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Reconciling Contract Law's Objective and Subjective Standards

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Although the common law of contract is often said to favour 'objectivity', it sometimes seems to adopt a 'subjective' standard. The apparent tendency to switch between rival standards troubles many contract scholars. In response, some seek to vindicate objectivity alone as the one true standard. Others propose a single abstract theoretical rationale that can allegedly encompass both standards. I suggest a different approach. I try to develop a fuller appreciation of what the objective and subjective standards are and what they seek to achieve. I conclude that each is a substantive ethical ideal that specifies certain minimal requirements of decency in business dealing. On this view, the two standards are not rivals but complementary. Nor need we invoke any more abstract theoretical rationale to understand them.

INTRODUCTION

In this article I present a view of the common law of contract's 'objective' and 'subjective' standards and the relationship between them. The view is in many ways orthodox. It can be gleaned from the case law and I suspect it comports with many lawyers' assumptions about what this doctrine seeks to achieve. Accordingly some readers may find some of the points I make familiar or even obvious. But in other respects, the view I present is unorthodox. It diverges significantly from many of today's leading scholarly accounts, and indeed aims to avoid certain assumptions and intellectual tendencies that pervade them.

My view has two key features. First, I depict contract law's subjective and objective standards as substantive ethical ideals. They are standards of decent business dealing in the striking of contractual bargains. Each standard is complex and variegated and not easy to encapsulate briefly. But in essence I suggest that judges engage in a 'subjective' inquiry to disapprove various forms of unscrupulous advantage-taking. They appeal to an 'objective' standard to uphold norms of contractual seriousness and fair play.

Second, on my view the subjective and objective standards are not rivals but continuous and complementary ideals. We can imagine them as addressing two adjacent sections of a spectrum of commercial behaviour, ranging from quite outrageous forms of deceptive advantage-taking (indeed outright fraud) to far

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less blameworthy conduct that nonetheless offends a sense of contractual fair play.

Viewing the two standards as variegated and continuous ethical ideals helps us avoid the temptation to pursue a monistic or overly unified account of this area of law. Over the centuries and into our own day, contract scholars have worried that the objective and subjective standards are in tension. In part to address this worry, some have sought to vindicate 'objectivity' as the common law's one true approach (and to explain away the law's apparently 'subjective' aspects). Others have sought intellectual unity by proposing a single abstract theoretical rationale that can allegedly encompass both standards. Each of these strategies, I will argue, is problematic.

To show how these monistic or unifying strategies are problematic I will consider certain leading scholarly accounts that pursue them. In particular, I will consider certain versions of what I label the 'linguistic', 'reliance', 'practice', and 'corrective justice' theories of objectivity and subjectivity. I will not discuss many other important accounts that raise quite different issues and would require a different treatment.[1]

My positive view identifies a set of ethical concerns underlying appeals to objectivity and subjectivity across a fairly wide swathe of contract law. Some scholars distinguish various conceptual questions in this area, such as whether there is a contract, what the contract's terms are, and what those terms mean. They then adopt different views about objectivity and subjectivity in each context. Others stress distinctions among the various doctrinal departments of contract law, such as offer and acceptance, mistake, rectification, incorporation, and interpretation. Notably, those who draw these distinctions have quite various reasons for doing so.[2] Yet another group of scholars – including most of those I focus on in this article – seek an understanding of objectivity and subjectivity that is broadly consistent across the various boundary lines. My view joins their camp. I do not deny one can draw conceptual and doctrinal distinctions in this area, nor that they may be useful for certain purposes. On the other hand, it may be possible to identify a common set of concerns that animates, at least in part, judicial appeals to objectivity and subjectivity across the subfields I have mentioned.[3] This article sets forth such an account.

I present an interpretation that endeavours to be faithful to the existing law while revealing it to be intelligible.[4] Thus I emphasise some aspects of the case law and downplay others. While I do not critique the law or propose reforms,

1 For example I will not directly address David McLauchlan's extensive body of work, though I will draw on some of his insights and note some affinities between my view and his.

2 Compare for example Anne de Moor, 'Intention in the Law of Contract: Elusive or Illusory?' (1990) 106 LQR 632 with Hugh Collins, *The Law of Contract* (Cambridge: CUP, 4th ed, 2003) 117-123, 228-238.

3 I will not roam further afield into other aspects of contract law (such as damages) or private law (such as tort), where 'objectivity' and 'subjectivity' are invoked. In my view a full appreciation of these concepts must connect with an understanding of the substantive aims of the bodies of law in which they appear. The contractual doctrines I focus on in this article aim, roughly speaking, to determine what sorts of conduct and evidence properly bear on the construal of a bargain. Other areas of contract and private law have different aims.

4 Stephen Smith, *Contract Theory* (Oxford: OUP, 2004) 5.

my view could serve as a starting point, or a target, for sceptics of the common law's current approach to policing contractual bargains.

DECENT BUSINESS DEALING

To begin I will sketch a view of the subjective and objective standards as substantive ethical ideals that specify certain minimal requirements of commercial decency in contractual bargaining. I will first discuss the subjective standard, then the objective standard, then their relation. At this stage I merely offer one view of the law without giving any reason to prefer it over others.

There are many possible conceptions of what basic commercial decency demands of contracting parties. I aim to bring out just one, which I believe animates the common law of contract in England and perhaps some of her former colonies. I do not claim this conception has any purchase beyond these societies;[5] nor indeed, within those societies but outside of the common law itself. This ethical ideal is forged in the practices of judges and lawyers – though it may influence, and be influenced by, all sorts of activities outside the law.

Unscrupulous advantage-taking

How should we understand contract law's subjective standard? It is often said to ask how contracting parties 'actually' understand certain words or conduct, which involves attributing to them 'mental states' such as belief, knowledge, or intention. I certainly do not claim this formulation is false. However, I believe it does not capture the full significance of what is going on when courts appeal to subjectivity, and I would like to bring out some deeper concerns that animate this approach.

The case of *Webster* v *Cecil* arose because at some point towards the end of October 1860, Cecil, calculating the value of various parcels of land he wished to offer for sale, forgot to carry a '1'.[6] Consequently he transcribed into his offer letter to Webster a price of £1,100 when he should have written £2,100. £1,100 was clearly too low: the property had been mortgaged for £1,800 and Cecil had recently refused to sell it to Webster's agent for £2,000. Webster seems to have noticed Cecil's mistake and sought to capitalise on it by sending a letter purporting to accept at £1,100 and instructing solicitors to proceed with the conveyance forthwith. Upon receiving Webster's letter, Cecil became aware of the mistake and informed Webster and the solicitors. Still Webster sought specific performance of the bargain.

The Chancery judge declined to grant specific performance without saying much about why. Twenty years later in *Tamplin* v *James* another bench of judges supplied a vivid rationale. Lord Justice James tells us that the would-be

5 See further Paul MacMahon, 'The Englishness of English Contract Law' (unpublished ms, on file with author).

6 (1861) 30 Beav 62; 54 ER 812.

purchaser Webster 'snapped at an offer which he must have perfectly well-known to be made by mistake'.[7] Lord Justice Brett goes further, claiming 'the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake'.[8]

This concern to prevent a party 'snapping up' or 'snatching at' a bargain – a form of misconduct akin to fraud – reverberates through the case law up until the present day. A party can resist an alleged contract by saying to the other in effect: '"There really was no contract, because you knew that [my proposal] contained a material mistake. You realised that, and you sought to take advantage of it."'[9] A recent example is *Longley* v *Paddy Power Betting*.[10] In a telephone call with the betting firm, Longley asked to place £2,600 on a horse called Redemptive in the Wolverhampton races. The telephone operator's verbal slip when she passed the request on to her colleagues led the firm to place a bet of £26,000. Longley noticed the mistake but 'decided to let it ride as he was confident' he would win.[11] He did win, and litigation ensued. The trial judge was disinclined to let Longley claim a windfall given some of her key factual findings:

> I am … satisfied that, when hearing [the] reference to the sum of £26,000, Mr Longley immediately appreciated that the larger stake did not reflect Paddy Power's true intention. First, as he acknowledged in cross-examination, in his approximately ten years as an account-holder Paddy Power had never offered him a bet at a stake higher than he had requested, let alone one at ten times the latter and … in such a substantial sum. Mr Longley is an experienced and sophisticated gambler who, I am satisfied, realised at the time, as would have anyone in that position, that a mistake had been made somewhere along the line, particularly as the higher sum in question had come with no discussion or explanation and would have resulted from the simple addition of a further zero to the stake which he had requested.[12]

Not every case where one party actually knows of the other's divergent understanding amounts to 'snapping up a bargain'. *Henry Boot and Sons* v *London County Council* concerned a 'rise and fall' clause that varied the contract price for construction work if builders' wages changed. After builders won a more generous holiday scheme through collective bargaining, the construction firm Boot and Sons had to increase its contributions to the scheme, and the firm invoked the rise and fall clause against the council. Prior to contracting, the council had written to Boot claiming that the clause did not cover holiday scheme payments, only regular hourly wages. So Boot knew of the council's

7 (1880) 15 Ch D 215, 221.
8 *ibid*, 222.
9 *Hartog* v *Colin & Shields* [1939] 3 All ER 566, 567.
10 [2022] EWHC 977.
11 *ibid* at [9]; see too [81]-[84].
12 *ibid* at [84]. The court says its conclusion is consistent with the view that, if one party knows of the other's mistake as to terms, 'it is clear that they are not in agreement', *ibid* at [94.5], quoting *Statoil* v *Louis Dreyfus Energy Services* [2008] EWHC 2257 at [87]. Much could be said about this rationalisation, opening up a number of controversies about the nature and role of agreement in contract law I will not attempt to address here.

belief in this respect. Yet the Court of Appeal accepted Boot's argument that the clause covered the holiday scheme payments. 'The [council's] letter is on the face of it saying: "This is what we say these words mean"; and … the plaintiffs were entitled to say: "We do not agree with that; we accept your contract, and let the court decide whether you are right, or we are."'[13]

Moreover, the rule against 'snapping up a bargain' is limited in English law by considerations of *caveat emptor*. While one party will not be allowed to capitalise on the other's mistake about the nature of their contractual promises (as in *Webster* v *Cecil*), he may knowingly take advantage of the other's mistake about the facts underlying the deal. For example, I may sell you a good knowing you are mistaken about its key features.[14] So long as I have not induced your mistake through a misrepresentation, or violated any applicable consumer protection legislation, the controversial maxim 'buyer beware' still to a large extent applies.[15]

So far we have considered cases where one party knows of the other's divergent understanding of the contract. A similar concern about unscrupulous advantage-taking also arises in a second kind of case: where both parties share the same actual intention that diverges from the ordinary construal. For instance, courts have the power to 'rectify' written instruments that, due to common mistakes in recording, do not say what both parties expected. In the recent *Four Seasons Health Care* v *Glas Trust*[16] (*Four Seasons Health Care*), Leggatt LJ (as he then was) justifies this power by drawing on a passage from Joseph Story's *Commentaries on Equity Jurisprudence*. Story notes that, to prevent fraud, a court may rectify a document that has been intentionally drawn up by one party in order to deceive the other into committing to an unwanted deal. Story then claims a similar concern arises where there is no deceptive intent at the time of contracting, but the parties' common subjective intention later turns out to diverge from the document's ordinary construal: 'To allow [the ordinary construal] to prevail in such a case would be to work a surprise, or fraud, upon both parties; and certainly upon the one who is the sufferer. … It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it.'[17]

Again not every case of a common subjective intention that diverges from the ordinary construal will put the danger of unscrupulous advantage-taking *inter partes* at the forefront of the judicial mind. Consider Learned Hand's renowned decision in *Hotchkiss* v *National City Bank of New York*. A firm of stockbrokers was suspended by the New York Stock Exchange after the collapse of a mining

13 [1959] 1 WLR 133, 138. The House of Lords [1959] 1 WLR 1069, 1075 approves this part of the reasoning. There may be other kinds of case in which no unscrupulous advantage-taking occurs despite a known unilateral mistake as to terms. For example (one might argue) where the parties agree to record their terms in a fully integrated written document and renounce any appeal to extrinsic evidence concerning their intentions.

14 *Smith* v *Hughes* (1871) LR 6 QB 597. See also Catherine MacMillan, *Mistakes in Contract Law* (Oxford: Hart Publishing, 2010) 207-213.

15 There are, of course, other exceptions I have not mentioned.

16 [2020] Ch 365.

17 *ibid*, 380-381; also 407.

company in which they held a large interest. Shortly thereafter the National City Bank's vice-president appeared at the brokers' offices and took possession of various securities. In subsequent bankruptcy proceedings, the bank argued that its loan contract with the brokers granted it a lien over the securities. The bank adduced testimony that both it and the brokers had a common subjective intention in this respect. Learned Hand 'wholly disregarded' that testimony: 'whatever was the understanding in fact of the banks, and of the brokers too, for that matter … it is of not the slightest consequence'.[18] The judge was no doubt concerned, not so much about one party snatching a bargain from the other, as about the thwarting of bona fide third party creditors.[19]

The 'snapping up' concern, or something close to it, may also explain a third kind of case: where a party asserting the ordinary construal did not actually adopt it herself.[20] In *The Hannah Blumenthal*, the Norwegian sellers of that ship argued they had implicitly contracted with the German buyers to abandon some arbitration proceedings – since each party had for a long time appeared to the other to be doing little or nothing to advance the arbitration.[21] This argument foundered on an important fact. Privately the sellers' lawyers had continued to gather evidence for the arbitration. This could be taken to show they did not assume the arbitration was abandoned.[22] Unsurprisingly the House of Lords refused to allow the sellers to assert a contract of abandonment based on the reasonable appearances: it was 'impossible for the sellers to say', or to 'assert' with 'validity', that there was such a contract.[23] It cannot have helped the sellers' case that they began to argue for a contract of abandonment well after the dispute had started wending its way through the courts.[24]

Although the type of conduct we are considering savours of fraud and will tend to provoke in judges a similar distaste, it does not necessarily amount to 'fraud' in any strict sense (as defined, say, in the tort of deceit) or even to misrepresentation. For instance, a party who 'snaps up' a bargain may have made no false statement acted upon by their counterparty. Outright fraud is but an extreme case of deceptive advantage-taking in contract formation.

18 200 F 287, 293-294 (SDNY 1911). Unfortunately some of Learned Hand's reasoning can be read as denying any role for a subjective approach. '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 [to them], unless there were a mutual mistake, or something else of the sort.' But note the qualification at the end. See too D. W. McLauchlan, 'Objectivity in Contract' (2005) 24 U Queensland LJ 479, 479-480, fn 6.

19 cf *Rose* v *Pim* [1953] 2 QB 450, 458, 459, 462 involving a chain of contracts among bean traders, only two of whom were mistaken about their beans. This reading is endorsed in *Four Seasons Health Care* n 16 above, 387.

20 Here one might distinguish two sub-variants: where the party 1) has an intention that diverges from the objective construal; 2) has no relevant intention, for example because she does not consider the matter at all. Edwin Peel, *Treitel, The Law of Contract* (London: Sweet & Maxwell, 15th ed, 2020) at [2-003].

21 [1983] AC 854.

22 This is one of Lord Brightman's formulations of the position, *ibid*, 924-925. Alternatively, the evidence might be taken to show that the sellers *believed that the buyers did not intend* to abandon the arbitration. See Lord Brandon, *ibid*, 914, and Lord Diplock, *ibid*, 916. That would bring us closer to the *Webster* v *Cecil*-type case discussed above.

23 *ibid*, 914, 916, 924.

24 *ibid*, 896, 898.

Indeed, courts may sometimes use a subjective standard to address conduct that not only falls short of fraud or misrepresentation but is difficult even to characterise as 'snapping up a bargain'. Sometimes one party simply 'stands by' while the other makes a mistake in which the first has no real interest. In *Sullivan* v *Constable* a famed Anglo-Irish barrister, anxious to 'have a few days' sailing before the start of the Michaelmas law sittings', entered negotiations to buy a second-hand yacht.[25] The eventual contract was for the sale of the yacht 'as she lies', which ordinarily means something like 'as is'. However, in his correspondence with the vendor's agents the buyer repeatedly indicated he did not believe this phrase excluded a warranty of seaworthiness. In the Court of Appeal, Scrutton LJ thought that if the vendor's agents knew of the buyer's erroneous belief they could not deny the warranty.[26] On one reading of the facts, the vendor's agents did snap at a bargain here, capitalising on the buyer's mistake to close an advantageous deal. Yet, in their correspondence the agents had made some efforts, albeit unsuccessful, to get the rather obdurate buyer to appreciate the significance of the phrase 'as she lies'. Conceivably the agents may have given up on the matter since they did not expect it to be important. If so their conduct would be more a form of resignation than the active opportunism displayed by the purchaser in *Webster* v *Cecil*.

In sum, courts may embark upon a 'subjective' inquiry to address a variety of forms of unscrupulous advantage-taking in contract formation, ranging from outright fraud or misrepresentation, to snapping up a bargain, to standing by and allowing a counterparty to deceive themselves about the contract.[27] This list is not exhaustive: the subjective inquiry may well embrace other forms of unscrupulous conduct bearing a family resemblance to those I have mentioned.[28]

The concerns about snapping up a bargain and related misconduct could be linked – and some judges and scholars have linked them – to more general

25 [1932] 42 Lloyd's Rep 99, 100.

26 [1932] 43 Lloyd's Rep 10, 14.

27 There remains the question of the appropriate remedy. Should the policy of refusing to countenance snapping up a bargain lead a court to: hold there is no contract at all (cf *Restatement of Contracts (First)* § 71(c) and illus 2); give the innocent party the option of avoiding the contract or enforcing the objective construal; enforce a contract against the guilty party according to the known actual intention (*Restatement of Contracts (Second)* § 20(2)(a) and illus 5); or adopt some other remedy (such as denying specific performance but allowing damages)? The position of English law is far from clear. In my view the appropriate response will vary from case to case depending on what is just on the particular facts. This may depend, for example, on the value of the respective deals for one or both parties and on changes in the market price. See *ibid*, rptr's note; George E. Palmer, 'The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second' (1966) 65 Michigan L Rev 33, 47-56; Robert Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 602.

28 Another scenario may be where each party adopts a different subjective construal, both of which diverge from the objective construal. As in Corbin's hypothetical where one party intends to sell Blackacre, the other to buy Whiteacre, and the ordinary reading of their written agreement indicates a sale of Greenacre. Arthur Linton Corbin, *Contracts* vol 3 (St Paul, MN: West Publishing, rev ed, 1960) § 539, cited in David McLauchlan, 'The Contract That Neither Party Intends' (2012) 29 J Contract L 26, 31. I agree with Corbin and McLauchlan that it would generally be outrageous to hold the parties to a sale of Greenacre. In my view this is because the party opportunistically seeking enforcement of that sale would be unfairly taking advantage of the other.

private law concepts such as 'good faith', 'unconscionability', or 'fault',[29] and one might also suspect they have a distinctively 'equitable' character.[30] I cannot address here the many deep controversies about the meaning of those general ideas and their proper role in contemporary English contract law. But since some readers will be unsatisfied if I do not take any stand at all on their relevance, let me briefly sketch a tentative view.

I have stressed that the subjective standard addresses a quite specific, complex, and subtle set of concerns about misconduct in bargaining. Consequently, there is a danger of obscuring more than we illuminate if we seek to understand the standard by linking it to other legal concepts of more general application.[31] 'Fault' seems especially problematic here because it comes laden with so many substantive preconceptions. Private lawyers are familiar with and perennially debate various meanings and applications of 'fault' in tort law. I doubt it would assist our understanding to import that intellectual baggage into the particular part of contract law that is my focus.

While 'good faith' is far less obviously problematic, I suspect that at least for English lawyers it would also do more harm than good for our understanding of this part of contract law.[32] The concept is extraordinarily controversial and its meaning uncertain. Relatedly, 'good faith' appears to be a rather broad brush that is not obviously capable of drawing the necessary discriminations in this area. To give just one illustration, could it be 'bad faith' for a party to capitalise on another's mistake about the terms of a contractual deal, but not for her to take advantage of another's mistake about crucial facts underlying the transaction?

I am more amenable to invoking 'unconscionability' and especially 'equity' to gather up and label the set of concerns I have identified. For English lawyers these concepts amount to familiar touchstones that gesture towards considerations of interpersonal fairness, but which do not in themselves purport to provide determinate guidance. For that, one must look closely at how the concepts play out in a particular legal domain. Hence there is less danger that these concepts will distract us from attending to the particular forms of misconduct the subjective standard addresses. However, I would give up on these concepts too to the extent that they lead us into potentially distracting debates, for example about exactly what the word 'unconscionable' really means, or about the relevant rules' precise historico-jurisdictional pedigree.

29 *Four Seasons Health Care* n 16 above, 407; John Phillips, '*Smith v Hughes* (1871)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing, 2008); Friedrich Kessler, '*Culpa in Contrahendo*, Bargaining in Good Faith, and Freedom of Contract' (1964) 77 Harvard L Rev 401 (though see 402, fn 4). Hugh Collins develops the notion of a 'duty to negotiate with care', Collins, n 2 above. I cannot do justice here to these sophisticated and illuminating accounts which share many affinities with mine.

30 For a sensitive discussion see Tiong Min Yeo, 'Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity' [2004] SJLS 227.

31 This difficulty may not arise in the same way for efforts to critique or reform the law.

32 It may be more helpful in other areas of contract law (for example policing the exercise of contractual discretion) or in other jurisdictions.

Seriousness and fair play

How should we understand contract law's 'objective' standard? It is often said to ask how a 'reasonable person' would construe the relevant words or conduct. The reasonable person may be influenced by conventional meanings and by context reasonably available to both parties. It is hard to say more without becoming mired in controversy.[33] Contract scholars debate where to place the imagined reasonable person: 'in the shoes' of one or other party (if so, which party?), or in a 'fly-on-the-wall' position observing both?[34] They debate what kinds of information should influence the reasonable person – for instance, where the parties have signed a contractual document should evidence from outside the document's four corners be considered?[35] Rather than entering these debates I want to ask a different question. Regardless of where we place our imagined reasonable person and what information is available to her, what does it mean to be 'reasonable'? This may bring out some deeper concerns that underlie the objective approach. Here I do not seek to belabour the obvious point that reasonableness is context-dependent, but to observe that a quite particular and largely unarticulated conception of proper bargaining behaviour animates appeals to reasonableness in this context.

In *Tamplin* v *James*,[36] a purchaser signed a contract for a plot of land near the town railway station in Lydney, Gloucestershire. Having 'known the property from a boy', he knew it had long been occupied by an inn and saddlery.[37] The purchaser assumed he would acquire all the land those businesses occupied – when in fact they stretched over the boundary line of the vendors' land (which was barely fenced off at all) onto land owned by the railway. Thus, the plot for sale was much smaller than the purchaser believed. When the vendors offered the land for sale they displayed a tracing of a tithe map with the plot outlined in coloured ink – 'a description which could not mislead anybody who took reasonable care' to look at it.[38] The purchaser told the court he did not consult the map and instead relied on his assumed local knowledge. According to the court this merely showed that his belief about the boundaries was not 'reasonably entertained'.[39] He could not escape a contract to buy the land described on the map.[40]

Lucy v *Zehmer* notoriously upheld a contract for the sale of a Virginia farm written out on the back of a restaurant check, over a bottle of whiskey, shortly

33 For an excellent overview see Mindy Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation' in Jason W. Neyers and others (eds), *Exploring Contract Law* (Oxford: Hart Publishing, 2009) 348-355.

34 J. R. Spencer, 'Signature, Consent, and the Rule in *L'Estrange v Graucob*' (1973) 32 CLJ 104; William Howarth, 'The Meaning of Objectivity in Contract' (1984) 100 LQR 265; J. P. Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 LQR 274; William Howarth, 'A Note on the Objective of Objectivity in Contract' (1987) 103 LQR 527.

35 Spencer, *ibid*.

36 n 7 above.

37 *ibid*, 216.

38 *ibid*, 221.

39 *ibid*, 218.

40 Compare *Denny* v *Hancock* (1870) 6 Ch App 1 where (according to the appellate court, reversing the trial judge) confusion caused by the appearance of a physical boundary was compounded by the vendors' misleading map. See further text to n 48 below.

before Christmas.[41] Despite the informal setting the parties appeared to be in earnest: they discussed their deal for some time and took some care over the drafting and redrafting of their contractual language, providing for instance that the sale was conditional on satisfactory title. Later the seller testified that he had secretly been playing a joke – that he whispered to his wife, at the time, that he was 'just needling' the buyer and 'didn't mean a thing in the world'.[42] The court disregarded that testimony. To all appearances 'the contract represented a serious business transaction' 'rather than a casual, jesting matter'.[43] '[A] person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.'[44]

What do these cases tell us about contractual objectivity? Each can be explained by invoking the figure of a 'reasonable person'. But what exactly must we assume about the reasonable person in order to conclude that he would properly consult a property map, and would realise that signing a legalistically worded document, even in a bar while whispering jokes to his wife, could have binding contractual effect? (After all, one could imagine circumstances in which one might reach a different conclusion about what was 'reasonable' – say, in a society where sales of land were less important, or where contracting was never done in bars.) The judgment about what is reasonable here surely flows in part from the assumption that contracting is a solemn matter to be undertaken in a disciplined and business-like way. In the words of the Virginia court, a contract is a 'serious business transaction'. That is why a contract cannot be undermined by sloppy mistakes, foolish jokes, or other similar conduct.

Courts invoking the objective approach also endeavour to uphold a certain sense of what I will call contractual 'fair play'. This is apparent in cases such as *Tamplin* and *Lucy* and comes out strongly in some of the earliest judicial formulations of what we now call the objective test. Consider the 1859 case of *Cornish* v *Abington* (*Cornish*). Abington had partly paid for and signed receipts acknowledging the delivery of various works supplied by the lithographic printer Cornish. When Cornish sued for the balance of the contract price Abington claimed he had not intended to contract with him but rather with one Gower, the former foreman of Cornish's printworks. The court barred Abington from making this argument because his own words and conduct in signing the receipts and paying part of the price naturally intimated a contractual relationship with Cornish. As Pollock CB put it:

> If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the

41 84 SE 2d 516 (Va 1954).
42 *ibid*, 519.
43 *ibid*, 521.
44 *ibid*, 522.

> party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.[45]

Here the judge not only appeals to reasonableness but articulates a particular ethical conception of what is reasonable: a businessman should not 'gainsay', or go back on, his own words and conduct.

In calling this ideal of 'fair play' an ethical conception I do not mean that a failure to live up to it should always attract serious moral rebuke. At least one of the judges in *Cornish*, Martin B, believed '[t]here [was] no reason to suppose that the defendant acted otherwise than as an honest man',[46] and more generally many parties who fall foul of the objective standard are not faulty in any grave sense. As Martin B also recognised in *Cornish*, the standard can be 'somewhat hard upon' those to whom it applies.[47] It licenses a certain indifference to the particular plight of contracting parties, since a party is assumed to have the acumen, sensibility, and wherewithal ordinarily expected of someone engaged in this serious business even if her failure to live up to that assumption turns out to be ruinous.

In partial defence of what I am calling the fair play principle, it cuts both ways, subjecting both parties to the same standard. Indeed, even if one party's conduct falls short he may be absolved if the other's sloppiness contributed to his error. So in *Denny* v *Hancock*, a purchaser of land who arguably should have taken more trouble to interpret the vendors' map, in order to see whether some 'magnificent' elm trees he wanted were included in the plot, nonetheless escaped the bargain because the map's marking of the vegetation was naturally confusing.[48]

I will not try to compile an exhaustive list of all of the forms of conduct the objective standard may address. No such list appears in the common law itself. Courts can apply or extend the objective principle to new forms of conduct bearing a family resemblance to those in existing cases, and exercise a significant degree of judgment to determine what should be expected of a particular pair of contracting parties given the circumstances of their particular deal. This judicial flexibility is made possible in part by the device of the 'reasonable person', who can be placed into just about any context and appear to yield a conclusion about appropriate norms of contractual behaviour.[49]

It may help to contrast the ethical ideal underlying the common law's objective approach with some other conceivable conceptions of fairness in transacting. Consider a purely moral promissory relation, such as a promise between friends about a non-commercial matter. We would not approach this transaction with the same commitment to seriousness and fair play and indifference to the parties' plight. Sometimes a purely moral promisor is surely absolved of a duty to perform if she makes a mistake due to her own foolishness

45 (1859) 4 H&N 549, 556; 157 ER 956, 959.
46 *ibid*, 959-960.
47 *ibid*, 960.
48 n 40 above, 14. See too *Scriven Brothers* v *Hindley* [1913] 3 KB 564.
49 cf Mayo Moran, *Rethinking the Reasonable Person* (Oxford: OUP, 2003) 301.

or sloppiness,[50] and an apparent promissory commitment between two friends may fall to the ground if one later reveals she was joking. Or consider a sacred religious pact,[51] in the context of which it might be highly relevant if a party confessed – perhaps to his priest, or on oath before a magistrate – that he had been mistaken or insincere.

Some common law contractual relationships may not be subject to the full force of the ethical ideal I have been trying to capture. The ideal most clearly applies to one paradigmatic sort of contractual interaction – roughly speaking, an arm's length commercial transaction.[52] Some contractual relationships have a more 'fiduciary' character (trustees and beneficiaries, lawyers and clients, directors and companies, and so on, can contract) so that one party must put the other's interests first or at least accord them higher priority than in an ordinary business deal. In other cases the parties' relationship is not fully fiduciary but amounts to a cooperative joint venture – the kind of relationship in which so-called 'relational' contract theorists have shown great interest.[53] These relationships may be governed by norms somewhat different from those of arm's-length deals.

The overall picture

Having recovered a fuller appreciation of the ideals of conduct the objective and subjective standards aim to realise we can now consider their relation. I suggest the two standards combine to yield a complex but coherent ideal of basic commercial decency in the striking of contractual bargains.

To see this it may help to imagine the two standards as addressing adjacent (indeed partly overlapping) sections of a spectrum of contractual dealmaking behaviour. The spectrum ranges from barely criticisable to thoroughly reprehensible conduct. We begin at one end – within the 'objective' section – with mere failures to live up to the norm of fair play that precludes gainsaying one's own words and conduct. (Failures that may be hardly blameworthy at all.) Moving further along the spectrum, we encounter various sorts of arguably culpable but hardly disgraceful conduct such as contractual foolishness or sloppiness. Next – shifting into the 'subjective' section of the spectrum – we find

50 See for example Peter Benson, *Justice in Transactions* (Cambridge, MA: HUP, 2019) 116-117, referencing the work of Charles Fried and A.I. Melden.

51 It may be that something akin to this conception can still be glimpsed in French law. 'French law has retained and bolstered the canonist dimension of the civil law tradition, analogising the relation of the private citizen to the law to that of the sinner to God … the citizen stands before the law in conscience, that standing being first and foremost a moral one, thus naturally anchored in the person's most inner thoughts.' Catherine Valcke, 'Consent in Contracts' in Jan M. Smits and others (eds), *The Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, forthcoming 2023). Valcke mentions important qualifications. See too Daniel Friedmann, 'The Objective Principle and Mistake and Involuntariness in Contract and Restitution' (2003) 119 LQR 68, 69-70 and fns10-11; Wayne Barnes, 'The French Subjective Theory of Contract' (2008) 35 Tulane L Rev 359.

52 cf P. S. Atiyah, *Essays on Contract* (Oxford: OUP, 1986) chs 1, 2.

53 Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 CLP 297, 324.

cases where a party deliberately 'stands by' and lets their counterparty misdirect themselves about the terms of the deal. Then we reach more troubling cases in which one party actively and opportunistically 'snaps up' a bargain, before ending with cases of misrepresentation and indeed outright fraud.

On this view the objective and subjective standards are not rivals. They are continuous and complementary ideals that together specify a range of contractual behaviour the law affirms or disapproves. In a given case a court may consistently endorse aspects of both standards – for instance, disapproving dishonest advantage-taking and also the gainsaying of one's own words. Indeed, especially in the older cases we often see judges endorsing both of what we now call the 'subjective' and 'objective' standards without apparent concern that their reasoning might be internally inconsistent.[54]

To be sure, the two standards may be brought into conflict given the facts of a particular case. For example, sometimes one party asserts the ordinary construal of a bargain, invoking the fair play principle, but the other claims that enforcing the ordinary construal would countenance dishonest advantage-taking. Who should prevail? Here a court must reach a judgment (explicit or implicit) about which forms of misconduct most urgently demand its attention. In predicting the court's judgment I suggest the following rule of thumb. The further we move towards the 'subjective' or fraudulent end of the spectrum, reaching more reprehensible forms of commercial behaviour, the more likely the court will attend to that misconduct even at the cost of ignoring other conduct towards the 'objective' or fair play end of the spectrum.

This is evident in cases that suggest a 'subjective' construal may trump the 'objective'. So far I have avoided some of the most famous English cases because they are so laden with theoretical baggage it is difficult to see them afresh. But it may now be safe to mention the case about the oats, *Smith* v *Hughes*.[55] The oat farmer argued he was not obliged to deliver aged oats, though they might have been better for the racehorse trainer's horses. The farmer testified that at the time of contracting he showed the trainer a sample of fresh oats from the latest crop. Assuming this were true, it would seem – applying what we today call an 'objective' approach – that a reasonable person would think the contract was for fresh oats.[56] However, perhaps the oat farmer was shrewd and realised – we would say 'subjectively' – that the hapless trainer was mistaken about the kind of oats he was contracting for. If so, we must decide whether the 'objective' or 'subjective' should prevail.

The judges who heard the appeal in *Smith* v *Hughes* did not determine what exactly happened on the facts but instead formulated principles for the court below to apply in a retrial. The reasoning is not easy to follow in part because the most influential judgments – those of Blackburn and Hannen JJ – are articulated in terms of 'estoppel' or preclusion and indeed pile estoppels on top of each other. The judges say that if a party's words and conduct reasonably leads another

54 For example *Smith* v *Hughes* n 14 above; *Tamplin* v *James* n 7 above; *Sullivan* v *Constable* n 26 above, evince no such concern.

55 n 14 above.

56 Though see Phillips, n 29 above on the difficulty of discerning oats' age and techniques for making them appear older.

to think he is assenting to one set of terms, he will be estopped from asserting the contrary; but if he actually knows of a different actual intention on the other's part, he will be estopped from asserting the estoppel. It would be simpler to say that courts uphold norms of fair play (and so deny attempts to gainsay the natural construal of words and conduct) but, moreover, refuse to countenance unscrupulous advantage-taking (such as snapping up a bargain). The concern about unscrupulous advantage-taking, which is more objectionable than a mere failure to meet the fair play standard, is overriding.[57]

CONTRAST OTHER ACCOUNTS

Whatever its disadvantages, the view I have just outlined has at least one advantage over some other leading views: it helps us steer clear of the temptation to pursue a monistic or overly unified account of this area of law. Some scholars confronted with the common law's apparent tendency to switch between objectivity and subjectivity try to vindicate objectivity alone as the one true approach. Others try to account for both standards with a single abstract theoretical rationale. I will now argue that each of these strategies faces substantial challenges. To show this I will discuss leading versions of what I label the 'linguistic', 'reliance', 'practice', and 'corrective justice' theories. I will not evaluate their overall merits but merely use them to illustrate the pitfalls of certain strategies for resolving the felt tension between objectivity and subjectivity.[58]

Efforts to vindicate objectivity over subjectivity

Some contract scholars try to extirpate or minimise the role of the subjective standard. Many of those who pursue this strategy are influenced, directly or indirectly, by the Oxbridge linguistic philosophy of the mid-twentieth century. They argue that an 'objective' standard should apply because contracting is a communicative act and such acts (or at least a relevant subset) are naturally construed according to conventional or otherwise publicly available meanings – rather than by trying to divine what 'subjective' thoughts pass through the parties' minds.

57 I leave open how exactly the approach I have sketched is best operationalised in legal doctrine. For instance, I will not try to determine whether the law should 1) adopt objectivity as the presumptive standard and regard subjectivity as exceptional (the dominant tendency in English law) or 2) start with a subjective standard and only when it fails to resolve the dispute satisfactorily turn to objectivity (as recommended by the *Restatement of Contracts (Second)* §§ 20, 201). Some will complain if I fail to mention *Raffles* v *Wichelhaus* (1864) 2 H&C 906; 159 ER 375 ('*The Peerless*'). On my view, 'objective' principles of fair play did not favour the plaintiff's construal of the alleged contract over the defendants'. Nor does the report contain any suggestion that 'subjective' principles against unscrupulous advantage-taking supported the plaintiff's position. So it made sense for the court to give judgment for the defendants.

58 Note that when discussing the various theories the ground will be shifting beneath us because the theories adopt subtly but crucially different understandings of 'objectivity' and 'subjectivity'. Certainly none conceives of these standards as substantive ethical ideals discountenancing unfair play and unscrupulous advantage-taking.

Some well-known analogies may be used to bring out the attractions of this view. If I declare, as I smash a bottle of champagne across the prow of a new yacht, 'I name this ship the Queen Elizabeth', my words and conduct amount to a conventional performance that names the ship, regardless of what thoughts happen to cross my mind. (I may be reminding myself to pick up a pint of milk on the way home.) '[T]he one thing we must not suppose is that what is needed in addition to the saying of the words in such cases is the performance of some internal spiritual act, of which the words then are the report.'[59] Or imagine I instruct a babysitter to 'teach the children a game'. The babysitter misunderstands my instruction if he teaches the children to gamble with dice – regardless of whether I mentally advert to the possibility of a dice game. The contents of my mind do not 'serve to fix what [my] words mean'.[60] The same is true, one might suppose, of contractual communications.

This sort of view is not found only in scholarship post-dating the mid-twentieth century. Perhaps the most famous and ardent objectivist, Oliver Wendell Holmes, anticipates some of the claims of later linguistically-oriented contract scholars. (Though he also differs from them in important ways.[61]) According to Holmes, contract formation depends on the exchange of 'two sets of external signs' – 'not on the parties' having *meant* the same thing but on their having *said* the same thing'.[62] The external signs should be given their conventional meanings as accorded by normal English speakers.[63] Contract law should not try to discover 'the actual internal state of the individual's mind'.[64]

I will not purport to evaluate the overall merits of the philosophy of language that is drawn on by linguistic theorists of contract. Indeed, I am willing to accept that, as an account of human communication generally, the philosophy is correct. I will consider only whether linguistic theorists can account for the specific aspects of contract law that are my focus. And here I will zero in on one particular issue: if contractual words and conduct are properly construed 'objectively', according to conventional or public meanings, how can we account for the 'subjective' approach, whereby courts inquire directly into the parties' minds? There seem to be two rival approaches taken by courts in contract cases, only one of which the linguistic theory approves.

Responding to this apparent difficulty, linguistically-motivated theorists often try to explain away the apparently 'subjective' aspects of the case law. Here they tend to pursue one or more of three argumentative sub-strategies.

59 Robert Samek, 'Performative Utterances and The Concept of Contract' (1965) 43 Australasian J Philosophy 196, 199; J. L. Austin, 'Performative Utterances' in *Philosophical Papers* (Oxford: OUP, 1961) 223.

60 Arthur Ripstein and Brian Langille, '"Strictly Speaking – It Went Without Saying"' (1996) 2 *Legal Theory* 63, 70; Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, GEM Anscombe tr, 1972) § 33.

61 His objectivism was shaped by the sweeping historical, sociological, and moral views that permeate Oliver Wendell Holmes, *The Common Law* (Cambridge, MA: Little, Brown, 1881). See too H. L. A. Hart, 'Holmes's Common Law' *The New York Review of Books* 17 October 1963.

62 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard L Rev 457, 464. See too Holmes, *The Common Law ibid*, 273.

63 Oliver Wendell Holmes 'The Theory of Legal Interpretation' (1899) 12 Harvard L Rev 417, 419-420.

64 Holmes, 'Path of the Law' n 62 above, 463.

Denial

One option is simply to deny that resort to subjectivity is appropriate in contract law. Holmes is the most famous proponent of this approach – but as his work shows, pursued too single-mindedly it produces implausible results. Consider a somewhat extreme example from his later oeuvre: what should happen where two contracting parties establish a private code that gives their words a peculiar meaning, such as where they both understand that any reference to 'Bunker Hill monument should signify Old South Church'?[65] Many scholars today would argue the private code can be embraced by some sort of 'objective' approach, but that was not Holmes' view. He simply claims he would ignore the private understanding and enforce the ordinary objective meaning. Thus, he would effectively allow one party to hold the other to a deal neither intended. As Holmes recognises, this puts him well outside the legal mainstream.[66] This extreme example clearly illustrates a key defect of the 'denial' strategy: it denies resort to the parties' subjective understandings even where they seem highly relevant, thus countenancing various sorts of unscrupulous advantage-taking.

Objectifying

The second sub-strategy is to 'objectify' the apparently subjective cases; show that their results can be produced by the objective standard properly understood. Again, Holmes was an early adopter (an aspect of his work that attracted Grant Gilmore's derision).[67] Today this approach is often pursued by scholars who advocate a highly contextual objective standard.

Consider Mindy Chen-Wishart's ingenious effort to objectify the apparently subjective aspects of *Smith* v *Hughes*. She approves the objective approach for a plurality of reasons, including linguistic reasons: 'Making a contract is essentially an exercise in the *communication* of choice, and communication is impossible without objectivity.'[68] Chen-Wishart also advocates a 'contextual' objective approach: the reasonable construal of the parties' deal should be based on all the relevant evidence – which in *Smith* v *Hughes* would include everything the racehorse trainer and the farmer did and said to each other when striking their bargain. By contrast a 'subjective' approach, according to Chen-Wishart, investigates the parties' actual mental goings-on. But crucially, she reasons, a court seeking to determine actual mental states can do so only by drawing reasonable inferences from the relevant evidence. So to determine what the oat farmer in *Smith* v *Hughes* actually knew, a court would have to draw reasonable inferences from what he and the trainer did and said when striking their deal. However,

65 Holmes, 'Theory of Legal Interpretation' n 63 above, 420.

66 *ibid*. See further McLauchlan, n 28 above.

67 Grant Gilmore, *The Death of Contract* (Columbus, OH: Ohio State UP, 1974) 45 (on some of Holmes' efforts in *The Common Law*: 'Even for Holmes this was an extraordinary *tour de force*. … The magician who could "objectify" *Raffles* v *Wichelhaus* … could objectify anything. But why bother?').

68 Chen-Wishart, n 33 above, 346 and fn16 (her emphasis), citing Timothy Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: OUP, 2000) and David Goddard, 'The Myth of Subjectivity' (1987) 7 *Legal Studies* 263.

that seems to be exactly what the court would do on the objective approach – the two approaches seem equivalent.

I am not convinced Chen-Wishart's effort to objectify *Smith* v *Hughes* fully succeeds. One key difficulty is that the pool of relevant evidence seems to differ substantially between the 'subjective' and 'objective' approaches.[69] A court seeking to determine a party's actual 'subjective' mental state should in principle consider, for instance, his confessions. (The oat farmer might secretly have admitted to his priest, his lover, or his diary that he knew of his counterparty's true intent. Or, broken down by a brutal cross-examination, a sobbing farmer might confess on the stand that he knew exactly what his counterparty was thinking.[70]) Such testimony is in principle irrelevant on the 'objective' approach, which seeks to establish a reasonable construal for the parties and is most plausibly understood to admit only evidence reasonably available to both parties at the relevant time.[71]

However, my aim here is not to prove that *Smith* v *Hughes* can never be fully 'objectified', or even that Chen-Wishart's effort is unsuccessful. I merely want to highlight the lengths one must go to, and the complexities and difficulties that will arise, if one embarks upon this kind of argument. Objectifying *Smith* v *Hughes* is difficult enough and it is just one of many cases in which courts seem to countenance a subjective standard. Objectifying them all would truly be a feat.

Hiving Off

The third sub-strategy I will call 'hiving off': explaining away subjective aspects of the law by assigning them to distinct departments of legal doctrine or to distinct areas of normative theory. This divide-and-conquer approach is also favoured by some of those contract scholars influenced by Oxbridge linguistic philosophy. For instance, Anne de Moor seeks to reconcile an understanding of 'objectivity' consistent with that philosophy with her view that contracts are, at least to some minimal extent, products of the 'subjective' human will.[72] To do so, she concedes that contractual *interpretation* is fully 'objective' but maintains that contract *formation* requires some minimal 'subjective' volition. However, it is questionable whether this is a plausible view of contract formation since the courts do not seem to have articulated de Moor's subjective requirement. Furthermore, her approach is at least somewhat troubling as a matter of principle

69 Of course, especially historically, restrictions in the law of evidence would complicate the picture here. See Joseph Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 Fordham L Rev 427.

70 Chen-Wishart claims that '[n]o rational party' in the farmer's position would admit to knowing of the trainer's beliefs, since doing so would land the farmer with a construal of the contract he prefers to avoid, n 33 above, 357. This claim is doubtful. For example, the admission might turn out to be a lesser evil in the context of multi-issue litigation. In any event, why should we assume that all contracting parties successfully exhibit a certain form of calculating rationality, which overrides any tendency to make honest admissions. Are there no honest oat farmers?

71 Jurisdictions such as England that exclude 'subsequent conduct' or 'course of performance' evidence insist, to that extent, on the evidence being reasonably available at the time of contracting.

72 de Moor, n 2 above.

because it introduces a sharp cleavage between doctrines (of formation and interpretation) that often seem to shade into each other.

Other scholars focus not so much on carving up areas of contractual doctrine as on distinguishing what they take to be different lines of normative inquiry. For example, Robert Samek insists on linguistic grounds that the parties' 'performative utterances' in contract formation be understood conventionally. But he then accepts that one party's knowledge of the other's mistaken belief might amount to an 'infelicity' with the utterance, or generate an 'equity', which could justify a court refusing to recognise a contract – depending upon how it weighs all the relevant policy considerations.[73] Arthur Ripstein and Brian Langille argue that communicative acts in contract formation are inherently public and so to be construed 'objectively', but then concede in a footnote that the law must address 'honest mistakes' by evaluating 'who should bear the risk' of the mistake. They do not elaborate except to say that a court should consider the source of the error and the information available to each party.[74] Finally Timothy Endicott claims that the phenomenon of agreement must be approached objectively, but then acknowledges that 'there may be very good reasons for the law not to hold parties to some agreements'.[75] Endicott does not examine these good reasons in detail but notes they may exist where one party knows of the other's mistake or where the parties' common subjective intention diverges from the objective construal.

All this will strike someone puzzled by contract law's apparent propensity to switch from objectivity to subjectivity as, at best, postponing the important questions. (And the propensity to switch between the two standards *is* puzzling, if one maintains that contract law's objective standard is somehow linguistically necessary.) Our puzzled interlocutor will want to know how a court should evaluate the significance of various 'infelicities' and 'inequities' by weighing all the relevant policy factors (Samek); or decide who should 'bear the risk' of a mistake (Ripstein and Langille); or assess the various 'reasons' for disregarding an objective agreement (Endicott). I suspect adequate responses here would articulate something like the view of the subjective standard I sketched above. Our interlocutor will then want to know how these subjective inquiries can be reconciled with the linguistic theory of objectivity to yield a coherent overall theory. We are entitled to more than an account that, on one hand, asserts the supposed inevitability of an objective construal, but then on the other, admits we may ignore the objective construal and appeal to subjective evidence to address other miscellaneous considerations.

I have not purported to make knock-down arguments here. Perhaps one of the three objectivist sub-strategies, or some combination, could when fully developed explain away the law's subjective aspects. But any attempt to do this faces formidable difficulties. Hence the advantage of my alternative view, on which the objective and subjective standards are continuous and complementary ideals addressing a spectrum of unethical conduct. On this view there

73 Samek, n 59 above, 200–201.
74 Ripstein and Langille, n 60 above, 77 fn 26.
75 Endicott, n 68 above, 162.

should be no temptation to jettison the subjective standard and vindicate objectivity alone. On the contrary, doing so would clearly create a gap in the law and hamper courts' ability to address a range of unscrupulous bargaining behaviour.

Efforts to explain both standards with a single rationale

Other scholars tolerate the presence of both the 'objective' and 'subjective' standards in contract law but attempt to account for both standards by appealing to some relatively unitary abstract rationale. I will consider three examples of this kind of account to bring out the challenges it faces. In essence, this kind of account has difficulty tracking the nuanced judgments in the case law about the proper application of the respective standards.

Reliance

P. S. Atiyah sought to rationalise contractual objectivity and subjectivity by drawing on his general view that contractual liability is often not voluntarily undertaken but imposed to protect reasonable reliance. According to Atiyah, contract law normally disregards a party's 'actual subjective intent' and holds her to the 'appearance' or 'manifestation of intent' which the other may rely upon:

> I refer … to the so-called 'objective-test' theory of contractual liability. Every law student is taught from his earliest days that contractual intent is not really what it seems; actual subjective intent is normally irrelevant. It is the appearance, the manifestation of intent that matters. Whenever a person is held bound by a promise or a contract contrary to his actual intent or understanding, it is plain that the liability is based not on some notion of a voluntary assumption of obligation, but on something else. And most frequently it will be found that that something else is the element of reasonable reliance.[76]

Reliance theories of contract law and its objective standard of course face various well-known objections,[77] but I want to zero in on one particular issue. Can a reliance theory account for the law's apparent tendency to switch from an objective to a subjective standard? Notice Atiyah is careful to say only that subjective intent is '*normally* irrelevant', and his other writings approve some of the cases that resort to subjectivity.[78] How is this consistent with his overarching reliance theory?

Atiyah confronts the issue in a note on *The Hannah Blumenthal*, arguing that the case's central ruling can be explained by a reliance theory. It is unsurprising

76 P. S. Atiyah 'Promises, Obligations, and the Law of Contract' in Atiyah, n 52 above, 21.

77 For instance, no detrimental reliance need be proved by the party asserting an objective bargain. *Centrovincial Estates* v *Merchant Investors Assurance* [1983] Com LR 158; *OT Africa Line* v *Vickers Plc* [1996] 1 Lloyd's Rep 700.

78 P. S. Atiyah, '*The Hannah Blumenthal* and Classical Contract Law' (1986) 102 LQR 363; see also Atiyah, n 52 above, 172-175, 253-260.

that Atiyah would make this argument since some of the judges seem to have taken a similar view. Lord Diplock in particular suggests that a reliance rationale generally favours the objective approach but sometimes requires resort to subjective evidence.[79] Yet, I suggest both the judges and Atiyah are wrong about this. The switch to subjectivity in a case such as *The Hannah Blumenthal* must be explained by normative considerations other than reliance.[80]

Recall the ship's sellers argued that, objectively, there was an implied contract to abandon the parties' arbitration – even though the sellers did not subjectively believe it was abandoned, as evidenced by their ongoing efforts to obtain evidence. Rejecting the sellers' argument, Lord Diplock reasons that they cannot appeal to the objective construal because their contrary subjective belief means they did not rely or act upon the objective appearance. 'The absence of actual belief on the sellers' part … would mean that there had in fact been no injurious reliance by the sellers'.[81] Or as Atiyah more pithily puts it, 'One cannot act on a belief that one does not have.'[82]

The problem is that one can act on a belief one does not have.[83] I can act in reliance, for instance, on a belief that you have. (I might buy you a ticket to the cup final because of your belief, which I think foolish, that your team will win.) I can also act in reliance on a belief that a third party, or a hypothetical reasonable observer, might attribute to one or both of us, though I myself do not hold the belief and even though I hold an incompatible belief. Thus, a contracting party can act or rely upon an objective construal she does not subjectively endorse. Indeed, the sellers of The Hannah Blumenthal did just that – for example, when they paid their lawyers to argue for an objective contract of abandonment. The question therefore arises: should the law protect a party's acts of reliance on the objective construal of a contractual interaction even though she does not subjectively adopt that construal? This question cannot be answered just by appealing to the idea of reliance but requires a judgment (explicit or implicit) about what forms of reliance are worthy of protection because they are justified, legitimate, or 'reasonable' (to use Atiyah's word).

Similar issues will arise if we try to use the reliance theory to account for all the other cases in which courts resort to subjectivity. To be sure, a reliance theorist might respond by developing an extensive account of what it is for reliance to be 'reasonable', justified, or legitimate. I conjecture that that account will look something like the view I outlined above of the respective standards as substantive ethical ideals. In any event, in this more developed account the notion of reliance will not itself be doing the relevant normative work.

79 *The Hannah Blumenthal* n 21 above, 916. But Lord Diplock, *ibid*, defines 'injurious reliance' in an unusual manner. 'I use the … expression "injurious reliance" … so as to embrace all circumstances in which A can say to B: "You led me reasonably to believe that you were assuming particular legally enforceable obligations to me"'.

80 This is of course a particular version of a common objection to reliance theories of contract generally.

81 *The Hannah Blumenthal* n 21 above, 916.

82 Atiyah, '*The Hannah Blumenthal* and Classical Contract Law' n 78 above, 368.

83 cf *Zurich Insurance* v *Hayward* [2017] AC 142.

Practice

Reliance theories of contract such as Atiyah's fell out of favour not least because of the critique levelled by his colleague Joseph Raz. Raz developed his own alternative theory according to which contract law supports the valuable practice of assuming voluntary obligations. This theory is evidently motivated in part by the need to account for contract law's objective approach.

A practice of assuming voluntary obligations is valuable, according to Raz, because it helps people form special relationships with each other.[84] Contract law supports the valuable practice by making voluntary obligations more secure and reliable.[85] Genuinely voluntary obligations are subjective in that a party must at least be 'aware' of, or have the 'belief' that, he will incur the obligation.[86] When contract law applies an 'objective' standard, therefore, it recognises some contracts that are 'not voluntary obligations at all'.[87] The law does this, Raz argues, to protect the practice of voluntary obligation more generally. 'Paradoxical though it sounds, it is in order to protect the practice from abuse and debasement that the law recognizes the validity of contracts that are not voluntary obligations.'[88]

> [A]n important way that the law can protect the practice of undertaking voluntary obligations is to prevent people from taking advantage of the practice by making it appear that they have agreed to obligations when they have not. For example, people who do not make a promise but who knowingly, carelessly, or negligently behave in a way that creates the impression that they have done so should be made to compensate those who innocently rely on the supposed promise. The best way to hold them liable is by estoppel, by stopping them from denying that they have promised. In this area, the common law often applies an 'objective test' for the formation of contracts.[89]

Practice theories of contract in general face numerous objections, but again I want to zero in on the particular issue of whether such a theory can explain the courts' apparent tendency to switch from an objective to a subjective approach (and vice versa). In this respect I must perhaps part ways with Raz himself since his account is to some extent prescriptive,[90] and is arguably not designed to address the fine-grained details of the case law. (Though I note Raz is careful to contend only that the law '*often* applies' an objective test, suggesting he would allow for a subjective approach in some cases.[91]) Regardless, I want to consider

84 Joseph Raz, 'Promises in Morality and Law' (1982) 95 Harvard L Rev 917, 933-934.
85 The law should also prevent harm to individuals who rely on the practice, *ibid*, 933. While the law can support the *practice* of making voluntary undertakings, it should not directly enforce such undertakings because that would violate the harm principle, *ibid*, 937.
86 *ibid*, 929-930.
87 *ibid*, 935.
88 *ibid*, 936.
89 *ibid*, 935.
90 *ibid*, 933.
91 Conceivably, a proponent of a practice view could deny that a subjective inquiry is ever appropriate. After all, this would more strongly incentivise parties to avoid misleading words and conduct in contract formation, in that way making the practice of voluntary obligation more robust. Hanoch Sheinman flirts with something like this approach in 'Contractual Liability and Voluntary Undertakings' (2000) 20 OJLS 205, 216-219.

whether Raz's practice theory is in principle capable of tracking the judgments about objectivity and subjectivity we find in the law.[92]

Any attempt to deploy Raz's practice theory to account for the courts' nuanced decisions about objectivity and subjectivity would be an ambitious enterprise indeed. As an initial matter, the theorist must claim that the practice of undertaking voluntary obligations is best facilitated when courts generally apply an 'objective' approach.[93] But then the theorist must contend that the goal of facilitating the practice also explains the various exceptions to the 'objective' approach – such as the actual knowledge qualification (set out in *Smith* v *Hughes*), or cases where parties share a common subjective intention that diverges from the objective construal (*Four Seasons Health Care*), or where a party does not in fact adopt the objective construal when allegedly contracting (*The Hannah Blumenthal*). Moreover, the theorist must then explain the exceptions to the exceptions: why the objective approach will sometimes prevail even where one party knows of the other's intention (*Boot and Sons* v *London County Council*), or where both parties share a common intention (*Hotchkiss* v *National City Bank*). Can all of these legal nuances be explained on the basis that they facilitate a practice of entering voluntary obligations? I can do little more than record my scepticism. I find it difficult to see how one would even begin to go about making that case.

Again, I do not claim to have knock-down arguments here which prove a practice theory of objectivity and subjectivity untenable – let alone a practice theory of contract or voluntary obligation more generally. I am merely highlighting the challenges that will arise if one seeks to make the theory track this part of contract doctrine in a relatively determinate manner.

Corrective Justice

'Corrective justice' labels a family of views that examine the fairness of interpersonal relationships in private law. I will focus on Peter Benson's recently articulated view. Benson argues that an objective or reasonable person standpoint is appropriate for assessing the justice of a relationship between two contracting parties because it is inherently 'mutual' (or 'transactional'). Whereas adopting the subjective construal of one of the parties – her '*own* internal standpoint'[94] – would privilege her over the other party, the reasonable person standpoint is independent of each party and can be adopted without privileging either: 'Because the objective test specifies a standpoint that refers simultaneously to

92 A related difficulty, noticed by Raz and others with similar views, is that on the practice theory of the objective test the law of contract recognises two quite different kinds of obligation. Contractual obligations arise where parties either 1) give genuine voluntary undertakings, or 2) do not give genuine voluntary undertakings but negligently create the appearance of having done so. One might be surprised that the law of contract, which to the untutored eye seems to contain just one kind of obligation, turns out to contain two, Raz, n 84 above, 935 fn 32; Goddard, n 68 above, 270 fn 17.

93 As Raz understands this, ie an approach that binds parties who 'knowingly, carelessly, or negligently behave in a way that creates the impression' of a voluntary obligation, see text to n 89 above.

94 Benson, n 50 above, 115-116.

both sides in their mutual relation, it represents the transactional meaning of the parties' manifestations of assent that are the source of agreement between them. Indeed, it would seem difficult to conceive of another test that would more suitably reflect the bilateral character of the [contractual] relation.'[95]

Again I want to zero in on one particular issue. Having justified the objective approach, how can Benson explain the law's tendency to resort in some cases to subjectivity? Benson is alive to the issue and argues that his theory can explain at least two kinds of arguably 'subjective' case. First, where one party does not adopt or act upon the objective construal for which she later contends (such as *The Hannah Blumenthal*).[96] According to Benson, a court should decline to apply the 'objective' or reasonable construal here because it has no bearing on the parties' mutual relationship: it is 'transactionally irrelevant'.[97] Second, a case where both parties' common subjective intention diverges from the ordinary construal. Benson's example is a hypothetical in which two parties, perhaps with limited command of English, say the word 'bull' when they both mean 'cow'. (Another example would be the rectification of a written contract to reflect the parties' common subjective intention, as in *Four Seasons Health Care*.) Here, Benson says, a court can decline to apply the objective standpoint and instead enforce the parties' coincident subjective intentions because they are sufficiently mutual: '[The parties' manifestations of assent] embody terms that each party assumes, correctly, that the other understands in the same way. They should be held to this shared meaning. … [T]he analysis is thoroughly bilateral and does not impose one side's undisclosed self-understanding on the other.'[98] In sum, Benson contends that an objective construal is appropriately mutual as between the parties – unless the party asserting that construal did not adopt it, in which case it is not appropriately mutual; further, a common subjective intention is also appropriately mutual.

Accepting that Benson's account reaches the right results in these cases, I want to suggest that the bare idea of 'mutuality' (or 'transactionality', etc) is not, in itself, doing the normative work to produce those results. Rather, the conclusions about mutuality must be implicitly driven by reasoning on more specific grounds – grounds which are to be found in something like the account I sketched above of objectivity and subjectivity as substantive ethical ideals.[99] If we are inclined to say that the various situations which Benson considers exhibit the requisite 'mutuality', this is because we endorse norms of contractual fair

95 *ibid*, 114.

96 Strictly speaking Benson does not regard this kind of case as involving a 'subjective' qualification of the objective principle, because it does not amount to a claim that the 'intent be interpreted from the subject's *own* internal standpoint', only that the reasonable construal must be acted upon by the subject, *ibid*, 115-116. Note also that Benson seems to equate this type of case with another type I distinguished above, where one party knows of the other's intention that diverges from the reasonable construal, *ibid*, 113 and fn 24.

97 *ibid*, 115.

98 *ibid*, 116.

99 Earlier Benson suggests that a subjective approach is inappropriate because it will lead to an infinite sequence, whereby each party must seek to confirm the other's subjective understanding before a contract can arise, *ibid*, 111. It is not obvious how to reconcile this with his later acknowledgement that a subjective inquiry may be appropriate in some cases.

play and regard it as unscrupulous for a party to assert a contractual construal that she did not adopt or indeed that neither party adopted.[100]

The three theories I have considered in this section invoke ideals – preventing harmful reliance, promoting a practice of voluntary obligation, and ensuring corrective justice – that may seem compelling in the abstract. But when applied to the common law of contract's intricate treatment of objectivity and subjectivity these abstract theories turn out to lack genuine illuminating power.

Contrast the view I outlined above of the subjective and objective standards as variegated ethical ideals that address various forms of advantage-taking and unfair play. This view does not attempt to account for the two standards by invoking any more abstract idea or value. To be sure, I have said we can view both standards as combining to specify an ethic of commercial decency in the striking of contractual bargains. Yet the notion of commercial decency here is merely a perspicuous label for the various specific forms of behaviour that are approved and disapproved in the case law.

Indeed, if we adopt the moralised view of objectivity and subjectivity I propose, there is in a sense no need to pursue any *theory* of this area of law – to account for the law by invoking a more abstract theoretical ideal. The justification for the law is apparent on the face of the objective and subjective standards themselves as soon as we understand them aright: they uphold contractual seriousness and fair play and disapprove of unscrupulous advantage-taking.

CONCLUSION

Bernard Williams once suggested that moral philosophy's 'prevailing fault, in all its styles, is to impose on ethical life some immensely simple model, whether it be of the concepts that we actually use or of moral rules by which we should be guided'. 'One remedy to this persistent deformation', he believed, might be 'to attend to the great diversity of things that people do say about how they and other people live their lives'.[101] This should sometimes lead us to discard the relatively 'thin' and abstract values beloved of philosophers – such as 'utility', or 'agency' – and instead adopt the '"thicker" or more specific ethical notions' that are more familiar in everyday life – such as say 'treachery', 'brutality', or 'courage'.[102]

Many of the leading treatments of objectivity and subjectivity in contract law are ultimately (though not in the details of their application) remarkably simple and abstract. Some scholars seek a unitary 'objective' view of the relevant contractual doctrine, which explains away its problematically 'subjective' aspects. This unifying tendency may be connected to a very general philosophical theory of nothing less than the nature of human communication. Other scholars tolerate a dualistic view of the contractual doctrine, in which both the

100 So one could regard my account as a more specific conception of what 'corrective justice' amounts to in striking a contractual bargain.

101 Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985) 127.

102 *ibid*, 129.

objective and subjective approaches coexist – but then try to rationalise the dualism by invoking an overarching, abstract philosophical value, such as the need to prevent harmful reliance, to facilitate a practice of voluntary obligation, or to ensure corrective justice.

I have suggested that much of our puzzlement about objectivity and subjectivity in contract arises because we lack an appreciation of the full ethical significance and complexity of these standards. If we attend closely to the great diversity of things that judges do and say in cases applying the standards we may see that they articulate an intricate ideal of basic decency in contractual dealings – an ideal composed of complementary, and in themselves variegated, 'objective' and 'subjective' aspects, which encompass a family of related ethical principles concerning fair play and deceptive advantage-taking. This view reveals some subtle and various forms of normative constraint at the heart of the law's approach to construing contractual interactions.