscape of facts, custom, usage, and practice has much to choose from in developing a concept of the reasonable person. This landscape is viewed through the unique vantage of the individual judge.[236] John Dewey explained that the process of thinking is influenced by a "number of unseen and unconsidered causes—past experience, received dogmas, the stirring of self-interest, the arousing of passion, sheer mental laziness . . . and so on."[237]

The subjectivity of judicial decision-making and the objectivity of the reasonable person standard can be said to have a reciprocal relationship. The reasonable person is the inevitable prisoner of the subjective judicial mind. Nonetheless, the reasonable person acts as a constraining influence upon judicial subjectivity. "The primary restraint on judges is the compelling need to articulate a principled decision, one that resides in logic independent of the result of the case at issue."[238] It can be said that judges are constrained by institutional values. A judge's view of the purpose of courts, the law, the process of adjudication, the importance of uniformity, and predictability are all examples of institutional values. The use of the reasonable person standard can

234. GIDON GOTTLIEB, THE LOGIC OF CHOICE 95 (1968).

235. CARDOZO, *supra* note 4, at 103-04.

236. "[J]udges generally have a choice among competing principles and . . . their choices are based on personal attitudes and values . . . ." HOROWITZ & WILLGING, *supra* note 66, at 27.

237. DEWEY, *supra* note 110, at 26.

238. *Id.* The importance of rationalization to judicial decision-making was explored by Joel Levin. "[J]udicial decisions are reconstructions. Once the judge arrives at a decision, he employs an analogue yielded by his judicial view and reconstructs his decision on a rational basis." Joel Levin, *The Concept of the Judicial Decision*, 33 CASE W. RES. L. REV. 208, 221 (1983). The reasonable person can be seen as such an analogue.

be seen as serving one of the more prevalent institutional values, that of loyalty to "the orderly development of the law."[239] Judges feel compelled to justify their decisions by reference to some external, objective analogue.[240] The reasonable person provides a well recognized arbiter that a judge may use to stamp a decision with an aura of objectivity and rationality.[241]

A. Gardner, Holmes, and Llewellyn on Judicial Constraints

Professor Gardner categorized the judicial decision-making process into three intellectual stages. The "scientific stage" places the reasonable person in the role as discoverer of the *is* of contract. It is the "ascertainment of what the parties did and thought."[242] This is the use of the reasonable person in a descriptive persona. The reasonable person in the normative persona is referred to as the "ethical stage." This is the reasonable person acting as the advance guard of a community's sense of fairness, or the *ought* of contract. It is the determination of what ought to have been done and what ought now be done.[243] The "practical stage" of Gardner's analysis can be seen as a combination of the first two stages as configured around the individual judge's core values. The practical stage is the rendering of a decision that represents the "best practicable means of bringing about a just result."[244]

The constraints of precedent, legal rules, institutional values, and legal and community norms from which the reasonable person is born all act to limit the discretion of the jurist. Justice Holmes in *Southern Pacific Co. v. Jensen* poetically articulated the bounded nature of judicial discretion or subjectivity. "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[245] They are constrained by law's objective guideposts, like the doctrine of stare decisis, and legal standards, like the reasonable person. Karl Llewellyn believed that the meaningful constraints upon judicial discretion, or *leeways*, were to be found in the more sublime reaches of the judicial mind. The inner workings of the judicial mind are conditioned by a process of socialization that results in one acting as a judge *qua* judge.[246] Llewellyn

239. Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 215 (1984).

240. Judges feel a natural compulsion to give an account for all arguably relevant rules, principles, and policies that bear upon the cases before them. *See* Samuel I. Shuman, *Justification of Judicial Decisions*, 59 CAL. L. REV. 715, 720-21 (1971).

241. For a discussion of rule application and judicial justification, see David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984).

242. Gardner, *supra* note 28, at 39.

243. *Id.*

244. *Id.*

245. 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

246. Stanley Fish developed the concept of the judicial system as a "community of

believed that the members of the judicial community were indoctrinated with an "operating technique." It was through this technique that the judicial mind was influenced by a sense of judicial community and the notion of judicial craft.[247]

Llewellyn structured cases along a spectrum ranging from those susceptible to strict rule application to those requiring or allowing for a higher degree of subjectivity. The reasonable person standard can be seen as an example of an application of the former type of case. It is, however, also susceptible to a high degree of subjectivity. The fact that the reasonable person is created on an ad hoc basis allows for subjectivity in the fabrication and implementation of the standard in order to justify a desired result. Llewellyn believed that judicial decision-making generally revolved around a "judge's honest efforts to derive a conclusion from a rule [or standard]."[248] In the application of legal rules and standards, however, judges are likely influenced by emotional factors[249] and public policy. "[J]udges more or less consciously behave in a policy-oriented fashion . . . within the leeway bounded by rules and precedents."[250] It can be argued that the reasonable person standard is itself a policy-oriented device. The reasonable person generally reflects a communal vision of appropriateness. Ronald Dworkin's theory of adjudication is essentially a theory of community.[251] The judge is sensitive to the notion of community in fabricating the reasonable person. "The prudential judge . . . is attentive to general standards of reasonableness and the need for coherence . . . ."[252] Philosopher Pierre De Tourtoulan was more vehement in his belief in the relationship between community standards and the role of judge. "[T]he law ought to be at the time of its creation the expression of the will of all, or, at least, of the greatest number, and . . . this . . . ought to be instilled into the judge and the

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interpretation." *See* Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982). There is a normative framework in which a judge assesses himself in relation to the judicial community. "By failing to adhere to basic norms that define his role within the legal system, he has performed an act that is determinately, objectively wrong under the law and he has violated his promise to fulfill the judge's role." GREENAWALT, *supra* note 6, at 89.

247. Paul Gewirtz, *Editor's Introduction to* KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA at ix, xix (Michael Ansaldi trans., 1989). Llewellyn coined a number of phrases to describe the subjective influences including the notion of *judicial intuition* which he borrowed from Roscoe Pound, the *sociology of doctrine*, and judicial *sensitivity*. *See* LLEWELLYN, *supra* note 5, at 78, 89, & 79.

248. LLEWELLYN, *supra* note 5, at 10.

249. In some decisions "emotional factors [such as] ethical, political, sociopolitical, economic, religious . . . are the deciding factor." *Id.*

250. *Id.*

251. *See* Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963) (discussing judicial discretion).

252. CORNELIUS F. MURPHY, JR., DESCENT INTO SUBJECTIVITY 116 (1990).

jurist."[253] The reasonable person can be seen as a judicial attempt to cohere the facts of a given case with community standards.

The reasonable person standard and its application is essentially fact-based. The standard is premised upon two sets of facts, those stemming from the case and those procured from community standards and practices. For Llewellyn this fact-based approach is hardly a purely objective exercise. There is an indeterminacy of facts because the determination of the factual is experienced-based.[254] Llewellyn's operating technique involves the application of contractual rules through a categorization of facts. This categorization of facts is an attempt to limit the scope of judicial subjectivity. Certain categories of facts dictate a finding of legal consequences. The reasonable person can be seen as a vehicle for categorizing facts that are legally significant. This technique ameliorates, but does not eliminate, the subjectivity of factual interpretation. It is sufficient to acknowledge that the judicial mind is influenced by both the objectivity of the reasonable person and the subjectivity of experience and values. William James saw this as a positive. In his influential work *Pragmatism*, he saw the need in any system, legal or otherwise, to possess both the influences of "loyalty to facts" and of the "old confidence in human values."[255]

B. The Subjectivity of Judgment

The appeal of the reasonable person is rooted in notions of objectivity and impartiality. The reasonable person provides an aura that the judicial mind "'can rise above all considerations of personal conviction and private feeling'" in rendering a decision.[256] It is an illusion, however, to believe that a judge's personal values and beliefs do not enter into the fabrication and application of the reasonable person standard. The judge must construct the reasonable person through a personal subjective belief of reasonableness.[257] Discretion is a

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253. DE TOURTOULAN, *supra* note 65, at 192.

254. If one observes a new fact situation *and is sensitive to its real-life meaning*, then there is a sudden and (so to speak) ex post facto change in the meaning of one's prior life experience in that area . . . . The "intuition" in this process lies in the judge's subconsciously using his prior experience and his sensitivity to the meaning of new fact situations. . . . A judge's intuition extends only as far as his experience and sensitivity.

LLEWELLYN, *supra* note 5, at 79.

255. WILLIAM JAMES, PRAGMATISM 13 (Bruce Kuklick ed., Hackett Pub. Co. 1981) (1907).

256. ARTHUR T. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 20 n.67 (1956) (citation omitted).

257. The judicial process . . . is a retrospective or backward-looking process of analysis calculated to interpret general rules in terms of particular sets of facts. The important point is that in order to apply law it must be interpreted . . . . Someone must be able to say what the general rule of law means

necessary ingredient of the reasonable person standard because it needs to be reinvented on a case by case basis. Discretion in the area of contract law manifests itself in numerous ways. Like human fingerprints, no two legal fact patterns are identical. Subjectivity enters the equation through the judicial sentiment of wanting to do justice in a particular case. Often, a court avoids injustice through innovative interpretations of "[h]istory or custom or social utility."[258] This creative interpretation directly impacts the fabrication of the reasonable person. Through the arts of distinction and discovery a court can avoid the onerous results of a particular fabrication. A modification of custom or a creative recognition of a trade usage is used to cloak a just decision with the halo of conformity to the reasonable person standard. If the modification is subsequently used by other courts, then the initial act of creation is surrounded with "the halo of conformity to precedent."[259]

Justice Cardozo discussed the interplay between the role of subjectivity and the application of external standards such as the reasonable person.

> [The judge's role] is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community [the objective sense] regarding transactions like those in question.[260]

"He is to exercise a discretion informed by tradition [subjective sense], methodized by analogy, disciplined by system [objective sense], and subordinated to 'the primordial necessity of order in the social life.'"[261] The reasonable person standard incorporates objective facts and subjective elements when used to interpret contracts. The objective theory as represented by the reasonable person standard becomes a misnomer when it disregards the reality of the subjectivity of judgment. "Only if we are conscious of our experiencing, understanding, judging, and deciding can we guarantee the objectivity of the results."[262] It is only in attempting to understand the role of the subjectivity of judgment and its relationship to the fabrication of the reasonable person can we hope to discover objective truth.

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to a particular person in a particular set of circumstances.

THE NATURE AND PROCESS OF LAW, *supra* note 109, at 138. That person in the law of contracts is the reasonable person as constructed by the individual judge.

258. CARDOZO, *supra* note 4, at 43.

259. *Id.* at 45.

260. *Id.* at 74.

261. *Id.* at 141.

262. GRANFIELD, *supra* note 89, at 3. Granfield succinctly states that "objectivity always depends on subjectivity." *Id.*

1. Discretion as the Touchstone of Subjectivity

Contractual decision-making involves a dialectic with the reasonable person and the subjectivity of judgment representing the objective-subjective poles. The touchstone of the subjective pole is judicial discretion. It is the interplay between judicial discretion or selectivity and the existing standards and rules of law that directly impact upon the implementation of the reasonable person standard. "We can make sense of the idea of judicial choice and discretion only against a background of rules to which judges are subject."[263] Rule skeptics believe judges are free to ignore or interpret rules and standards in order to justify a preconceived decision. To them, the reasonable person acts as a facade to mask judicial discretion. The court constructs the reasonable person with an eye towards rationalizing a predetermined result.

An alternative, and I believe a more plausible interfacing of the poles of the dialectic, is that judicial discretion is constrained by standards such as the reasonable person. The reasonable person standard acts as a check upon unbridled judicial discretion.[264] It requires the court to discuss the objectivity of its analysis by way of its fabrication and implementation of the reasonable person standard. The discretion inherent in the art of judicial interpretation is constrained by the judicial reverence for the rules and standards of law. Professor Greenawalt discusses coherence theory as it relates to judicial discretion and external standards. Under a theory of coherence a judge gives effect "as objectively as he can to the values already implicit in the legal system."[265] The judge's decisions must cohere with judicial benchmarks existing within authoritative legal standards. The reasonable person is an example of such a legal standard.[266]

There are inevitably areas where the objectivity of legal standards will fail to provide adequate guidance. It is in these areas that the subjectivity of judicial discretion will play a pivotal role. "When authoritative standards yield no clear

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263. Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 465 (1986); *see also* John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931) (discussing the philosophy of legal rules and their importance in judicial decisions).

264. Professor Kronman discusses the free creativity element of judicial decision-making:

> The idea that there is an irreducible element of free creativity, of interpretive freedom, in the adjudicative process which is left over, so to speak, after one has taken account of all the rules that might conceivably bear on the case at hand is today an idea so familiar, so patently obvious, that it has lost all of its original power to shock or disturb.

Anthony T. Kronman, *The Problem of Judicial Discretion*, 36 J. LEGAL EDUC. 481, 481 (1986).

265. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 396 (1975). Greenawalt analyzes the works of Ronald Dworkin and Rolf Sartorious on the subject of judicial discretion.

266. Others that come to mind include the legal standards of materiality, substantiality unconscionability, and good faith.

answers . . . and when more than one result will widely be regarded as a satisfactory fulfillment of his judicial responsibilities . . . [the judge] has discretion to decide between them."[267] Another area where judicial discretion plays a crucial role is the determination of whether an issue is one of law or one of fact. A court may maneuver around a previous fabrication of the reasonable person by distinguishing a previous case or usage upon the facts.[268] An issue of law is then transcended into an issue of fact. The reasonable person of a similar case can be reconfigured to support a different result.

The reasonable person is an example of the use of community values and customs in the fabrication of a legal standard. It is the task of the judge to determine the existing values, customs, usage, and practices of a particular community. How does a judge differentiate personal values from community values? The objective aims of a judge in uncovering community values will undoubtedly be tainted by the judge's personal value system. Often times this infusion of personal values into the judicial decision-making process may not be premeditated. "[W]e are often able to find reflections of our own views in external ambiguous sources, . . . [however] our capacity for self-deception increases as the level of abstraction gets higher."[269] This projection of personal values into the community value determination is likely to increase when dealing with such abstract concepts as good faith, fair dealing, and reasonableness.

2. The Reasonable Person as Synthesis

The reasonable person can be seen as a synthesis of legal and community values. The individual judge constructs the reasonable person within the constraints of the judicial community and of the extra-judicial community. The notion that the reasonable person is a product of judicial decision-making has been explored by a number of commentators. Ronald Dworkin speaks of law as a collective enterprise in which judges act as novelists writing successive chapters of a chain novel.[270] From this perspective the fabrication of the reasonable person is not undertaken on a purely ad hoc basis. Instead, earlier fabrications are used as a starting point to which a judge turns for guidance. At most, a newer reasonable person is simply a modification of an earlier fabrication. Earlier fabrications of the reasonable person by fellow judges and lawyers can be seen as constraints upon judicial discretion and subjectivity. Duncan Kennedy refers to the notion of *double objectivity* as a conscious effort by judges to conform their decisions within a range of acceptability as determined

267. Greenawalt, *supra* note 265, at 378.

268. *See, e.g.*, Ashville Invs. Ltd. v. Elmer Contractors Ltd., [1989] Q.B. 488 (C.A. 1987) (holding that a previous interpretation of an arbitration clause did not have precedential value).

269. Greenanwalt, *supra* note 265, at 397.

270. RONALD DWORKIN, A MATTER OF PRINCIPLE 159 (1985).

by the general legal community.[271] A judge attempts to fabricate the reasonable person to reflect a view of objectivity and as a fabrication that will be acceptable within the legal community. Professor Kennedy felt that this process of fabrication and application involved a social component.[272] The yearning for acceptance and credibility acts to keep the judge's subjectivity within acceptable limits. Consequently, the reasonable person can be seen as a synthesis drawn from the entire judicial community.

The reasonable person can also be seen as a Hegelian synthesis of the external and the internal.[273] This synthesis acknowledges that behind the objectification of reasonableness lies the subjectivity of judgment. The synthesis is a realization that the generality of law as represented by the reasonable person must be tempered with pragmatic application. Often the concerns of pragmatism, justice, and subjectivity are found in the courts' dicta. These concerns are then synthesized over time transforming the dicta into rule. The subjective is converted into the objective. Arguably, the interpretation of facts is the heart and soul of the reasonable person. Professor Frug asserts that "[t]he interpretation of facts suffers from the . . . intermixture of subjectivity and objectivity."[274] Since this intermixture or synthesis "is a human creation and not a reflection of what the world 'is really like,'"[275] the reasonable person is similarly a legally concocted fiction.

Professor Bronaugh speaks of "subjective reasonableness" in analyzing the bargain theory of contracts.[276] He openly asserts that the reasonable person possesses a strong subjective element. His reasonable person is not the communal or detached personification of pure objectivity. Instead, his reasonable person has a party-specific perspective to which a party's subjective beliefs play a role in the reasonableness inquiry. The subjective beliefs of the parties are encapsulated within an objective boundary.[277] "[T]o test the reasonableness of someone's subjective belief is not to be indifferent to his belief; it is that *subjective* state which is the very subject of an [objective] evaluation."[278] Subjective reasonableness allows a defending party to state

271. Kennedy, *supra* note 104, at 521.

272. *Id.* at 561.

273. *See generally* GEORG W.F. HEGEL, THE PHILOSOPHY OF HEGEL (Carl J. Friedrich ed., 1954); Summers, *supra* note 206, at 12 ("Hegel worked out a theory of logic that seeks to eliminate dichotomies or at least to unify or synthesize opposites.").

274. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1292 (1984).

275. *Id.* at 1291 (citing Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074-75 (1980)).

276. Richard Bronaugh, *Agreement, Mistake, and Objectivity in the Bargain Theory of Contract*, 18 WM. & MARY L. REV. 213, 244 (1976).

277. *See id.*

278. *Id.* at 251.

that actual intent was not reasonably reflected in any external manifestations. Instead of the singular focus of the reasonable person upon external manifestations, a two-stage analysis emerges. First, the contracting party must prove that actual intent differed from manifested intent. Second, the contracting party must persuade the court of the reasonableness of that subjective intent. The burden of proof shifts from the plaintiff (promisee) to the defendant (promisor). The plaintiff satisfies the burden by showing the meaning attributed by the reasonable person to the defendant's manifestations. Subjective reasonableness allows the defendant a rebuttal by way of the above two-stage analysis.

The reasonable person as synthesis is a recognition that the reasonable person need not be the purely external, objective, nonpersonal creation of classical contract law. The synthesis recognizes that the reasonable person may possess objective and subjective elements, community and personal values, and internal and external factors. In terms of the subjective-objective synthesis within the reasonable person, Professor Eisenberg argues that the objective-subjective mix will vary from case to case. "[S]ubjective principles should be employed where they serve both fairness and policy, and where they do not . . . the principles employed will . . . typically depend on objective variables that provide a reliable surrogate . . . ."[279] This can be seen clearly at work at the genesis of the doctrine of substantial performance. Justice Cardozo, in the landmark case of *Jacob & Youngs, Inc. v. Kent*,[280] explains that law is inevitably a balancing act between the quest for symmetry and certainty (pure objectivity) and the sentiment towards fairness and equity (subjectivity of judgment).

> Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something . . . may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.[281]

279. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1111-12 (1984). Karl Llewellyn noted that as a practical matter a general correlation or synthesis of the subjective and the objective elements of contract exists. "Is it not clear that if in all but amazing cases manifestation did not roughly coincide with [subjective] intent, we should have neither reasonable reliance in fact nor any law of contract to make an 'objective' theory of peculiar cases necessary?" Llewellyn, *supra* note 170, at 750-51.

280. 129 N.E. 889 (N.Y. 1921).

281. *Id.* at 891.

From Cardozo's perspective the reasonable person must weigh factors of fairness and equity as well as factors of pure objectivity. To do otherwise would be acting unreasonably.

VI. THE REASONABLE PERSON AND CONTRACT LAW'S INNER EXPERIENCE

Despite the external nature of the reasonable person standard, law at its quantum level is an inner experience. Contract law in its essence is the internal belief of what is reasonable and unreasonable. The inner experience of contract law is different for the different parties in the contractual process. Both parties to a contract dispute may firmly and in good faith believe that their positions are morally and legally correct. The reasonable person provides the court with a tool to determine which party's view is the objectively correct one. The objective demeanor of the reasonable person, however, is colored by the inner experience of law. The reasonable person standard entails processing input; the facts, customs, and circumstances of each case through one's subjective beliefs of the law and through one's own notion of reasonableness. William James stated that it "happens relatively seldom that [a] new fact is added raw. More usually it is embedded cooked, as one might say, or stewed down in the sauce of old."[282] Facts, the essence of the reasonable person, are rarely processed as they appear instead they are perceived through the modifying gaze of past experience. The reasonable person is not only a creation of the present but also of the past.

The inner experience of law is not strictly an intrapersonal experience as envisioned in classical contract law. Classical contract viewed the reasonable person as a detached, impersonal arbiter of reasonableness. This impartial judge is to view objectively the facts of the case at issue and make a purely objective and essentially intrapersonal or nonpersonal determination. In reality, emotional bonding among the participants in the contract dispute resolution process frequently occurs. Total detachment is a human impossibility. The reasonable person is vulnerable to the workings of law's sympathy. "[T]he sentiment of pity is and always has been a constant factor in *modifying* usage and laws."[283] The modification of usage and law necessarily results in a change in the characteristics of the reasonable person. The emotional bonding of a judge with the contesting parties impacts upon the subsequent construction of the reasonable person. Clearly the reasonable person is not the facsimile of Kant's

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282. JAMES, *supra* note 255, at 75.

283. DE TOURTOULON, *supra* note 65, at 208 (emphasis added); *see* Note, *Sympathy as a Legal Structure*, 105 HARV. L. REV. 1961, 1968 (1992) (noting the judge struggles "between 'empathy' or emotional bonding . . . and 'legality' or rational rules."); *see also* Gardner, *supra* note 28, at 3 ("The strength of English Law . . . resides in a traditional willingness to hear the parties . . . ."); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (analyzing the interplay between empathy and legality).

rational person as envisioned by objectivists. The reasonable person of contracts possesses a conscience and a soul.[284]

The emotional component of the reasonable person can be seen at work in the development of the doctrine of unconscionability. In the area of unconscionability the ruse of pure objectivity is abandoned. The subjective elements of the parties' states of mind become of central import. "[W]e use this knowledge of the subjectivity of the individual and collective other when we argue that an unconscionable contract ought not be enforced, even though both parties [objectively] consented to it . . . ."[285] The *collective other* may well be the reasonable person of contract. This shift in the unconscionability area is an open acknowledgment that a purely detached reasonable person suffers from objective blindness.

> The insistence on rational knowledge and, hence, on objects of rational knowledge, may have blinded us to the possibilities within the human spirit for arational and arationally [or subjectively] acquired forms of undisciplined knowledge . . . We can, do, and should use our knowledge of the subjectivity of others, sympathetically and arationally acquired.[286]

This plea for subjectivity and arationality has not gone unanswered in the realm of the reasonable person. In practice, a court builds an objective version of the reasonable person while being influenced by its empathy for the parties and by its sympathy for fairness and justice.[287] A skilled judiciary can synthesize objectivity and subjectivity within its inner reasonings. Subjectivity is incorporated within the process of objectively fabricating the reasonable person. The nature of the construction process allows enough leeway for the influence of subjective elements. "[A]djudication routinizes both analogy and modification, each of which enables sympathy's search for common ground."[288] This is demonstrated through the "ability of judges to distinguish cases or uncover similarities between them by shifting their perspectives on the meaning of fact patterns. . . . [A]nalogy is, after all, imperfect."[289] "Doctrinal

284. Some commentators argue that judicial decision-making is basically intuitive in nature. *See, e.g.*, Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). The reasonable person can be considered a product of that intuition.

285. West, *supra* note 86, at 154.

286. *Id.* at 152.

287. *See* R H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 358 (1983) ("Judges and juries decide the cases. They do take into account 'subjective factors' when these can be proved or inferred from the evidence.").

288. Note, *supra* note 283, at 1969.

289. *Id.* at 1973.

flexibility (or indeterminacy) rests on the ability to . . . distinguish a new fact pattern without attacking the facial validity of that previous holding."[290]

This statement of practicality can also be applied to the fabrication of the reasonable person. This process of legal reasoning allows the judicial mind to build upon past fabrications and, if need be, to avoid earlier constructions of the reasonable person. This same selectivity allows the judge to interpret fact patterns in a way that bolsters the facade of the reasonable person as objectively, rationally, and externally based. The jurist may envision acting objectively, but the selectivity of perception and the influence of personal and institutional values[291] impact heavily upon objectivity. "[I]n most of the situations we face we can detect only a modest number of the variables or considerations"[292] that are present. Because of these human limitations the reasonable person will remain an imperfect surrogate for the objective theory of contracts.

VII. SUMMA

Some fifty years ago, Dean Roscoe Pound recognized the illusion of increased objectivity in the law of contracts. "[J]urists have sought objectivity by elimination of the difficult problems of jurisprudence . . . ."[293] Many jurists hoped that the reasonable person would provide the mechanical jurisprudence for which objectivists had yearned. At its greatest stage of evolution, the reasonable person would play the role of a Kantian rational being par excellence or reach the stature of a Greek philosopher-king. But at last, the reasonable person is only as objective as the person's creator. Institutional values, personal preferences, and the subjective posturing of the contracting parties will continue to play influential roles in contractual interpretation.

The objective theory of contracts and its reasonable person have molded the way that contract law is practiced. They have channeled subjectivity into the terminology of objectivism. The reasonable person, at the least, has provided capable jurists with a technique of judicial justification. Subjectivity in the law of contracts has been forced to conform itself to the language of objectivity. The reasonable person, "though subjectively tainted with rationalization,"[294] provides an impressive edifice for the notion of an unbiased application of the rule of law. The divergent elements, both objective and subjective, that make up contracts are made to contribute to the "rational development"[295] of contract rules and doctrine. The reasonable person serves

290. *Id.* at 1975-76.
291. *See supra* notes 234-41, 258 and accompanying text.
292. HERBERT A. SIMON, REASON IN HUMAN AFFAIRS 20 (1983).
293. Roscoe Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 444, 453 (1938).
294. Newman, *supra* note 239, at 205.
295. *Id.*

a function of legitimation.[296] It provides solace to all parties concerned that they are being dealt with fairly, objectively, and rationally.[297]

The reasonable person lives by a creed dedicated to the use of fact and objectivity in the rendering of interpretive judgments. In the fabrication and application of the reasonable person standard, the subjectivity of judgment plays a crucial role in the selection of the facts to be used in the interpretation. Kelsen saw the free discretion of judges resulting in each "application of law [and of the reasonable person] as a law-making activity."[298] Limitations to this notion of unbounded subjectivity exist. Custom, usage, the interpretive community, and the recognition of institutional values all act upon the individual judge to conform the reasonable person to a phantom reasonable person acceptable to other members of the legal community.

296. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382 ("'*Legitimacy*' is a state of widespread belief; namely, the belief that an order is obligatory or exemplary.") (emphasis added). *See generally* 1 MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 1968) (discussing concept that social action is often guided by belief in legitimate order).

297. The Weberian motives of habit, expediency, and legitimacy can be seen working behind the edifice of the reasonable person. Since it is an "ideal type[]." Hyde, *supra* note 296, at 387.

298. GOTTLIEB, *supra* note 234, at 95.