Assent and Accountability in Contract: An Analysis of Objective Standards in Contemporary Contract Adjudication

Brian A. Blum
ASSENT AND ACCOUNTABILITY IN CONTRACT: AN ANALYSIS OF OBJECTIVE STANDARDS IN CONTEMPORARY CONTRACT ADJUDICATION

BRIAN A. BLUM*

I. INTRODUCTION

This Article is concerned with the adjudication of disputes that relate to contract formation. In particular, it examines the use of the objective test in the resolution of formation disputes, which

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1 See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 2-2, at 23-25 (1977). The objective test is a contract law doctrine that requires the intention of a contracting party to be determined by what a reasonable person in the position of the other party would interpret the first party's manifestations to mean. Id. at 24. In discerning whether assent has been given to an agreement, adherents of the objective test are concerned with the intentions of the parties only as manifested by their actions. E. FARNSWORTH, CONTRACTS § 3.6, at 113 (1982). The objective test, however, does more than merely inspect particular contractual language; examination of contractual intent often includes an examination of the circumstances surrounding the contract as well. See Wallace v. Rogier, 182 Ind. App. 303, 305, 395 N.E.2d 297, 300 (1979) (intention of the parties to be determined in light of surrounding circumstances existing at time contract was made).

Objectivity in contract theory has long had support among scholars. Bronaugh, Agreement, Mistake, and Objectivity in the Bargain Theory of Contract, 18 WM. & MARY L. REV. 213, 242 (1976). As Justice Holmes stated, "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, [we] must go by externals, and judge parties by their conduct." O. HOLMES, THE COMMON LAW 309 (1881). Williston, another vigorous proponent of the objective theory, see Williston, Mutual Assent in the Formation of Contracts, 14 ILL. L. REV. 85, 87 (1919), contended that the basis of a contract is the manifestation, either in words or actions, of the parties' intent, id. The primacy given to the objective
are disputes concerning either the creation or the terms of contracts. Because this Article treats suits arising out of both oral and written transactions, it also will deal with the parol evidence rule. However, the primary focus of the Article is on the objective test, and the parol evidence rule will be discussed only to the extent that it is related to or affords insight into the objective test.

When a court is deciding whether a contract exists, or is interpreting the meaning of contractual provisions, it is engaged in a task that involves the application of legal rules to factual situations. Since the factual inquiry is a crucial part of the adjudicatory process, its importance should not be understated. Contracts are meant to be consensual arrangements; therefore, before a court enforces a relationship as a contract, the court must have a reasonably certain basis in fact to justify binding the parties to each other.

The facts on which the court's resolution will be based are often complex. Contracts are formed by an alignment of individual contractual intentions through the medium of communication. They necessarily involve a combination of an internal or subjective element, and an external or objective element. The internal element is the individual state of mind of each of the parties—individual understanding, intent, and expectations. The external element is communication—the overt conduct through which the parties signal their intent to each other. To reach actual
agreement on every term of their relationship, each contracting party must know not only what she intends, but also what the other party intends. Both parties must express their intent comprehensively, and they each must efficiently understand the other's communication. It is trite to observe that few people are consistently capable of such rapport. Therefore, courts routinely are required to untangle disputes that have arisen because underlying intent has been imperfectly expressed or inadequately received, so that the apparent agreement often does not represent the relationship intended by one, or possibly both, of the parties. This Article focuses on those disputes, and on the problems presented by the divergence between intent and overt communication.

When subjective and objective elements are irreconcilable, the court must decide which should be given greater weight. For many years it has been settled that a court should apply an objective standard in resolving formation disputes. This doctrine maintains that a court should favor the overt communications of the parties and should disregard evidence of their subjective intent to the extent that such evidence describes a state of mind inconsistent with the overt action. Preference for the overt lies at the basis of the

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6 Cf. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (where parties disagreed as to subject matter, contract held not binding). In Frigaliment, the contract merely stated the term "chicken" without further description. Id. Nevertheless, the parties disagreed on the meaning of that term as used in their contract. Id. The plaintiff defined "chicken" as a "young chicken, suitable for boiling and frying," while the defendant contended that "chicken" meant "any bird of that genus that meets contract specifications on weight and quality." Id.

6 See, e.g., Lucy v. Zehmer, 196 Va. 493, 498-500, 84 S.E.2d 516, 520 (1954). In Lucy, the Zehmers agreed to sell a farm to the Lucys for $50,000. Id. at 495, 84 S.E.2d at 518. The Zehmers, however, claimed that their acceptance was in jest, and that the entire transaction was merely a joke. Id. at 502, 84 S.E.2d at 521. The Lucys, on the other hand, understood the transaction to be a serious undertaking and took appropriate steps to consummate the deal. Id. at 496, 84 S.E.2d at 518. The court, adhering to the objective test, held that the promise was binding and that a contract was formed. Id. at 503, 84 S.E.2d at 522. The court stated that: "The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial." Id. at 503, 84 S.E.2d at 522.

7 See J. Calamari & J. Perillo, supra note 1, at 23 (objective theory of contracts has been dominant for at least a century); E. Farnsworth, supra note 1, § 3.6, at 114 (objective theory became ascendant by end of 19th century). But cf. Ricketts v. Pennsylvania R.R., 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring) (objectivist theory went too far in treating all kinds of agreements alike and in excluding consideration of actual intent of parties).

8 See Connecticut Gen. Life Ins. v. Chicago Title & Trust, 714 F.2d 48, 50 (7th Cir. 1983) (intent refers to party's outward manifestation of his intention rather than to some unexpressed intention); Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1140 (8th Cir. 1974).
objective test. When the apparent agreement is recorded in writing, the concentration on outward communication is even more heavily emphasized by the parol evidence rule.

The objective test is firmly established in case law, and it is routinely applied by courts. Probing such an apparently well-settled and frequently traversed area might seem at first to be a banal exercise. However, a study of contemporary case law reveals that the rules of the objective test are unclear and that its purpose and scope are surprisingly lacking in definition. The objective test is often applied ineptly in formation adjudication, and is often used thoughtlessly and rigidly to exclude evidence that might be viable and relevant. While this Article recognizes the value of using ob-

1974) (what is expressed by parties constitutes contract that courts are to enforce); J. Baranello & Sons v. Hausmann Indus., 571 F. Supp. 333, 339 (E.D.N.Y. 1983) (quoting Reprosystem, B.V. v. SCM Corp., 522 F. Supp. 1257, 1275 (S.D.N.Y. 1981), modified on appeal, 727 F.2d 257 (2d Cir. 1984)) ("What is looked to in determining whether an agreement has been reached is not the . . . parties' subjective intent but their objective intent as manifested by their expressed words"); see also supra note 1.

* See RESTATEMENT (SECOND) OF CONTRACTS § 2 comment b; id. §§ 3, 17, 18 (1981). The Restatement (Second) of Contracts provides that “[m]any contract disputes arise because different people attach different meanings to the same words and conduct. The phrase ‘manifestation of intention’ adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.” Id. § 2 comment b.

10 See infra note 80. Since the parol evidence rule is based on the rationale that a later written agreement has been substituted for prior negotiations, the rule is not relevant unless an enforceable written agreement has first been established. See E. FARNsworth, supra note 1, § 7.4, at 461.


12 See infra notes 128-137 and accompanying text.

13 See, e.g., Action Eng’g v. Martin Marietta Aluminum, 670 F.2d 456 (3d Cir. 1982). The court in Action Engineering ruled that a clause in a construction contract, which stated that if the defendant was of the opinion that the plaintiff was behind schedule, the defendant could terminate the contract, should be interpreted to allow the defendant to terminate the contract. See id. at 461. The court refused to take into consideration evidence tending to show that the plaintiff had completed almost 90% of the job and that the parties intended that a substantial completion would satisfy the parties’ criteria. See id. at 458; see also Norse Petroleum A/S v. LVO Int’l, Inc., 389 A.2d 771 (Del. Super. Ct. 1978). In Norse, the court refused even to consider the minutes of a board meeting that pertained to the formation of a contract. See 389 A.2d at 775. The court stated that “[t]he minutes could do no more than indicate the subjective intent of [the defendant] with regard to the proposed contract. It is a settled rule of contract law that a party’s objective intent . . . determine[s] the existence of a contract, not its subjective intent.” Id. [T]he minutes[,] therefore[,] could
jective standards in resolving formation disputes, it stresses that courts should recognize the purpose of, and limitations upon, the employment of those standards.

The argument will be made that the objective test is not a rule of substantive law, and that it should not be applied as such. The objective test is a standard for evaluation, a guide for determining the weight to be given to evidence. It suggests a procedure to be followed by courts in resolving formation litigation in a way that is consistent with the substantive rules and fundamental policies of contract law. The objective test is neither self-contained nor self-justifying. It is a vehicle for effectuating policy, and is viable only to the extent that it serves policy by directing the court toward a principled decision.\(^{14}\)

It is the goal of this Article to define the scope and purpose of the objective test in light of the policies it should serve, and to suggest a means of applying objective standards in formation adjudication in a way that effectuates those policies. The discussion begins in section II by identifying the concerns that must be addressed in formulating rules for resolving formation disputes. Section III addresses the policies that must be served in the resolution of formation disputes. Sections IV and V discuss and criticize the judicial approaches to objectivity as they have developed and as they exist in contemporary case law, and sections VI and VII propose a means of applying objective standards in a way that conforms with contract policy.

II. THE FORMULATION OF RULES FOR RESOLVING FORMATION DISPUTES: LEGAL POLICY, SUBSTANTIVE LAW, AND PROCEDURAL RULES

The following hypothetical fact pattern will be used to illustrate the context of formation disputes and to identify the distinctions among policy considerations, substantive legal rules, and rules of procedure:

A needed money to pay her debts. She asked B, her wealthy uncle, to lend her $1,000 for two months, promising to repay the

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\(^{14}\) See infra notes 175-180 and accompanying text.
loan with interest at the current rate within 60 days. B nodded his head vigorously in apparent assent. A and B then parted without further discussion.

An observer of this transaction would probably infer, on the basis of the verbal expression of A and the physical conduct of B, that a loan agreement had been concluded. However, the observer would not be able to tell what A and B were thinking while they were manifesting these overt indications of agreement. Assume the following alternative, uncommunicated states of mind:

Case 1: B's vigorous nod in response to A's request did not result from his intention to communicate assent. It was an involuntary and unconscious reflex action caused by his intense irritation at being asked for a loan by yet another of his sponging relatives.

Case 2: A knew that B had assisted other family members in the past by giving them cash gifts. A was too proud to ask for a gift, although that is what she intended the transaction to be. She asked B for the loan on the uncommunicated expectation that B would treat her as generously as he had treated her relatives. She assumed that B would not call on her to repay the debt. B, however, who never liked A as much as he liked the rest of her family, fully expected to be repaid.

Case 3: A's expectations were as described in Case 2. In this case, however, she had correctly assessed B's benevolence. He did not intend to accept repayment from A. Thus, while neither party communicated the intent that the money would be a gift, they share by coincidence a common intent at the time of transacting.

Case 4: Both A and B intended the transaction to be a loan on the terms expressed. However, A intended the term "current rate" to mean the market rate prevailing when the agreement was concluded. B understood the term to mean that the interest rate would vary over the 60-day period in conformity with the market rate.

In the first case the formation dispute will involve the question of whether the parties entered into a contract at all. This may be an issue in all four cases, but the facts in cases two through four seem more strongly to present disputes over the terms of the contract. 15 Each of the four hypothetical cases illustrates a conflict between apparent agreement and subjective intent. In each case, the outward manifestation is the same, and in any ensuing litiga-

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15 For the sake of simplicity, the reader is asked to ignore any issues that might arise out of the consideration doctrine or the statute of frauds.
tion would be proved by objective evidence.

Objective evidence is evidence of observed or expressed behavior.\(^\text{16}\) It includes not only evidence of a party’s own utterances or actions (for example, A’s evidence describing what she said to B), but also testimony describing the utterances or acts of the other party (for example, A’s evidence describing B’s act of nodding after A had spoken). Objective evidence normally relates to the external element of the transaction—communication. However, it also may relate to the subjective intent of one of the parties if that intent was translated into overt conduct not communicated to the other party. For example, if in Case 2 A had told her brother C immediately before the transaction with B that she intended to procure a gift, but would do so by asking B for a loan, C’s testimony on what A had said would be objective evidence relating to A’s subjective intent.\(^\text{17}\)

\(^{16}\) In the contractual setting, objective evidence includes all evidence of observed utterances (whether written or oral), actions, or other external signs that signify that consent was intended. See A. Corbin, Corbin on Contracts § 542 (1963). Courts often admit objective evidence to aid in contract interpretation. See, e.g., Haeberle v. Texas Int’l Airlines, 738 F.2d 1434, 1439 (5th Cir. 1984) (clarity or ambiguity should be assessed from manifest circumstances surrounding contract); Caporale v. Mar Les, Inc., 656 F.2d 242, 244 (7th Cir. 1981) (objective manifestation is controlling); Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1140-41 (8th Cir. 1974) (express terms, rather than subjective mental processes, constitute a contract).

In Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001 (3d Cir. 1980), the court used the term objective evidence to refer to a demonstration of circumstances surrounding the formation of the contract that might be indicative of a specialized usage agreed to by the parties, as distinct from a common usage, see id. at 1012 n.12.

\(^{17}\) See Wallace v. Rogier, 182 Ind. App. 303, 307, 395 N.E. 297, 301 (1979). In Wallace, the parties entered into a sham transaction concocted to enable one of the parties to obtain financing. Id. at 305, 395 N.E.2d at 299. The actual intent of the parties was that they would not be bound despite the apparent import of their actions. Id. at 306, 395 N.E.2d at 300-01. Believing it was precluded by the objective test from admitting evidence by the parties of their secret intent, the court nevertheless was willing to receive the evidence of their attorney based on express statements by the parties that the transaction would be for the sake of form only. Id. at 305-06, 395 N.E.2d at 300.

Objective evidence relating to subjective intent often is offered in the context of proving fraud, where one party to a contract claims the other entered into the agreement with no intention of carrying it out. See, e.g., Williams v. Hasshagen, 166 Cal. 386, 392, 137 P. 9, 12 (1913). In Williams, objective evidence of a bank officer’s acts and statements were sufficient to prove an intent to defraud. Id. at 392, 137 P. at 12. The court reasoned that “[t]he effort of the corporation to collect the note instead of returning it according to the promise of Hays [the bank officer] is sufficient evidence of that fraud which arose from the making of a promise without intention of performance.” Id.; see also Sallies v. Johnson, 85 Conn. 77, 79-80, 81 A. 974, 975 (1911) (party’s intention in doing an act is fact admissible in any action, to be proved by actor’s words or inferred from conduct); Foster v. Dwire, 51 N.D. 581, 594, 199 N.W. 1017, 1021-22 (1924) (testimony regarding plaintiff’s promises, represen-
If objective evidence includes all evidence of observed behavior, then its nemesis, subjective evidence, includes only the direct testimony of a party on her actual state of mind. Subjective evidence may relate to a party’s intent accompanying or motivating her conduct or utterance (for example, in Case 2, A’s evidence that she believed that the transaction was a gift, or in Case 4, A’s or B’s testimony on their own understanding of the term “current rate”), or to a party’s interpretation or understanding of the other party’s conduct or utterance (for example, in Case 1, A’s evidence that she understood B’s nod to signify assent). Therefore, one must distinguish the subjective and objective elements of a transaction from the subjective and objective evidence offered to prove those elements. The rules that prescribe the extent to which intent and communication must coexist in a transaction for it to be enforceable as a contract are rules of substantive law, which determine the nature of contracts. By contrast, the rules that determine the admissibility, evaluation, and interpretation of subjective and objective evidence are procedural rules. The purpose of these rules is to ensure that evidence offered in the formation dispute is presented and dealt with in a way that enables the court to decide most efficiently and accurately whether the necessary elements of

18 See 1 W. Jaeger, Williston on Contracts § 21 (3d ed. 1957). For a definition of “subjective evidence,” see J. Wigmore, Evidence § 1715, at 60 (3d ed. 1940). Wigmore observed that “[t]he conditions of a person’s mind may be indicated by his conduct or by his assertions. The former evidence is of an indirect or circumstantial nature . . . . The latter evidence is of a direct or testimonial nature . . . .” Id. (emphasis in original).

19 See 3 A. Corbin, supra note 16, § 537, at 41, § 536, at 33. In his treatise on contracts, Corbin outlined 18 “tentative working rules of substantive law,” including the following:

1. The primary and ultimate purpose of interpretation is to determine and make effective the intention of the contracting parties.

4. No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge.

7. No word or group of words in any language has an “objective” meaning separate from and independent of its actual use by some person to convey his thought to another person.

contract were present in the transaction.  

Although they are not always treated as such, the objective standards roughly described by the term "objective test" should in fact be characterized as procedural rules. Because they are procedural in nature, they are not self-justifying. Consequently, any attempt to define the scope and purpose of these standards must begin with an examination of their relationship to the rules of substantive law and underlying legal policy. Legal policy, the foundation on which rules of substantive law are built, differs from legal rules in that policy is much broader and more profoundly embedded in the premises of the legal system. Legal policy reflects the underlying ideological principles that justify the more specific rules of law, and channels them in the direction of the political, social, and economic goals of the community. Therefore, before legal rules can be settled, courts must identify and articulate the policies that those rules must effect. Once these substantive rules have been determined, courts can concentrate on devising procedural rules. That order is crucial. If, through a slavish concentration on procedural rules fixed by precedent, courts forget that they are in fact ancillary rules, the rules may fail in their purpose and may preclude courts from recognizing and accommodating underlying policy.

For the purpose of illustrating the relationship between policy, substantive law, and procedural rules in the context of contract formation, a simplified model of policy and rule development is used in this section. Since the model is a caricature, exaggerated for the sake of illustration, more accurate and refined discussion of the policies and rules underlying formation dispute resolution is attempted in following sections.

Assume for the sake of argument that in the late nineteenth century influential courts identified as the dominant policy behind the enforcement of contracts the facilitating of economic exchanges. The courts believed that such transactions could be facilitated only if people could unquestioningly and absolutely rely on the manifested contractual conduct of others. To achieve that general sense of reliance, courts held that the resolution of formation disputes must be rigidly and consistently confined to an investiga-

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20 The term procedure is defined as “[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right.” BLACK'S LAW DICTIONARY 1083 (5th ed. 1979).
tion of the conduct of parties, without any credence being given to the actual intentions that motivated their conduct. This policy generated rules of substantive law that defined contract only in terms of an objective element: Contracts are formed by manifestations of assent, not by assent itself.\footnote{See, e.g., Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff'd, 201 F. 684 (2d Cir. 1912), aff'd, 231 U.S. 50 (1914) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties"). The general rule giving primacy to manifestations of assent has been repeated both by courts, see, e.g., Capital Warehouse Co. v. McGill-Warner-Farnham Co., 276 Minn. 108, 114, 149 N.W.2d 31, 35 (1967) ("It is the objective thing, the manifestation of mutual assent, which is essential to the making of a contract"), and in scholarly works, see, e.g., Restatement of Contracts § 20 (1932) (manifestation of mutual assent by parties to informal contract is essential to formation).}

This rule of substantive law in turn justified evidentiary rules that, in order to direct the factfinder away from facts that had become legally irrelevant, either excluded subjective evidence or created presumptions in favor of objective evidence.\footnote{See 13 S. Williston, Contracts, § 1536, at 34 (3d ed. 1970). In the case of a conclusive or irrebuttable presumption, when fact B is proved, fact A must be taken as true, and the adversary is not allowed to disprove it. C. McCormick, Handbook of the Law of Evidence § 342, at 966 (3d ed. 1984). In contract law, a conclusive presumption allows mental assent to be presumed on the basis of the parties' external acts. 13 S. Williston, supra, § 1536, at 34; see, e.g., Sokoloff v. National City Bank, 239 N.Y. 158, 170, 145 N.E. 917, 920 (1924). In Sokoloff, Judge Cardozo quoted Justice Holmes in asserting that "[a]ssent in the sense of the law is a matter of overt acts, not of inward unanimity in motives, design or the interpretation of words." Id. (quoting O'Donnell v. Town of Clinton, 145 Mass. 461, 463, 14 N.E. 747, 751 (1888) (Holmes, J.)).}

Strict application of the foregoing policy, and the rules generated by it, would lead a court dealing with illustrative Case 1 to bind B even though he did not intend his nod to express assent. Because, under the rules assumed above, intent was not required for contract formation, B's intent would be irrelevant as a matter of law.\footnote{See E. Farnsworth, supra note 1, § 3.6, at 113-14. While the parties to most contracts give actual as well as apparent assent, it is clear that a mental reservation on the part of one party does not impair the obligation he purports to undertake. Restatement (Second) of Contracts § 17 comment c (1979). Courts have followed the commentators in declaring intent irrelevant to the formation of contracts. See, e.g., Triboro Coach Corp. v. New York State Labor Relations Bd., 261 App. Div. 636, 638, 27 N.Y.S.2d 83, 85 (2d Dep't 1941) ("[m]ere intent means nothing"); see Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 388, 105 S.W. 777, 778 (1907) (intent of parties can neither make contract, nor prevent one, if words used were sufficient to constitute contract).} Similarly, in Case 2, A would be held to the loan transac-
tion despite her intent to contract for a gift. The same result would be reached in Case 3, because the shared intent was unexpressed. In Case 4, concentrating only on the external indications of agreement, the court would have to resolve the dispute over the meaning of the term "current rate" without recourse to evidence of the parties' understanding of its meaning.24

This strictly objective resolution of the cases would be justifiable as long as the link between procedural rules, substantive law, and underlying policy remained unbroken. However, policy changes as courts perceive changing conditions and shifts in societal goals. The rigid facilitation philosophy, therefore, may fade in the light of a realization that the true goal of contract enforcement is the protection of individual contractual autonomy, and that an exclusive focus on the protection of economic exchanges is not the best way to advance that goal. The emphasis on overt conduct must then be tempered by at least some inquiry into whether the outward conduct was based on an exercise of individual autonomy.25

This change in policy will necessitate a new definition of contract to accommodate both the objective element, conduct, and the subjective element, assent. Substantive law will have to provide a means of assigning weight to those elements where they are in conflict, and procedural rules governing the reception of evidence must also change because subjective evidence, once legally irrelevant, will have become useful.

Of course, the common law does not develop tidily. Some courts will have been receptive to changing societal values and changing conditions, and they will have identified and expressed the new policy while refining the substantive law and evidentiary rules. These courts will therefore be able to perceive, for example, that the issue to be established by subjective evidence in Case 1 is

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24 The resolution of these fact patterns is obviously oversimplified for illustration, and it is not suggested that courts ever applied the objective theory in such an absolute form. A more qualified discussion of the impact of the objective theory on the resolution of disputes is contained in § IV of this Article. See infra notes 51-121 and accompanying text.

25 A party may avoid liability by showing that he never intended to engage in the actions by which he appeared to manifest assent. E. Farnsworth, supra note 1, § 3.6, at 114. Moreover when each party to what otherwise would be a bargain manifests an intention that the transaction is not to be taken seriously, there is no manifestation of assent. Restatement (Second) of Contracts § 18 comment c (1979).

The issue of individual autonomy and the balancing of assent and expectations is discussed further in § II.
not the same as that in Case 2. In Cases 3 and 4, they will be able to enforce a contract that more closely resembles what the parties intended.

Other courts will change more slowly. They may have failed to perceive the need for change in policy, or they may not have thought about policy carefully enough, and consequently will continue to apply rules established by precedent without inquiry into the purpose and effect of such standards. Some of these courts may have moved partially in the direction of recognizing the new policy, and may have hovered between following and disregarding outmoded rules. Courts that have not come to terms with the policy issues will approach formation disputes in an unprincipled way that will likely confuse and frustrate the goals of formation adjudication. It is that confusion and lack of coherent principle that is addressed in this Article.

The preceding section sketched the nature of formation disputes, and the relationship among policy, substantive law, and procedural rules in the resolution of those disputes. The following section identifies the policy issues more carefully.

III. ASSENT AND ACCOUNTABILITY—THE FUNDAMENTAL POLICIES GOVERNING CONTRACT FORMATION

When a court resolves a formation dispute, it decides whether an alleged relationship qualifies for enforcement as a contract. The court's decision to enforce the relationship arises from two fundamental policies, which this Article identifies as the "assent policy" and the "accountability policy."  


For a concise critique of the objective approach and problems it has caused in the courts, see generally Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760-70 (2d Cir. 1946) (Frank, J., concurring); Note, Contracts—Objective Approach—Subjective Approach, 23 N.Y.U. L. Rev. 143 (1948).

27 See, e.g., Caporale v. Mar Les, Inc., 656 F.2d 242, 244 (7th Cir. 1981) (fact that parties signed agreement does not resolve issue of whether valid, enforceable contract arose); Interstate Indus. v. Barclay Indus., 540 F.2d 868, 870 (7th Cir. 1976) (deciding whether correspondence between parties constituted enforceable contract); Industrial Prods. Mfg. Co. v. Jewett Lumber Co., 185 F.2d 886, 889 (8th Cir. 1950) (controlling issue is whether there existed a contract between the parties).

28 The accountability policy is closely tied to the concept of reliance. See infra notes 42-49 and 153-161 and accompanying text.
The assent policy emerges from the inviolate principle, basic to the common law of contracts, and explicitly recognized in the United States Constitution, that individuals are at liberty to order their commercial relationships by private agreement. Because contracts arise from an exercise of private autonomy by both parties, courts may enforce as contracts only those relationships that are voluntary and consensual. The distinguishing feature of contracts is mutual assent, which results from an interaction between the parties through which they form a common contractual intent from their individual contractual intentions.

When a court is charged with the task of resolving a formation dispute, it is obliged to ascertain and give effect to the common contractual intent of the parties. This does not mean that courts

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29 See U.S. Const. amend. V and XIV, § 1. The Due Process clauses of the fifth and fourteenth amendments prohibit federal and state governments from denying persons "life, liberty, or property, without due process of law." Id. The constitutional guarantee of due process protects an individual's right to enter and form contracts and to dissolve relationships not voluntarily entered. Blum & Wellman, Participation, Assent and Liberty in Contract Formation, 1982 Ariz. St. L.J. 901, 908. In addition to the Due Process Clause, which protects the liberty aspect of contract formation, the Contract Clause of the Constitution prohibits states from imposing any law "impairing the Obligation of Contracts." U.S. Const. art. 1, § 10, cl. 1; see also 3 A. Corbin, supra note 16, § 551 (state court's interpretation of Contract Clause). The Contract Clause provides the right to judicial enforcement of the interests and expectations of parties to a contract. Blum & Wellman, supra, at 908.

30 See Fuller, Consideration and Form, 41 Colum. L. Rev. 798, 806 (1941). Fuller notes that the principle of private autonomy is "pervasive and indispensable" to contract law. Id. Private autonomy means that an individual may effect a change in his legal relationships with others. Id.

31 See Bronaugh, supra note 1, at 219. Mutual assent is the culmination of a negotiation process between parties who exchange compromises until they reach agreement. Id. at 217-19. In contract law, intent to enter into an agreement must be distinguished from the underlying mental state that motivates that intent. "Intent" in a contractual sense must be confined to mean the party's conception of the terms and nature of the relationship rather than his or her underlying motivation in entering into the contract, or his or her anticipation of its benefits. 1 S. Williston, Contracts § 21 (1957); see also infra note 37 (distinction between a party's motivation for entering into a contract and his intent with regard to the terms).


If a court imposes a contract in the absence of an adequate level of assent, it exceeds its legitimate function and infringes on the contract liberty of the party on whom the contract has been imposed. See Blum & Wellman, supra note 29, at 931-38. Indeed, courts have recognized that they are "compelled to carry out the parties' intentions." E.g., Pennzoil v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 388 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); Ader v. Hughes, 570 F.2d 303, 309 (10th Cir. 1978); Leonard Concrete Pipe Co. v. C.W. Blakeslee & Sons, Inc., 178 Conn. 594, 597, 424 A.2d 277, 279 (1979).
may not enforce as contracts those relationships that exhibit less-than-perfect actual agreement. The assent policy does not mandate complete agreement on every facet of the arrangement. Principles of contract liberty require that a distinction be drawn between legal assent and actual assent so that courts are able to enforce seriously intended relationships that have created legitimate expectations of enforceability.

The requirement of mutual assent must therefore be brought into proper perspective by acknowledging that the law seeks not perfect, but adequate, coincidence of minds. Courts should recognize that the formulation of an agreement requires the externalization of individual will. Agreement occurs through a process of human interaction that is rarely thorough enough to produce a wholly accurate synthesis of individual intentions. Often there will be gaps in the agreement because one or both of the parties

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33 See Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1009 (3d Cir. 1980); Lambert Corp. v. Evans, 575 F.2d 132, 137 (6th Cir. 1978); Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971) (quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968)). The law should, insofar as possible, foster security of transactions by providing certain and predictable rules that facilitate economic interaction and promote confidence in the enforceability of seriously-intended contractual relationships. See, e.g., U.C.C. § 2-204(3) & official comment (1978) (even though terms in contract are left open, if parties have intended to contract and there is “reasonably certain basis” for relief, contract will not fail).

34 See supra notes 29-30, 32-33 and accompanying text.

35 See Lambert Corp. v. Evans, 575 F.2d 132, 137 (7th Cir. 1978). In Lambert, the appellants argued that the parties had never agreed to many of the matters concerning the transactions in question. Id. The court responded that “there is nothing in the law of contracts that requires parties’ minds to meet on all conceivably related questions.” Id. The Lambert court affirmed the lower court’s decision that an enforceable contract existed because the appellants had not shown that any essential terms were not agreed upon. Id.; see also Care Display, Inc. v. Didde-Glaser, Inc., 225 Kan. 232, 238, 589 P.2d 599, 604 (1979) (mutual assent required only with respect to essential terms of a contract); Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980) (parties must agree to essential terms to form a contract). The Uniform Commercial Code acknowledges that a contract may be formed when the parties have not come to an agreement on all the terms. See U.C.C. § 2-204(3) (1978) & official comment.

36 See Bronaugh, supra note 1, at 219. Professor Bronaugh draws the distinction between parties being in agreement and parties having an agreement: To be in agreement, they must think the same way; to have an agreement, they must communicate those thoughts to each other. Id. Even when parties are in agreement with each other, the extent of the agreement may range anywhere from a detailed agreement on the precise terms of the contract to only a shallow agreement on the broad scope and nature of the transaction. Id. at 214-19; see also Farnsworth, Disputes Over Omission in Contracts, 68 COLUM. L. REV. 860, 868-73 (1968) (discussing how ambiguities and uncertainties may be embodied in a contract); infra note 37 (methods by which courts deal with ambiguity and vagueness in contracts).
will not have formed clear intentions on every point. Moreover, even if a party is able to crystallize his or her thoughts on every pertinent point, such individual intentions may not emerge clearly from the overt communications between the parties. The verbal or behavioral symbols used to express intent may be poorly chosen (as in Case 4 above, where the parties chose an apparently ambiguous phrase to describe the rate of interest), a party may be deliberately evasive (as is illustrated by the terms of A's offer in Cases 2 and 3 above), or the parties may otherwise fail in their purpose of conveying underlying intention.\(^7\)

These practical barriers to comprehensive agreement temper the assent requirement. In searching for assent, therefore, courts do not look for a literal "meeting of the minds."\(^8\) Rather, they conduct an examination of the relationship to determine whether

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\(^7\) See 1 A. Corbin, supra note 16, § 107. When the manifestations used by the parties to express their intent are susceptible of more than one interpretation, the contract is deemed ambiguous. Castaneda v. Dura-Vent Corp., 648 F.2d 612, 619 (9th Cir. 1981); Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir. 1978); First Nat'l Bank v. Clark, 228 Kan. 619, 705, 602 P.2d 1299, 1304 (1979) (quoting Wood v. Hatcher, 199 Kan. 238, 242, 428 P.2d 799, 803 (1967)). When a contract is deemed ambiguous and neither party has reason to know of the meaning attached by the other, a court may find that no contract exists. See Flower City Painting Contractors, Inc. v. Gumina Constr. Co., 591 F.2d 162, 165-66 (2d Cir. 1979); Julius Kayser & Co. v. Textron, Inc., 228 F.2d 783, 789-90 (4th Cir. 1956); Oswald v. Allen, 285 F. Supp. 488, 492 (S.D.N.Y. 1968), aff'd, 417 F.2d 43 (2d Cir. 1969); see also 1 S. Williston, supra note 31, § 95, at 345-46. Alternatively, a court may decide to interpret the ambiguity based on the custom and usage prevailing in the area. See, e.g., Corbin-Dykes Elec. Co. v. Burr, 18 Ariz. App. 101, 104, 500 P.2d 632, 634 (1972) (evidence of custom and usage admissible only where agreement ambiguous); see also infra note 40 (discussing types of evidence used to determine what parties intended in event of ambiguity or conflict over interpretation).

\(^8\) The subjectivist maxim, "meeting of the minds," is frequently used by both older and contemporary courts, but usually its meaning is metaphorical rather than literal. See, e.g., Rice v. McKinley, 590 S.W.2d 305, 307 (Ark. Ct. App. 1979) ("meeting of the minds" refers to mutual assent or mutual obligation); Brant v. Gallup, 5 Ill. App. 262, 267 (1879); see also 3 A. Corbin, supra note 16, § 537, at 42 ("meeting of the minds" does not necessarily mean that the parties give to the words of the contract and identical meaning).

Usually, "the manifestation of a party's intention rather than his actual subjective intent is . . . controlling." Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (6th Cir. 1971); see Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1191 (N.D. Miss. 1970); Howarth v. First Nat'l Bank, 596 P.2d 1164, 1167 n.8 (Alaska 1979). The subjective intent of the parties does not ordinarily convince the courts of either contract formation or lack of it unless the subject matter of the contract is defined in ambiguous terms or there are no objective manifestations of intent. Caporale v. Mar Les, Inc., 656 F.2d 242, 244 (7th Cir. 1981); L. Simpson, Contracts § 9, at 10 (2d ed. 1965); see Swanson v. Holmquist, 13 Wash. App. 939, 942, 539 P.2d 104, 106 (1975). Williston, however, has suggested that ignoring the subjective intent of the parties could result in the formation of a contract that does not conform to the intent of either party. 1 S. Williston, supra note 31, § 95, at 349.
it is substantially consensual—whether there has been a sufficiently close mesh of individual intentions to create agreement on the relationship as a whole or on the disputed term. This, however, does not mean that courts may ignore the requirement of assent. The determination of whether a contract was formed is still premised on actual, albeit sometimes imperfect, assent.

In order to comply with the assent policy, the inquiry into the transaction must be based upon an evaluation of the facts of the parties' interaction. The factual inquiry must begin with the premise that all evidence is worthy of consideration. It must extend to all pertinent facts, including not only the overt conduct of the parties, but also their states of mind—that is, their intentions in acting on or in responding to overt conduct. An inquiry based on a rule that requires the court deliberately to overlook any of those facts prevents the court from conducting an adequate inquiry into the fact of assent, and will endanger the assent policy by allowing the court to impose on one or both parties an arrangement that does not exhibit an adequate degree of assent.

The assent policy, however, is not the only policy that bears upon the court's inquiry. The accountability principle expands the

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39 See, e.g., Rice v. McKinley, 590 S.W.2d 305, 307 (Ark. Ct. App. 1979) (letter in question held to express agreement and to recite mutual exchange of obligations sufficient to meet essentials of a contract).

40 Some courts have acknowledged that evidence concerning the states of mind of the parties should be considered even when the contract has no apparent ambiguities. See, e.g., Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 388 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 873 (9th Cir.), cert. denied, 444 U.S. 981 (1979). Both the Uniform Commercial Code and the Restatement (Second) of Contracts advocate this approach. See U.C.C. § 1-205, official comment 1 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 201 (1982). State of mind evidence is admitted because courts acknowledge that the language of a contract may not have an absolute and precise meaning. See Lucie v. Kleen-Leen, Inc., 499 F.2d 220, 221 (7th Cir. 1974), overruled, Sunstream Jet Express, Inc. v. International Air Serv. Co., 734 F.2d 1258 (7th Cir. 1984); Farnsworth, supra note 36, at 876-81. An alternate rationale for the admission of extrinsic evidence concerning the parties' states of mind is that "courts are compelled to give effect to the parties' intentions." Pennzoil, 645 F.2d at 388; see Western Sec. Co. v. National Reserve Life Ins., 570 F.2d 269, 271 (8th Cir. 1978); Manuel Lujan Ins., Inc. v. Jordan, 100 N.M. 573, 575, 673 P.2d 1306, 1308 (1983). Courts that admit evidence to determine the parties' states of mind, however, typically require inherently reliable extrinsic evidence. See, e.g., Pennzoil, 645 F.2d at 388 (evidence of commercial setting and changed circumstances held admissible); Interform Co. v. Mitchell, 575 F.2d 1270, 1277-78 (9th Cir. 1978) (evidence concerning circumstances surrounding execution of contract and subsequent conduct of parties deemed admissible); Manuel Lujan, 100 N.M. at 576, 673 P.2d at 1309 (intent determined from parties' conduct, language, and objectives, as well as from surrounding circumstances); see also 3 A. CORBIN, supra note 16, § 538, at 66-73.
range of the definition of contract by including under its aegis some transactions that are apparently consensual, rather than actually consensual. That is, there are some cases in which the court will be justified in imposing an arrangement or term on a party even in the absence of an adequate degree of assent. This will result when the facts of the case call for the party to be held accountable for conduct even if the conduct does not reflect his or her actual underlying intentions.41

Accountability is based on the policy that precludes individuals who, by their actions, have led others justifiably to believe that they harbor a particular contractual intent, from later denying the misleading import of their actions.42 The policy goal is the protection of reasonable expectations resulting from justifiable reliance.43 Accountability is analogous to estoppel. The individual is bound not because she has been proved to have actually assented to a relationship or term, but because she has ostensibly assented.44 Her conduct caused the other party to the transaction justifiably to

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41 See infra notes 42-45 and accompanying text.
42 The principle of equitable estoppel was acknowledged by the Supreme Court in the 19th century. See Dickerson v. Colgrove, 100 U.S. 578 (1879). "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Id. at 580.
43 Kabil Devs. Corp. v. Mignot, 279 Or. 151, 155, 566 P.2d 505, 507 (1977); see Farnsworth, supra note 36, at 876. Corbin has identified one of the chief purposes of contract law as "securing the realization of expectations reasonably induced by the expressions of agreement." 3 A. Corbin, supra note 16, § 537, at 45. Contract law generally is solicitous of the reliance and justifiable expectations of contractors and would-be contractors. Reliance, in the sense that it is used here, is distinguishable from, but has a kinship to, notions of detrimental reliance that underlie the promissory estoppel theory. The essential difference is that, in the present context, reliance is the foundation for the establishment of a fully enforceable contractual relationship, and not for the more limited relief normally associated with promissory estoppel. See generally Fuller, supra note 30, at 810-12 (discussing basic principles underlying reliance theory and relationship between concepts of reliance and private autonomy).
44 See Stoddard v. Ham, 129 Mass. 383, 385 (1880). In Stoddard, the court observed: A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention . . . . It is not the secret purpose, but the expressed intention, which must govern. . . . A party is estopped to deny that the intention communicated to the other side was not his real intention. Id. at 385-86; accord O'Donnell v. Town of Clinton, 145 Mass. 461, 462, 14 N.E. 747, 750 (1888) (party who misrepresented nature of a document to other—an illiterate—was held bound to his misrepresentation because it induced reliance); Bronaugh, supra note 1, at 243-44 (estoppel should be imposed to prevent a party from taking advantage of contractual defects they created).
form the impression of assent. Accountability, therefore, is not premised on actual assent. In fact, there has been a failure of agreement between the parties, but a contract is found nevertheless. 45

Before a person may be held accountable for an unintended impression created by her conduct, it is necessary both that some degree of blame was present on her part, and that some degree of reliance existed on the part of the other party. 46 The definition of blame in this context must be a flexible one because accountability need not be grounded in fault. 47 The normal conception of fault, which suggests a deliberate or negligent misrepresentation of intention, 48 is too restrictive a standard for accountability since it implies too strong a requirement of wrongful conduct. For example, in Case 2 above, A's deliberate failure to disclose her true intent seems to provide a clear example of fault. The more flexible concept of blame, however, would also include B's involuntary action in Case 1 if A relied upon B's involuntary action and B immediately failed to correct that impression. In Case 4, involving the differing interpretations of the term "current rate," blame and reliance would be determined by evidence both of the parties' interpretation and of common usage.

Accountability is motivated by the need to protect the justifiable reliance of one party on the acts or utterances of the other. 49

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46 See C. Fried, Contract As Promise 61 (1981); S. Williston, supra note 31, § 95, at 181. A constructive mutual assent will be found by the courts when there is no actual assent but the conduct of one of the parties would lead the other party reasonably to believe a contract had been formed. See Kabil Devs. Corp. v. Mignot, 279 Or. 151, 157, 566 P.2d 505, 508-09 (1977); Lucy v. Zeher, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954). But see Bronaugh, supra note 1, at 245 (to find a bargain when there is obviously no assent is incredible).


48 See J. Calamari & J. Perillo, supra note 1, at § 11-34, at 445. Professors Calamari and Perillo maintain that a promise or an innocent representation of fact is a sufficient basis for estoppel. Id.


Section 90 of the Restatement (Second) of Contracts addresses the doctrine of estoppel. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). In light of the contention in this Article that estoppel and accountability are similar, see supra text accompanying notes 42-45, this section can be helpful in discussing accountability. Section 90 states in part:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce
Accordingly, accountability should involve a relative evaluation of the actors' behavior. Each party's justification for using any misleading symbols of intent must be weighed against the justification of the other party in gleaning the unintended meaning from those symbols. For example, in Case 1 above, to decide whether the equities favor A, evidence of A's subjective understanding of the nod, and B's belief on how it was perceived, is highly relevant. Neither blame nor reliance can be measured without reference to the factual context in which the manifestation occurred. This inquiry must extend, as does the inquiry into the fact of assent, to all pertinent evidence, whether subjective or objective, that bears upon the fact of blame or reliance.

In summary, assent forms the basis of contracts. Practical considerations and the need to protect substantially consensual arrangements have resulted in a distinction between actual assent and legal assent. Assent need not be comprehensive in order to be legally effective. Furthermore, where the facts call for it, principles of accountability will justify the imposition of a contract or contract terms on a party in the absence of actual assent. However, that does not mean that a court may carelessly disregard the assent policy. Legal assent must have some basis in a factually demonstrated consensual relationship, and accountability must be based on factually demonstrated blame and reliance. The substantive rules of contract formation and the procedural rules used in the adjudication of formation disputes must serve these policies, and they must do so accurately and efficiently.

In addition to substantive policy considerations, courts must keep in mind a variety of purely procedural questions. Courts must employ rules of evidence and process that fairly allocate evidentiary burdens, that permit adequate but not oppressive control of the factfinding process, and that avoid wasting court time on valueless testimony.\(^5\) The objective test has been erected at the point of confluence of these policies. However, it has been used in a way

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\(^5\) See, e.g., Vickers v. Vickers, 553 S.W.2d 768, 770 (Tex. Civ. App. 1977). In Vickers, the court held that a claim of ambiguity in a contract must be raised by the pleadings and that in the absence of such a pleading the court will not admit evidence of ambiguity. See id.; see also Ross v. Burleson, 274 S.W.2d 105, 107 (Tex. Civ. App. 1954) (ambiguity in a contract must be raised in pleadings).
that deflects and obscures such policies rather than advances them. The following two sections expand upon the implications of the assent and reliance policies, and discuss the way in which objective approaches to formation disputes have detracted from these policies.

IV. THE OBJECTIVE THEORY OF CONTRACTS

During the mid-nineteenth century, courts faced with formation issues began to focus more intently upon external manifestations to establish intent.51 The movement toward objectivity grew in strength and reached its peak in the early twentieth century.52 It came to be formulated as a rule known as the “Objective Theory of Contract.” 53 In a sense, the objective theory of contract is the forebear of what currently is called the objective test.54 Although

51 See, e.g., Davison v. Holden, 55 Conn. 103, 112, 10 A. 515, 516 (1887); Benjamin v. McConnell, 9 Ill. 536, 544 (1847); Stoddard v. Ham, 129 Mass. 383, 385-86 (1880); see also Williston, supra note 1, at 87. The preference for objective evidence is not an innovation of the 19th century; it is rooted in both the Roman law and the early common law. See Chloros, Comparative Aspects of the Intention to Create Legal Relations in Contract, 33 Tulane L. Rev. 607, 607-10 (1959); see also M. Horwitz, The Transformation of American Law 196-201 (1977) (cyclical substitution of subjective and objective criteria during formative periods of American contract law). For a judicial discussion of the rise of objectivity in American contract law, see Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760-70 (2d Cir. 1946) (Frank, J., concurring); Kabil Devas. Corp. v. Mignot, 279 Or. 151, 154, 566 P.2d 505, 507-09 (1977).

52 See, e.g., Brant v. California Dairies, Inc., 4 Cal. 2d 128, 133, 48 P.2d 13, 16 (1935); Zurich Gen. Accident & Liab. Assur. Co. v. Industrial Accident Comm’n, 132 Cal. App. 101, 102-03, 22 P.2d 572, 573 (1933). As the cases cited in this Article demonstrate, one cannot accurately confine the rise or fall of objectivity to precise time periods. A chronological description of objectivity is no more than a description of the strength and concentration of trends during particular time periods. Because objectivity has been emphasized in varying degrees throughout history by different writers and different courts, and since there has been no universal acceptance or rejection of objectivity in this century, it would be an exaggeration to speak of clear cycles of objectivity or subjectivity.

53 Ricketts v. Pennsylvania R.R., 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring); Industrial Indem. Co. v. Industrial Accident Comm’n, 34 Cal. 2d 500, 509, 211 P.2d 857, 858 (1949) (Traynor, J., concurring); see Parsons, Law of Contracts, in 2 Historical Writings in Law & Jurisprudence 6 (1980); see also 1 A. Corbin, supra note 16, § 106, at 476-77; M. Horwitz, supra note 51 at 196-201.

54 As is indicated by the contemporary cases cited in this Article, most courts no longer speak of an objective theory of contracts, preferring to use the term “objective test.” See, e.g., Action Eng’g v. Martin Marietta Aluminum, 670 F.2d 456, 461 (3d Cir. 1982) (en banc); Fairway Center Corp. v. U.L.P. Corp., 502 F.2d 1135, 1140 (8th Cir. 1974); Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971). There are modern exceptions, however. Washington courts, for example, still refer to the objective test as the “objective manifestation theory.” See, e.g., Dwelley v. Chesterfield, 88 Wash. 2d 301, 335, 560 P.2d 353, 355 (1977); Alexander & Alexander, Inc. v. Wohlman, 19 Wash. App. 670, 681, 578 P.2d
the objective theory generally is associated with older cases and writers, there has never been a clear break away from it. It retains some vitality and is encountered periodically in contemporary cases either in its full-blown form, or in a refined version. For the sake of convenient categorization, this Article uses the term “objective theory” to refer to the strict objectivist approach more commonly found earlier in this century. The term “objective test” is used to refer to the modified but less clearly defined approach that is more commonly found in contemporary cases.

A. The Objective Theory and Assent

The rise of the objective theory has been described by others and is not fully discussed here. It is worth noting, however, that the objective theory originated in part as a reaction to an earlier trend in which courts concentrated on the internal element—the will of the parties—and emphasized the importance of actual assent in contract formation. By the latter part of the nineteenth

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536 (1978).

50 E. FARNSWORTH, supra note 1, § 3.6, at 114; see, e.g., Fairway Center Corp. v. U.L.P Corp., 502 F.2d 1135, 1140 (8th Cir. 1974); Billmyre v. Sacred Heart Hosp. of Sisters of Charity, Inc., 273 Md. 638, 642, 331 A.2d 313, 316 (1975); Stark v. Morgan, 602 S.W.2d 298, 302-03 (Tex. 1980).

Since the historical and the contemporary often merge in this area this Article groups cases on the basis of the judicial attitude they represent, rather than on the basis of their chronology.

56 See, e.g., Huntington Beach Union High School Dist. v. Continental Information Sys., 621 F.2d 353, 356 (9th Cir. 1980). The court in Huntington rejected as inconsistent with the objective theory evidence of the plaintiff’s interpretation of a contract. See id.; see also Molton, Allen and Williams, Inc. v. Harris, 613 F.2d 1176, 1180 (D.C. Cir. 1980). In reaching its decision the Molton court viewed the facts at hand in terms of the objective theory. 621 F.2d at 356.

57 See, e.g., Zell v. American Seating Co., 138 F.2d 641, 646-48 (2d Cir. 1943), rev’d, 322 U.S. 709 (1944); M. HORWITZ, supra note 51, at 18-20; Farnsworth, supra note 36, at 943; see also Oliphant, Book Review, 19 Mich. L. Rev. 358, 360 (1921) (reviewing S. WILLISTON, THE LAW OF CONTRACTS (1920)).

58 See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942); G. GILMORE, DEATH OF CONTRACT 29, 35-43 (1974); Farnsworth, supra note 36, at 943. Gilmore argues that the objective theory was the product of a scorn felt for the subjective theory by Holmes and his followers, who succeeded in changing the emphasis of contract interpretation from the subjective to the objective by misinterpreting 19th century cases. See G. GILMORE, supra, at 37-38; see also Cohen, The Basis of Contract, 46 HARRY. L. REV. 553, 577 (1933) (limitations of will theory of contracts led to rejection of notion of will in contract interpretation).

The subjective theory of contracts emphasizes the will of the parties, and requires actual agreement between them, or a literal “meeting of the minds,” before a contract can be formed. 1 W. ELLIOT, COMMENTARIES ON THE LAW OF CONTRACTS § 25, 26, 40 (1913). Under
century, that subjectivism was perceived by many influential courts and writers as a barrier to the enforcement of promises. Those critics, who have come to be called objectivists, regarded the subjective standard as unreliable. They considered inquiry into the minds of the parties to be elusive, and believed that it created uncertainty and insecurity in commercial dealings. Because they believed that the security of commercial transactions demanded a standard that was external and observable, the objective theory, “[b]oth parties must understand the same thing in the same sense.”

Id. § 26; see, e.g., National Bank v. Hall, 101 U.S. 43, 49 (1879).

See J. CALAMARI & J. PERILLO, supra note 1, § 2-2 at 23. The authors contend that the objective theory has been dominant for over a hundred years and that under this theory a party's subjective intent is ordinarily irrelevant. See id; see also Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 985 (S.D.N.Y. 1917). Judge Learned Hand contended that giving effect to a party's subjective intent “related only to their state of mind when the contract was made, and that has nothing to do with their obligations.” Id. see also Palmer, The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second, 65 Mich. L. Rev. 33, 45 (1966). The Article proposes that as early as 1843 the New York courts used a “reason to know” test known as “Dr. Paley's rule.” Id. This rule was used by the courts as opposed to the subjective theory. See United States Rubber Co. v. Silverstein, 229 N.Y. 168, 171, 128 N.E. 123, 124 (1920) (a promise is to be taken in the sense that the promisor had reason to suppose it was understood); Hoffman v. Aetna Fire Ins. Co., 32 N.Y. 405, 413 (1865). Commentators have maintained that it is the basis for the objective theory. J. CALAMARI & J. PERILLO, supra note 47, at 2-2, at 24 & n.12.

See Ricketts v. Pennsylvania R.R., 153 F.2d 757, 761-62 (2d Cir. 1946). The label “objectivists” inaccurately suggests a cohesive jurisprudential school. In this Article, the term is used simply to refer to those courts and authors that have adopted or have urged the adoption of a strict form of the objective theory of contracts. As this Article will indicate, there are different degrees of objectivism, and some courts have been more inclined to apply the objective theory than others. See infra notes 96-105 and accompanying text.

See Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984-85 (S.D.N.Y. 1917); E. FARNSWORTH, supra note 1, § 7.9, at 484-85. Gilmore defends the objective theory by pointing out the inherent difficulties in the subjective theory. G. GILMORE, supra note 58, at 29. He states:

[If] “the actual state of the parties minds” is relevant, then each litigated case must become an extended factual inquiry into what was “intended,” “meant,” “believed” and so on. 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 precedent about recurring types of permissible and impermissible “conduct.”

G. GILMORE, supra note 58, at 42.

See, e.g., Stoddard v. Ham, 129 Mass. 383, 386 (1880); see Kabil Devs. Corp. v. Mignot, 279 Or. 151, 154, 566 P.2d 505, 507 (1977). In Stoddard, the court warned that to hold that expressed intention is not real intention “would be to put it in the power of the vendor in every case to defeat the title of the vendee . . . by proving that he intended to sell to another person.” Id.; see also G. GILMORE, supra note 58, at 42-43.

See Fuller, supra note 30, at 808. But see Ricketts v. Pennsylvania R.R., 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring) (no clear proof that either security of transactions or other socially desirable result would follow application of objective theory).
jectivists distrusted and eschewed inquiry into the actual intent of the parties.\textsuperscript{64}

The objectivists overreacted, however, by emphasizing objectivity too heavily and suppressing the subjective element too fiercely.\textsuperscript{65} The objective theory, although largely motivated by a distrust of subjective evidence, was not merely a procedural rule of evidentiary selection. It altered the substantive law of contract, and attacked fundamental contract policy, by declaring that manifestations of assent, rather than assent itself, formed the basis of contract.\textsuperscript{66} One of the most celebrated judicial expressions of the objective theory of contracts is that of Judge Learned Hand in \textit{Hotchkiss v. National City Bank of New York}:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by 20 bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of

However, it is surely true that, by making the existence of a contract depend upon the party seeking enforcement being able to show a true coincidence of wills at the time of formation, a purely subjective test for assent would severely disrupt the planning and enforcement of contract relationships.

\textsuperscript{64} See Fuller, \textit{supra} note 30, at 806.

\textsuperscript{65} See id. at 806-08. According to Fuller, the objectivists took the will theory too literally, and in their refutation of it, obscured the issue of private autonomy. Id.; see Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 38, 442 P.2d 641, 644-45, 69 Cal. Rptr. 561, 564-65 (1968); 3 A. Corbin, \textit{supra} note 16, § 583, at 474-75; Whittier, \textit{The Restatement of Contracts and Mutual Assent}, 17 CAL. L. REV. 441, 442-43 (1929).

In his concurring opinion in \textit{Ricketts v. Pennsylvania R.R.}, 153 F.2d 757 (2d Cir. 1946), Judge Frank found it ironic that the objectivists, who extolled the value of the free enterprise system and the individuality on which it was founded, should pervert that individuality by refusing to consider individualistic evidence, id. at 761 & n.2 (Frank, J., concurring). In seeking to foster the individualistic value of private contract facilitation, the objectivists undermined the inquiry into the existence of individual will in contract. Id. (Frank, J., concurring).

\textsuperscript{66} See, e.g., Tallant v. Stedman, 176 Mass. 460, 467, 57 N.E. 683, 686 (1900); see \textit{Restatement of Contracts} § 3, at 20 (1932); Oliphant, \textit{supra} note 57, at 360. Williston criticized the rule that intent to form a legal relationship is a requisite for contract formation. 1 S. Williston, \textit{The Law of Contracts}, § 21, at 21-23 (1924). In his view, the consideration doctrine dispensed with the need for an inquiry into intent, because the presence of consideration justified a finding that a legal relation had been entered. Id. at 21-22. See generally O. Holmes, \textit{supra} note 1, at 110 (legal liability is determined by a man's manifest acts, the law is indifferent to internal conscience).
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The objective theory advanced the premise that the internal element in contract should be treated as legally meaningless. Its adherents declared that contracts were formed not through agreement, but through apparent agreement.68 The existence of a contract had to be gleaned exclusively from an examination of external indicia.69

If the internal element is stripped of legal significance, it follows that subjective evidence is no longer of interest to the factfinder.70 The objective theory applied in its strictest sense created a conclusive presumption that manifestations of assent accurately represent actual assent.71 Accordingly, under the objective

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67 200 F. 287, 293 (S.D.N.Y. 1911); see also Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984 (S.D.N.Y. 1917); Tallan v. Stedman, 176 Mass. 460, 467, 57 N.E. 683, 688 (1900) (undisclosed intent of plaintiff is inadmissible); Stoddard v. Ham, 129 Mass. 383, 386 (1880) (expressed intention, not secret purpose, must govern). According to § 20 of the Restatement of Contracts, "neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be binding is essential" to the formation of a contract. RESTATEMENT OF CONTRACTS § 20 (1932). The essential element is the "manifestation of mutual assent by the parties." Id. (emphasis added). If the manifestation differs from the mental intent, the manifestation is controlling. See id. comment a.

68 The objective theory, discussed in the past tense in this Article, remains vital today. There are many examples of modern courts that unequivocally espouse the objective theory. See, e.g., Barco Urban Renewal Corp. v. Housing Auth., 674 F.2d 1001, 1008 (3d Cir. 1982); Leitner v. Braen, 51 N.J. Super. 31, 38, 143 A.2d 256, 260 (1958); Stark v. Morgan, 602 S.W.2d 298, 302-03 (Tex. Civ. App. 1980). In some extreme cases, courts have held that the manifested intent of the parties should be upheld even if the court believes that the parties in fact intended something different. See Powel v. Burke, 176 Conn. 369, 423 A.2d 97 (1979); Illinois Cas. Co. v. Peters, 77 Ill. App. 3d 33, 37, 29 Ill. Dec. 284, 288, 381 N.E.2d 547, 549 (1979).

69 See 3 S. WILLISTON, supra note 31, § 1536, at 2731. According to Williston, "the law . . . can be expressed accurately . . . by saying that the elements requisite for the formation of contract are exclusively external." Id.

70 See, e.g., Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913); Sullivan v. Phillips, 178 Ind. 164, 165, 98 N.E. 868, 869 (1912); Severance v. Heyl & Patterson, Inc., 308 Pa. 101, 108, 162 A. 171, 173 (1932). But see Woburn Nat'l Bank v. Woods, 77 N.H. 172, 176, 89 A. 491, 493 (1914). In Woburn, the court, while stressing that overt conduct rather than intent creates the contract, conceded that subjective evidence might sometimes be of interest since it may be referred to if there is no adequate objective evidence available. See id. If, for example, a witness is unable to remember overt conduct, the court will receive evidence of intent, which becomes relevant not because the court cares about the state of mind of the parties, but because it might help to prove their conduct. Id.

71 See Williston, supra note 1, at 87-88. Williston acknowledged that the objective theory was not a strict presumption, but a rule of law that declared that manifestations of assent rather than mental intent are the basis of contract liability. See id. The "presumptive" nature of the objective test is periodically alluded to by courts, but not all courts share Williston's confident understanding of the force or nature of the presumption. Some cases,
theory, subjective evidence became per se irrelevant.\textsuperscript{72} The natural effect of the objective theorists' emphasis on the external was the weakening of the consensual base of contract\textsuperscript{73}—substituting for actual assent a presumed, and sometimes fictional, assent.\textsuperscript{74} The self-contradictory perversity of strong objectivity is illustrated by cases that redefined assent in purely formal terms. For example, in \textit{Barco Urban Renewal Corporation v. Housing Authority}, the court stated:

[T]he polestar of contract interpretation is to ascertain the 'intentions and understanding of the two parties'... [a]ll other tools in aid of interpretation are subordinate to this goal... By intention, courts do not mean the actual subjective intention of the parties, but the objective manifestations of intent.\textsuperscript{75}

both older and more modern, have stated that the presumption is conclusive. \textit{See}, \textit{e.g.}, \textit{Salant v. Fox}, 271 F. 449, 451 (3d Cir. 1921) (law presumes that parties understand import of their contract and that they had intention that its terms express); \textit{Federal Land Bank v. Terra Resources, Inc.}, 373 So. 2d 314, 319-20 (Ala. 1979) (where there are no allegations of defect in formation of contract its terms, if unambiguous, are conclusive evidence of the parties' intentions). By contrast, in \textit{Transport Indem. Co. v. Seib}, 178 Neb. 253, 132 N.W.2d 871 (1965), the court made it clear that it used the word "presumption" in a loose sense to convey the idea that an objective manifestation (in this case, a writing) creates only a strong inference that parties intended a contract on its terms, \textit{see id.} at 260, 132 N.W.2d at 875-76. In \textit{Boat Town U.S.A. v. Mercury Marine Div.}, 364 So. 2d 15 (Fla. Dist. Ct. App. 1978), the court described a written manifestation as the "best evidence of intent and meaning of the parties." \textit{Id.} at 17.

\textsuperscript{72} \textit{See} \textit{Hotchkiss v. National City Bank}, 200 F. 287, 293-94 (S.D.N.Y. 1911), \textit{aff'd}, 201 F. 664 (2d Cir. 1912), \textit{aff'd}, 231 U.S. 50 (1913); \textit{Phillip v. Gallant}, 62 N.Y. 256, 263 (1875); \textit{Farnsworth, supra} note 36, at 945-46. Some cases have sustained objections to the admission of subjective evidence on the ground that subjective evidence is presumptively irrelevant. \textit{See}, \textit{e.g.}, \textit{Farnum v. Whitman}, 187 Mass. 381, 383, 73 N.E. 473, 474 (1905); \textit{Tallant v. Stedman}, 176 Mass. 460, 466, 57 N.E. 683, 685 (1900).

\textsuperscript{73} \textit{See} \textit{Ricketts v. Pennsylvanian R.R.}, 153 F.2d 757, 761-62 (2d Cir. 1946) (Frank, J., concurring); \textit{G. Gilmore, supra} note 58 at 42-43; \textit{Bronaugh, supra} note 1, at 220-21.

\textsuperscript{74} \textit{E.g.,} \textit{Barco Urban Renewal Corp. v. Housing Auth.}, 674 F.2d 1001, 1008 (3d Cir. 1982); \textit{Powel v. Burke}, 178 Conn. 384, 387, 423 A.2d 97, 99 (1979). Contractual intent under the objective theory is partially a legal fiction. Fuller observed that, because courts are not so much concerned with establishing real intent, their inquiry is partially factual and partially legal. \textit{L. Fuller, \textit{Legal Fictions} 88-89 (1967). The inquiry is designed to establish a form of constructive intent that has both factual and fictitious elements. \textit{Id. See generally id.} at 1-48 (nature of legal fictions); \textit{I W. Page, \textit{The Law of Contracts}} \textit{§ 73}, at 92-94 (1920).}

\textsuperscript{75} 674 F.2d 1001, 1008 (3d Cir. 1982) (citations omitted); \textit{accord} \textit{Powel v. Burke}, 178 Conn. 384, 387, 423 A.2d 97, 99 (1979) (court will construe intent even when the evidence indicates that such construction is fictional); \textit{Illinois Cas. Co.}, v. \textit{Peters}, 73 Ill. App. 3d 33, 35, 391 N.E.2d 547, 549 (1979) (purported intent may not alter otherwise clear and unambiguous words in insurance policy); \textit{Quenzer v. Quenzer}, 225 Kan. 83, 85, 587 F.2d 880, 882 (1978) (according to rules of parol evidence, if property settlement contract is unambiguous, it must be enforced according to its terms).
The *Barco Urban Renewal* court became so engrossed in the external utterances that it fictionalized assent and underplayed the importance of assent as an element of contract.

It is useful at this point to refer briefly to the parol evidence rule and its place in the scheme of objectivist thought. The long-standing discrimination by the common law in favor of written documents tied in well with the objectivist's penchant for the external. When the objective element of a transaction was recorded in a written memorial, the objectivist's enthusiasm for the external was heavily reinforced by the traditional reliance of the law on the symbolism of the written act and its reverence for the written word. The parol evidence rule is not aimed solely at subjective evidence. The rule also strikes down evidence of objective facts, for example, prior writings and contemporaneous or prior oral expressions, rendering those objective facts inoperative in the face of an

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76 The parol evidence rule provides that, when the parties have reduced their agreement to an integrated and complete written memorial, no evidence of oral or prior written terms may be admitted. See, e.g., Royal Indus. v. St. Regis Paper Co., 420 F.2d 449, 452 (9th Cir. 1969); International Multifoods Corp. v. D & M Feed & Produce, Inc., 470 F. Supp. 654, 656 (D. Neb. 1979); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 22 (D.D.C. 1973).

77 See Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833, 846 (1964). Patterson distinguishes symbolic acts from non-symbolic acts. A symbolic act is performed in order to denote agreement. For example, the signing of a written memorial is the creation of a symbol of agreement. A non-symbolic act is motivated by practical considerations rather than a desire to record and memorialize. For example, the act of mailing a letter of acceptance is concerned with effecting a practical end rather than symbolizing an agreement. However, these acts may just as well afford evidence of agreement. The parol evidence rule is premised in part on a belief that a deliberate symbolic act is usually reliable evidence of underlying intent. *Id.*

78 See Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009 (3d Cir. 1980); see also Smith v. Standard Oil Co., 227 Ga. 268, 278, 180 S.E.2d 691, 697 (1971) (dictum) (complete written contract may not be contradicted by parol evidence). In *Mellon Bank*, the court, emphasizing the necessity of interpreting contracts objectively, noted that "[t]he strongest external sign of agreement between contracting parties is the words they use in their written contracts." 619 F.2d at 1009. The court further posited that "the sanctity of the written words of the contract is embedded in the law of contract interpretation." *Id.* Another court, borrowing the reasoning of *Mellon Bank*, declared that the written words of a contract constitute "the most important manifestation of intent." Consolidated Rail Corp. v. Providence & Worcester Co., 540 F. Supp. 1210, 1218 (D. Del. 1982); accord National Cash Register Co. v. Modern Transfer Co., 224 Pa. Super. 138, 142, 302 A.2d 486, 488 (1973) (courts will not construe terms of contract in manner that conflicts with clear written agreement); see also Masterson v. Sine, 68 Cal. 2d 222, 226, 436 P.2d 561, 564-65, 65 Cal. Rptr. 545, 548-49 (1968) (evidence of collateral agreements are barred if they would certainly have been included in written contract).

79 See Evensen v. Pubco Petroleum Corp., 274 F.2d 866, 871 (10th Cir. 1960) (dictum); Bank Bldg. & Equip. Corp. of Am. v. Georgia State Bank, 132 Ga. App. 762, 765, 209 S.E.2d 82, 84 (1974). Authorities generally agree that, as a rule of substantive law, the parol evi-
The parol evidence rule is regularly characterized as a rule of substantive law rather than as a rule of procedure. It creates a conclusive presumption that the writing expresses the actual agreement of the parties. This rejection of extrinsic evidence establishes the primacy of a subsequent integrated agreement over previous utterances whether such previous utterances are oral or written. See generally 4 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 646, at 1196 (3d ed. 1961 & Supp. 1984) (parol evidence rule precludes prior extrinsic evidence irrespective of whether it is oral or written).

Although it is difficult to advance a uniformly accepted statement of the parol evidence rule, the formulation of the Restatement of Contracts can be used as a guide. The Restatement provides that, when an agreement is integrated, the parol evidence rule "makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto." RESTATEMENT OF CONTRACTS § 237 (1932). The Second Restatement contains a similar rule stated with greater equivocation. See RESTATEMENT (SECOND) OF CONTRACTS § 213(1), (2) (1981). Section 213 provides: "(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them; (2) a binding completely integrated agreement discharges prior agreements to the extent that they are within its scope . . . ." Id.; see also Patterson, supra note 77, at 845-47 (discussion of parol evidence rule).

The parol evidence rule has frequently come under attack by commentators on the law of evidence. See, e.g., J. Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 390 (1898). Thayer observed that there are few things that are "darker than [the parol evidence rule] . . . or fuller of subtle difficulties." Id. Wigmore observed that the rule is "attended with confusion and obscurity which make it the most discouraging subject in the whole field of evidence." J. Wigmore, supra note 15, § 2400, at 4.

See, e.g., Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 451 (2d Cir. 1977); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645, 649 (3d Cir. 1964). The parol evidence rule is characterized as a rule of substantive law because it precludes the admission of evidence not on evidentiary grounds, but as a matter of law. See In re Gaines' Estate, 15 Cal. 2d 255, 264, 100 P.2d 1055, 1060 (1940) (rule excludes evidence not because of ordinary reasons "based on the probative value," but, rather, because subsequent agreement "becomes the contract of the parties"). See generally 4 S. Williston, supra note 66, at 956 n. 15 (discussing parol evidence). Under the parol evidence rule, prior or contemporaneous agreements are legally ineffective, and therefore, evidence of them is excluded as irrelevant. See American Crystal Sugar Co. v. Nicholas, 124 F.2d 477, 479 (10th Cir. 1941); Pitcairn v. Philip Hiss Co., 125 F. 110, 113 (3d Cir. 1903); Michigan Chandelier Co. v. Morse, 297 Mich. 41, 48-49, 297 N.W. 64, 67 (1941); see also J. Thayer, supra note 80, at 390, 397; 9 J. Wigmore, supra note 18, § 2400, at 3.

See International Multifoods Corp. v. D & M Feed & Produce, Inc., 470 F. Supp. 654, 656 (D. Neb. 1979) (when parties create written agreement void of uncertainty, "it is conclusively presumed" to be complete, and parol evidence is inadmissible to change it); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 22 (D.D.C. 1973) (writing complete on its face is integration that cannot be altered by parol evidence). Once the integrated memorial is established in evidence, the fact of agreement on its terms is inferred as a matter of law and that inference may not be rebutted by evidence to the contrary. See Royal Indus. v. St. Regis Paper Co., 420 F.2d 449, 452 (9th Cir. 1969) (if parties intended writing to be "full and final embodiment" of the agreement, parol evidence may not change the agreement.)

If the parol evidence rule were a rule of evidence, the court would be able to consider parol evidence that was introduced and received without objection. However, as it is treated
tion of objective facts not included in the writing bespeaks an even greater intolerance of evidence relating to subjective intent, which unquestionably is irrelevant. Therefore, the objectivist's distaste for the subjective is even more likely to assert itself in circumstances in which a written memorial exists.

The objective theory, strictly applied, operated to exclude subjective testimony and objective testimony relating to the subjective element. Moreover, the objective theory went beyond the exclusion of evidence by affecting the way in which objective evidence was interpreted and evaluated. Once objective facts were proved, they had to be interpreted so that their meaning could be determined. Under the objective theory, however, the significance of facts could not be established by subjective explanations of the intent or interpretations of the parties; such subjective explanations inevitably would involve a return to the forbidden regions of the internal. As a result, the objective theory required that the evidence be interpreted objectively, and provided an external standard of interpretation. That external standard was derived from the reasonable man test of tort law.

However, transplantation to the law of contract endowed this test with functions that it did not possess in tort law.

Although the contract version of the reasonable man test did have some affinity with its tort counterpart in that each was concerned with deciding the question of accountability for conduct,
the contract test went further, becoming a device for interpreting
and ascertaining the terms of consensual relationships. The con-
tract test became a substitute for the factual interpretation of
communications between people, thereby changing the character
and quality of the inquiry. The notion of communication implies a
real intercourse between people in which they impart information
to each other. A proper interpretation of that interchange must in-
volve inquiry not only into the signal sent, but also into the recep-
tion of the signal. If the court examines only the facade of the
communication, interpreting its meaning solely on the basis of
outside appearances, the court is not really interpreting the com-
munication at all; rather, it is imposing its own view of how the
signals should have been received.

The reasonableness standard of the objective theory has not
worked. In cases involving written manifestations of assent, its
shortcomings are particularly acute. The added force of the parol
evidence rule in such cases has enabled some courts to usurp the
factfinding function by confusing the distinction between questions
of fact and questions of law. These courts have treated the inter-
pretation of the writing as a legal question to be resolved without
reference to extrinsic evidence unless it is not possible to under-

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See, e.g., Dumas v. First Fed. Sav. & Loan Assoc., 654 F.2d 359, 361 (6th Cir. 1981) (language of contract held to be clear as a matter of law); Quenzer v. Quenzer, 225 Kan. 83, 85, 587 P.2d 880, 882 (1978) (overturning trial court's determination that contract clause was ambiguous).
Such decisions have distinguished this “legal” interpretation, referred to as “construction,” from the factual interpretation, referred to as “interpretation.” The notion that the interpretation of a written contract is a question of law, however, is a fiction designed to withdraw the question from the trier of fact. A number of cases have rejected this objectivist stance, acknowledging that the intention of the parties is always a question of fact, even when a written expression exists.

In addition, the reasonableness standard has not proved capable of certain application because, unless the courts are uniformly willing to resolve contract formation disputes in the abstract, the standard cannot be applied consistently. Even courts that have applied the objective theory have struggled with the conflict between the external standard of the objective theory and the realization that communication always involves a factual context containing potentially pertinent evidence, including evidence of subjective intent. As a result, the law has always been in an unsettled state. It

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90 See, e.g., Dumas v. First Fed. Sav. & Loan Assoc., 654 F.2d 359, 361 (5th Cir. 1981) (when language is clear court ascertains intent as a matter of law); Quenzer v. Quenzer, 225 Kan. 83, 85, 587 P.2d 880, 882 (1978) (when contract is unambiguous “it must be enforced according to its terms” and parol evidence is inadmissible); Armstrong v. Colletti, 88 Wis. 2d 148, 153, 276 N.W.2d 364, 366 (1979) (construction of contract is matter of law for the court unless contract is ambiguous). Some courts, however, have equivocated on whether extrinsic evidence should be considered. See, e.g., Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 872-73 (9th Cir.), cert. denied, 444 U.S. 981 (1979); URS Corp. v. Ash, 101 Ill. App. 3d 229, 233, 427 N.E.2d 1295, 1299 (1981).


92 See 3 A. CORBIN, supra note 16, § 554, at 219-21; Patterson, supra note 77, at 835, 836-37. Patterson suggested that courts have classified interpretation as a question of law because judges believe that, due to their “education and legal experience,” they are better equipped than laymen “to interpret written instruments and to give them reliability.” Id. at 837.


94 See, e.g., Cook Indus., Inc. v. Community Grain Inc., 614 F.2d 978, 980 (6th Cir.), cert. denied, 449 U.S. 952 (1980). In Cook, the court reflected objective philosophy by ruling
is unclear whether subjective evidence will be considered in interpreting manifested conduct, and whether all objective elements in the context may be examined. A few courts, applying the objective theory, have sought the meaning of manifestations within the confines of the courtroom. In so doing, they aspire to pure objectivity by approaching the manifestations in an abstract environment rather than within the context of evidence of surrounding circumstances. Most courts, declaring that they seek the interpretation that would be placed on the conduct by a reasonable man in the position of the parties, have been willing to take some account of

that contract interpretation is normally a question of law for the court. Id. at 980. However, the court also acknowledged that “interpretation frequently depends heavily on the resolution of factual disputes,” which must be submitted to the trier of fact. Id. Recognizing that complex contractual language does not easily lend itself to a single objective interpretation, courts frequently have discussed the propriety of referring to subjective evidence of intent. See, e.g., Paragon Resources, Inc. v. National Fuel Gas Distribution Corp., 695 F.2d 991, 998-99 (6th Cir. 1983) (if agreement is ambiguous, parol evidence of intent is admissible); Estate of Mixon v. United States, 464 F.2d 394, 407 (5th Cir. 1972) (if objective facts are ambiguous, subjective intent becomes relevant); Palipchak v. Kent Constr. Co., 389 Colo. App. 181, 183, 554 P.2d 718, 719 (1976) (when contract is ambiguous, any evidence that shows intent is important).

See, e.g., Hotchkiss v. National City Bank, 200 F. 287, 293-94 (S.D.N.Y. 1911), aff’d, 201 F. 664 (2d Cir. 1912), aff’d, 231 U.S. 50 (1913). In Hotchkiss, Judge Hand ruled that testimony regarding one’s understanding of contractual terms is of no consequence because the obligations imposed by a contract are “attached by the mere force of law.” 200 F. at 293. Judge Hand declared that, “[u]nexpressed intent” is of no significance. Id. In a later case, Judge Hand again declared evidence regarding subjective intent to be irrelevant, noting that such evidence “would make not a particle of difference in his obligation.” Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. Supp. 976, 984 (S.D.N.Y. 1917).

See, e.g., Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984 (S.D.N.Y. 1917) (evidence of subjective intent is irrelevant); Hotchkiss v. National City Bank, 200 F. 287, 294 (S.D.N.Y. 1911) (testimony regarding party’s subjective intent is irrelevant), aff’d, 201 F. 664 (2d Cir. 1912), aff’d, 231 U.S. 50 (1913); Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957) (contract consists of two parties objectively manifesting, rather than harboring, an identical intent). This has been called the “fly on the wall” theory. See, e.g., Spenser, *Signature, Consent and the Rule in* L’Estrange v. Graucob, 32 CAMBRIDGE L.J. 104, 108 (1973) (describing this theory in context of English Law).

See, e.g., Intercounty Constr. Corp. v. District of Columbia, 443 A.2d 29, 32 (D.C. 1982); Aetna Casualty & Sur. Co. v. Insurance Comm’r, 293 Md. 409, 420, 445 A.2d 14, 19 (1982); Alexander & Alexander, Inc. v. Wohlman, 19 Wash. App. 670, 681, 578 P.2d 530, 536 (1978). It is sometimes said that the court must establish the meaning that would be attached to the manifestation by a reasonably intelligent person acquainted with all the usages and knowing all the circumstances prior to or contemporaneous with it. See, e.g., URS Corp. v. Ash, 101 Ill. App. 3d 229, 235, 427 N.E.2d 1295, 1300 (1981). Nevertheless, some courts describe the context as that surrounding the person to whom the manifestation was made; that is, the context from his or her standpoint only. See, e.g., Deverho Constr. Co., Inc. v. State, 94 Misc. 2d 1053, 1060, 407 N.Y.S.2d 399, 404 (Cl. Ct. 1978); Shrum v. Zeltwanger, 559 P.2d 1384, 1387 (Wyo. 1977). The extent to which this formulation excludes evidence of a context that would be allowed under the first formulation is unclear.
the transactional context in interpreting manifestations, or at least have so professed.  

Even among the courts that have evinced a willingness to consider transactional context, however, there is no clear agreement on the question of whether subjective elements may be included in that context. Many of the cases that recognize the relevance of contextual evidence generally do so vaguely, in terms that obscure the court's view regarding evidence of subjective intent as part of the relevant context. By contrast, other courts clearly express the view that context does include evidence of subjective intent.

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98 See, e.g., Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1140-41 (8th Cir. 1974). In Fairway, the court acknowledged the necessity of finding a "meeting of the minds," id. at 1140, but noted that such a meeting could be shown objectively from "words and actions viewed within the context of the situation and surrounding circumstances," id. at 1141. One court has noted that the "reasonable person" is presumed to know "all the circumstances surrounding the making of [a] contract." See Intercounty Constr. Corp. v. District of Columbia, 443 A.2d 29, 32 (D.C. 1982). In this vein, courts have looked to the trade usage of words in order to interpret contracts. See, e.g., Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117-21 (S.D.N.Y. 1960) (interpreting trade meaning of the word "chicken"); Cedar Park Cemetery Ass'n v. Village of Calumet Park, 398 Ill. 324, 334, 75 N.E.2d 874, 880 (1947) (trade usage of engineering terminology). See generally 3 A. CORBIN, supra note 16, § 536, at 36-39 (more courts have resorted to evidence of surrounding circumstances).

99 Some courts have declared the transactional context to be relevant but thereafter have failed to take it into account. See, e.g., Illinois Cas. Co. v. Peters, 73 Ill. App. 3d 33, 35, 391 N.E.2d 547, 549 (1979); Litwack v. Litwack, 289 Pa. Super. 405, 408, 433 A.2d 514, 515 (1981). In Litwack, the court, while stressing the importance of the context, appeared to place inordinate emphasis on the plain grammatical meaning of the words used by the parties, and inferred an intent from those words as a matter of legal interpretation. Id. Similarly, in Peters, the court appeared to have considered context, but then refused to take it into account, preferring to rely on a grammatical meaning of the words in a written memorial of agreement. See 73 Ill. App. 3d at 36-37, 391 N.E.2d at 549-50.

100 See, e.g., M.O.N.T. Boat Rental v. Union Oil, 613 F.2d 576, 579-80 (5th Cir. 1980); Palipchak v. Kent Constr. Co., 38 Colo. App. 181, 182, 554 P.2d 718, 719 (1976). In Palipchak, the court ruled that "any" evidence that shows intent is important when a contract is ambiguous. Id. However, in the absence of an indication that subjective evidence was an issue in the case, it is not clear how literally such a pronouncement should be taken when made by a court that professes to follow the objective test. Similarly, in M.O.N.T. Boat Rental, the Fifth Circuit observed that it had considered, apart from the parties' written agreement, "other indicia of the parties' intent"; however, the court offered no explanation of what those indicia were or might be. See 613 F.2d at 580. Other courts simply refer vaguely to extrinsic contextual "facts" without any explanation of that reference. See, e.g., Central Jersey Dodge Truck Center v. Sightseer Corp., 608 F.2d 1106, 1109-10 (6th Cir. 1979); see also Stewart v. Worden, 42 Mich. 154, 160, 3 N.W. 876, 880 (1879) (reference should be made to the "surrounding facts" of the transaction).

These courts recognize that they seek actual intent rather than constructive intent. Still other courts have expressly declined to include evidence of subjective intent.

The state of the law is further confused in cases involving written memorials of agreement because courts are swayed by the influence of the parol evidence rule. The rule often leads courts to refuse to consider any contextual evidence at all, whether objective or subjective, once the court has decided that a writing purporting to be a complete memorial of agreement is facially unambiguous. A court that follows the "plain meaning" rule will confine its interpretation to the face value meaning of the document and will not move outside the agreement to consider contextual evidence, whether subjective or objective. Not all courts, however, have adopted this approach; there are many cases in which courts have allowed extrinsic evidence even when the writing seemed self-contained and unambiguous on its face. There is also a middle
ground occupied by courts that do not seem to know where they stand.\textsuperscript{108}

The "plain meaning" approach, like other constructions beloved of the objectivists, is a fiction designed to avoid factual inquiry.\textsuperscript{109} Its unrealistic qualities are apparent to anyone who recognizes that dictionary definitions of words do not invariably convey the meaning intended by either or both of the parties. A court does not seek the true meaning of the parties' utterances by examining a dictionary. An apparently clear grammatical interpretation of words may become less clear once the intention with which they were used is explained. A cursory "plain meaning" treatment creates the illusion that interpretation is a mechanical exercise, and it masks ambiguity by suppressing the inquiry into possible alternative meanings.\textsuperscript{110}

B. The Objective Theory and Accountability

Although Williston underplayed the requirement of reliance as a basis of the objective theory,\textsuperscript{111} and rejected its estoppel parallel,\textsuperscript{112} protecting justifiable expectations is clearly a basic rationale behind the objective theory.\textsuperscript{113} However, the objective theory does not adequately protect such expectations because it tends to preclude inquiry into facts that would establish reliance and grounds for accountability for conduct.

\textsuperscript{108} See, e.g., Central Jersey Dodge Truck Center v. Sightseer Corp., 608 F.2d 1106, 1109-10 (6th Cir. 1979). The Sightseer court initially noted that, if the contract is unambiguous, "the court has no right to look to extrinsic evidence to determine [the parties'] intent." \textit{Id.} at 1109 (quoting DeVries v. Brydges, 57 Mich. App. 36, 41, 225 N.W.2d 195, 198 (1974)). Later in the opinion, however, the court observed that "[t]he parties' intention ... is to be ascertained by construing it in light of circumstances ... and the manifest intent must prevail over the literal sense of the terms." \textit{Id.} at 1110.

\textsuperscript{109} The plain meaning approach has been criticized as a futile and misleading search for certainty in the written word. See, e.g., Masterson v. Sine, 68 Cal. 2d 222, 226, 436 P.2d 561, 564, 65 Cal. Rptr. 545, 548 (1968); 3 A. CORBIN, supra note 16, § 536, at 26; J. Thayer, supra note 80, at 427-28.


\textsuperscript{111} See Williston, supra note 1, at 88.

\textsuperscript{112} See id. Williston rejected the estoppel parallel because he considered it too confining, and did not want the application of objective standards to be qualified by inquiry into the existence of detrimental action in reliance upon the manifestation. See id. Other writers, however, have recognized the analogy between estoppel and objectivity. See W. Page, supra note 74, § 73, at 92-94; Bronaugh, supra note 1, at 245-44; Whittier, supra note 65, at 441.

\textsuperscript{113} See Farnsworth, supra note 36, at 869.
Because the objective theory seeks the meaning of manifestations through the eyes of a reasonable man, courts often must rely on their own perceptions of what an objective interpretation would be, without any reference to the actual understanding of either party. There are exceptions recognized by the objectivists, but they are confined to clear-cut categories of cases involving special circumstances. In the absence of those special circumstances, once the court has decided upon its own interpretation of an utterance, it will assume that the party to whom the utterance was made reacted to it in the same way. In short, although protection of justifiable expectations is one of the motivations behind the objective theory, the objectivists’ distaste for subjective evidence has resulted in a tendency for courts to construct those expectations instead of inquiring into them. The objective theory generalizes and abstracts reliance so that it flows as a matter of legal inference from the court’s own understanding of the utterance. The actual reliance of the real party fades into irrelevance.

C. The Failure of the Objective Theory

The goals of the objective theory are respectable; the theory aims at facilitating the enforcement of seriously intended relationships by streamlining the factfinding process and by protecting re-

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114 See supra notes 84-86 and accompanying text.
115 See infra notes 119-121 and accompanying text. Even objectivists generally would concede that if one party did not intend assent, and the other knew of that lack of intention, the absence of assent would preclude formation even if an objective observer of the transaction would reasonably have believed that a contract was concluded. See O’Neill v. Corporate Trustees Inc., 376 F.2d 818, 820 (5th Cir. 1967); Chiles v. Good, 41 S.W.2d 738, 739 (Tex. Civ. App. 1931), aff’d, 57 S.W.2d 1100 (Comm’n Civ. App. 1933); 1 S. WILLISTON, supra note 65, § 21, at 21. A similar approach has been adopted in cases in which one party knew or should have known of the other’s unilateral mistake. See, e.g., Peerless Casualty Co. v. Housing Auth., 228 F.2d 376, 379 (5th Cir. 1955); Jansen v. United States, 344 F.2d 363, 370 (Ct. Cl. 1965); M.F. Kemper Constr. Co. v. Los Angeles, 37 Cal. 2d 696, 700, 235 P.2d 7, 11 (1951). Some objectivist courts have recognized a further exception for instances in which there is shared subjective intent. See, e.g., McConnell v. Lamontagne, 82 N.H. 423, 425, 134 A. 718, 719 (1926); Leonard v. Washington Employers, Inc., 77 Wash. 2d 271, 278, 461 P.2d 538, 543 (1969); 1 S. WILLISTON, supra note 66, § 21, at 23.
116 See supra notes 65-75 & 87-110 and accompanying text. In some cases, particularly those in which there has been a written memorial, courts have refused to consider even shared subjective intent when that intent differed from the court’s interpretation of the manifested conduct. See, e.g., Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984 (S.D.N.Y. 1917); Hotchkiss v. National City Bank, 200 F. 287, 294 (S.D.N.Y. 1911), aff’d, 201 F. 684 (2d Cir. 1912), aff’d, 231 U.S. 50 (1913); Robison v. Fickle, 167 Ind. App. 651, 657, 340 N.E.2d 824, 829 (1976).
liance on the reasonable meaning of manifested conduct. Nevertheless, the theory has severe shortcomings. Repudiation of the internal element in contract harms the assent policy that underlies contract law, while it clumsily guards not actual, but formalized, expectations. The objective theory is too blunt an instrument for the delicate task of formation adjudication. Although its exclusion of subjective evidence will, in some cases, insulate the factfinder from distracting, self-serving testimony, the theory imposes a blanket prohibition on a whole class of facts that often will be pertinent to the resolution of disputes. Although it seeks to protect reliance on overt conduct, the objective theory generates assumptions about reliance without permitting factual inquiry into the actual interpretations of the parties. Although it holds individuals accountable for their actions, it does so without hearing their own explanations of their conduct.

In short, the objective theory forecloses factual inquiry and circumvents the factfinding process. It demands an intense concentration on the external, and compels a selective approach to the facts of the transaction. As a result, it stylizes and abstracts the contractual relationship, and changes the basis of contract from assent and accountability to a mechanically constructed verisimilitude of those elements.

Because the objective theory created rules of law that diverge from deeply ingrained underlying contract policies, it has not been widely accepted, and has never been applied with conceptual consistency. Even avowed objectivists have recognized exceptional situations in which subjective evidence is relevant. In some

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117 See, e.g., United States v. Roberts, 436 F. Supp. 553, 557-58 (E.D. Tex. 1977) (court seems to apply both subjective and objective tests in tax agreement case); Citizens Utils. Co. v. Wheeler, 156 Cal. App. 2d 423, 432, 319 P.2d 763, 769 (1958) (while court claims to apply objective test, it declines to review trial court finding that there was no "meeting of the minds"); Reagan v. Bruff, 49 Tex. Civ. App. 226, 228, 108 S.W. 185, 187 (1908) (rule in construing contract is to determine what parties themselves meant, but meaning is to be determined by what they said and not what they intended).

118 See supra note 115 and accompanying text; see also Whittier, supra note 65, at 444-45 (evidence of subjective intent is necessary to resolve disputes concerning unilateral contracts). In addition, even objectivists balk at the imposition of a contract on a person who had no intention of entering into a contract, but who unconsciously acted in a way that gave rise to an apparent manifestation of contractual intent. Therefore, the objective theory generally has been regarded as limited by the requirement that the manifestation be intentional, so that no contractual liability can arise from an unconscious act unless that act gave rise to an estoppel. See 1 S. WILLISTON, supra note 66, § 35, at 53-54, id., § 95a, at 182. The limitation is a narrow one, however, and as long as the act was intentional and conscious, it is not necessary that the actor actually appreciates and understands its effects or legal im-
cases, recourse to subjective evidence has been explained on the ground that obvious fairness, policy, or common sense demand mitigation of the rule. Admission of subjective evidence also has been justified on the ground that the objective manifestations were either unclear or too ambiguous for objective interpretation. Failing all else, it is sometimes explained on the basis that the contradictory rules are holdovers from the subjective test that has never been fully put to rest. As the discussion in this and the

Notions of fairness have prevented courts from imposing the objective meaning of a manifestation on an actor when the other party knew of the actual intent of the actor. See, e.g., O'Neill v. Corporate Trustees, Inc., 376 F.2d 818, 820 (5th Cir. 1967); M.F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 702, 235 P.2d 7, 11 (1951); Ardis v. Grand Rapids & Ind. Ry., 200 Mich. 400, 414, 167 N.W. 5, 9 (1918).

Relaxation of the objective theory is also commonly found in cases of duress, fraud, or mutual or unilateral mistake. See Shrum v. Zeltwanger, 559 P.2d 1384, 1387 (Wyo. 1977); see also Woburn Nat'l Bank v. Woods, 77 N.H. 172, 175, 89 A. 491, 492 (1914) (dictum); Williston, supra note 1, at 91; Kessler & Fine, Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401, 426, 434 (1964) (courts rely on "discredited" subjectivist interpretation to avoid "socially undesirable results," and to prevent unconscionable loss to one party); Sharp, Williston on Contracts, 4 U. Cin. L. Rev. 30, 31-39 (1936) (discussing need for qualified objective test when adjudicating unilateral mistake problems).

Subjective evidence is used as a policy matter when, for instance, parties ascribe a meaning to a word that, because of the particular trade of the parties, means something different from its ordinary meaning. See Hurst v. W.J. Lake & Co., 141 Or. 306, 310, 16 P.2d 627, 629 (1932).
next section shows, there have always been courts that have challenged the premises of the objective theory. Although remnants of the objective theory remain,\textsuperscript{122} these remnants do not form the basis of a comprehensive approach to formation adjudication. The following section attempts to describe the influence of the objective theory in contemporary law.

V. THE OBJECTIVE TEST—OBJECTIVITY IN CONTEMPORARY CONTRACT LAW

Although it is difficult to evaluate the importance of objectivity in modern contract law, it is clear that most modern courts do not concentrate on objectivity as dogmatically as did the early proponents of the objective theory of contract.\textsuperscript{123} Nevertheless, the objective theory is not purely historical. Statements of the doctrine linger, particularly quotations of influential objectivist courts and writers.\textsuperscript{124} Although courts have become increasingly conscious of


\textsuperscript{123} Compare Charbonnages de France v. Smith, 597 F.2d 406, 414-15 (4th Cir. 1979) (contemporary formulation of objective test looks to intentions manifested in negotiations rather than those undisclosed) and Pan Am. World Airways v. Aetna Casualty & Sur. Co., 505 F.2d 989, 1003 (2d Cir. 1974) (subjective or hidden intent cannot be considered to determine meaning of words used) and Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 352 (1977) (in determining whether parties entered contract, objective manifestations of intent are to be examined in light of all circumstances) with Brant v. California Dairies, Inc., 4 Cal. 2d 128, 133, 48 P.2d 13, 16 (1935) (outward manifestation of assent is controlling and undisclosed intentions of parties are immaterial) and Deitrick v. Sinnott, 189 Iowa 1002, 1009, 179 N.W. 424, 427-28 (1920) (person cannot avoid contract because he was joking if listener reasonably believed he was serious) and Right Printing Co. v. Stevens, 107 Vt. 359, 365, 179 A. 209, 212 (1935) (term in contract cannot be altered because of one party's mental reservation).

the shortcomings of a rigid objective test, the movement away from an intensive concern for objectivity has been uneven and difficult to generalize.

While some courts have adhered tenaciously to the objective theory, others have rejected it firmly, acknowledging that since contracts involve both internal and external elements, formation disputes must be resolved on the basis of all available evidence—both objective and subjective. However, most contemporary courts have not taken a firm stance on the scope of objectivity in modern law. The typical approach is a pragmatic one that acknowledges the existence of an objective test by placing principal value on the external element, while according some recognition to the relevance of the internal element. This pragmatism has er-

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126 See, e.g., Barco Urban Renewal Corp. v. Housing Auth., 674 F.2d 1001, 1008 (3d Cir. 1982); Sands v. Sands, 252 Md. 137, 145, 249 A.2d 187, 191 (1969); P.J. Carlin Constr. Co. v. Whiffen Elec. Co., 66 App. Div. 2d 684, 685, 411 N.Y.S.2d 27, 28 (1st Dep't 1978); see also supra notes 68, 90, and 106. Adherence to the objective theory is even more vigorous in cases involving written manifestations because the parol evidence rule adds force to the court's aversion to evidence that is both subjective and extrinsic to the written memorial. See, e.g., Gendzier v. Bielecki, 97 So.2d 604, 608 (Fla. 1957); Marskill Specialties, Inc. v. Barger, 428 N.E.2d 65, 69 (Ind. 1982); Bernstein v. Kapneck, 290 Md. 452, 460, 430 A.2d 602, 606 (1981). See generally supra notes 76-82 and accompanying text.

127 See, e.g., Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 388 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). Since courts are compelled to give effect to the parties' intentions, ascertaining this intent is the aim of contract interpretation. See id. at 388. In Pennzoil, even though the contract was not ambiguous on its face, the court attempted to place itself in the position of the contracting parties by considering the commercial setting of the contract and the circumstances that had changed since the formation of the contract. See id. Moreover, in response to one party's plea that the contract be interpreted according to its "plain meaning," the court declared that "the 'plain meaning' position . . . ignores the parties' intentions or presumes a degree of verbal precision presently unattainable by our language." Id. (quoting Lucie v. Kleen-Leen, Inc., 499 F.2d 220, 221 (7th Cir. 1974), overruled, Sunstream Jet Express, Inc. v. International Air Serv. Co., 734 F.2d 1258 (7th Cir. 1984)); accord Stevens v. Fanning, 59 Ill. App. 2d 285, 290, 207 N.E.2d 136, 139 (1965) (intent is determined by giving contract fair and reasonable interpretation (objective), yet contract should be enforced according to mutually understood terms (subjective)).

Even during the height of the objectivists' influence, some courts considered subjective evidence. See, e.g., Hoffman v. Hoffman, 212 App. Div. 531, 532, 208 N.Y.S. 734, 735 (4th Dep't 1925) (to ascertain parties' intent, court puts itself in position of parties and looks at language, context, and surrounding circumstances).
oded firm rules and has made the search for a precise, generally applicable formulation of the modern objective test extremely difficult.

Apart from the inevitable conflict among different courts, there are many cases that are inarticulate and difficult to interpret, and that fail to indicate, either through doctrinal exposition or through clear demonstration, the scope and impact of the objective test. In some opinions, courts seem to have recited objectivist maxims without any indication that they have considered and adopted the philosophical position that motivated the maxims, so that the maxims seem to be used rhetorically. In many cases, the reader must question the doctrinal sincerity of the court when it holds in favor of an objective test because the facts of the case exhibit no conflict between external and internal elements. There

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hattan Bank v. First Marion Bank, 437 F.2d 1040, 1047 (5th Cir. 1971); Hawes Office Sys., Inc. v. Wang Laboratories, 524 F. Supp. 610, 614 (E.D.N.Y. 1981); see also Lubrication & Maintenance, Inc. v. Union Resources Co., 522 F. Supp. 1078, 1081 (S.D.N.Y. 1981) (contract is not governed by unexpressed subjective intent); Intercounty Constr. Corp. v. District of Columbia, 443 A.2d 29, 32 (D.C. 1982). In Intercounty Construction Corp., the court stated that the first step in ascertaining the meaning of disputed contract terms is to determine "what a reasonable person in the position of the parties would have thought the disputed language meant." 443 A.2d at 32. The court observed further, however, that the subjective intent of the parties entering the contract sheds light on the reasonable meaning. Id. Another court has held that although the subjective intent of the parties is relevant in resolving contract disputes, this intent is arrived at not by analyzing hidden views, but rather by analyzing a party's outward acts and conduct. See Lubrication & Maintenance, Inc., 522 F. Supp. at 1081.

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128 It is unclear whether objectivity is regarded by contemporary courts as a matter of substantive law. Some courts, including the highest courts of California and New York, candidly categorize the objective test as a rule for regulating evidence rather than a rule of substantive law. See Masterson v. Sine, 68 Cal. 2d 222, 225, 436 P.2d 561, 565, 65 Cal. Rptr. 545, 548 (1968); Braten v. Bankers Trust Co., 60 N.Y.2d 155, 157, 456 N.E.2d 802, 805, 468 N.Y.S.2d 861, 863 (1983). That some courts use objectivity to regulate evidence can be seen in cases that distinguish between subjective intent, which is deemed relevant, and evidence of subjective intent, which is deemed inadmissible. See, e.g., Evans v. Mo-Kan Teamsters Pension Fund, 519 F. Supp. 9, 13 (W.D. Mo. 1980), aff'd, 655 F.2d 900 (8th Cir. 1981); Mullen v. Christiansen, 642 P.2d 1345, 1350 (Alaska 1982); Stevens v. Fanning, 59 Ill. App. 2d 285, 290, 207 N.E.2d 136, 139 (1965). On the basis of that distinction, some courts recognize that subjective intent must be sought in interpreting an agreement between the parties, yet declare, in accordance with the objective test, that such intent must be gleaned only from objective manifestations, not from the testimony of a party on his or her state of mind. See, e.g., Evans, 519 F. Supp. at 13; Mullen, 642 P.2d at 1350; Stevens, 59 Ill. App. 2d at 290, 207 N.E.2d at 139.

are, for example, a number of cases in which courts have “applied” the objective test to decide a case that apparently involved no subjective evidence. In those cases, it is unclear whether the court was expressing a preference for objective evidence by way of clear dictum, or whether it was merely indulging in the thoughtless repetition of a doctrinaire formula that had no practical implications on the facts.

In some cases, the use of the objective test seems to be based not on a belief in objectivist doctrine, but on expediency. The test is used to exclude evidence that the court wants to avoid either because it is not credible or for some other reason. There are, for example, a number of cases in which it is obvious that although the court purports to exclude subjective evidence on the basis of the objective test, the true reason for rejecting the evidence is that the court has found the evidence unconvincing. In other cases, courts have used the objective test to achieve goals of trial management or jury control. It is sometimes expedient for a court to

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130 See, e.g., Estate of Savage v. Golub, 73 Ill. App. 3d 656, 659, 392 N.E.2d 263, 266 (1979); General Corrosion Servs. Corp. v. “K” Way Equip. Co., 631 S.W.2d 578, 580 (Tex. Civ. App. 1982); Maples v. Erck, 630 S.W.2d 488, 490 (Tex. Civ. App. 1982). In Savage, the court professed to apply the objective theory when the party whose intent was at issue was deceased at the time of suit. 73 Ill. App. 3d at 660, 392 N.E.2d at 266-67. In General Corrosion, although the court professed to apply the objective test, its decision does not indicate whether either party offered subjective evidence or other contextual facts bearing upon the meaning of the contract language; the grammatical meaning of the word “lost” comprised all the evidence the court considered. See 631 S.W.2d at 580. A similarly irrelevant reference to the objective test is found in Maples, in which the court applied the objective test to a case in which no subjective evidence was available since the contracting parties were dead. See 630 S.W.2d at 491.


132 See E. FARNSWORTH, supra note 1, § 3.6, at 116, id. § 7.14, at 515-17. The objective theory tends to hold the parties to linguistic usage that is accepted as normal, a matter of fact that arguably falls within the province of a jury. Id. § 3.6, at 116. However, if the contract is integrated and the intent of the parties may be gathered from the agreement, interpretation is an issue for the court and not the jury. See, e.g., General Wholesale Beer Co. v. Theodore Hamm Co., 567 F.2d 311, 313 (5th Cir. 1978) (if terms of contract are unambiguous, interpretation is for judge, not jury); Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456, 460, 141 N.E.2d 590, 593, 161 N.Y.S.2d 90, 93 (1957) (mere assertion that otherwise clear language has different meaning is not enough to raise triable question of fact).
reject testimony on the basis of a legal rule rather than on grounds of credibility. For example, when subjective evidence is tendered in the context of a summary judgment application, its exclusion on the grounds of a legal rule of inadmissibility will allow the court to grant summary judgment. If the court admits the evidence, it will generate a factual dispute that could preclude disposition of the case by summary judgment. Although these goals might be worthwhile, the use of an unarticulated and generalized objective test to achieve them leads to confusion and unpredictability.

The same pragmatism is evident in cases that attempt to move away from a more strictly objective approach. Instead of asserting a clear doctrinal position, some courts seem to soften the impact of the objective approach only to the extent needed to achieve a particular result in a particular case. The result reached may be fair, but the court misses an opportunity to clarify legal rules. The same limited, tentative approach is apparent in the treatment of the parol evidence rule. While many courts express dissatisfaction with the idea that it is possible to interpret a written memorial without recourse to external evidence, the same courts continue to apply the rule in one form or another. Other courts, circum-

123 See Interocean Shipping Co. v. National Shipping & Trading Corp., 523 F.2d 527, 534 (2d Cir. 1975), cert. denied, 423 U.S. 1054 (1976). In Interocean, the court stated that a contract requires a "meeting of the minds." Id. Whether there is such a meeting of the minds is a question of fact for the jury, which precludes summary judgment. See, e.g., Seitzingers, Inc. v. National Bank, 490 F. Supp. 340, 342-43 (D.D.C. 1980) (preclusion of summary judgment may have been a factor as court appeared to consider evidence on the merits, but excluded it on basis of objective test); see also Blue Jeans Corp. v. Pinkerton, Inc., 51 N.C. App. 137, 139, 275 S.E.2d 209, 211 (1981) (plaintiff's evidence of precontractual oral negotiations not sufficient to create material issue of fact, as evidence failed to controvert validity of writing).

124 See, e.g., Montgomery Ward & Co. v. Callahan, 127 F.2d 32, 34 (10th Cir. 1942) (adopting fiction of mutual mistake to avoid unjust consequences of objective test); General Warehousemen and Employees Union Local No. 636 v. J.C. Penney Co., 484 F. Supp. 130, 135, 137 (W.D. Pa. 1980) (espousing objective view, but examining subjective interpretations). One commentator has argued that courts should openly renounce the use of the objective theory instead of creating fictions to achieve a particular result. Note, supra note 26, at 147.

125 See, e.g., Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009-11 (3d Cir. 1980) (although extrinsic evidence may be admitted in some circumstances, "the parties remain bound by the appropriate objective definition of the words they use to express their intent"); Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1047 (5th Cir. 1971) (parol evidence rule does not preclude admission of evidence dealing with course of dealing and usage of trade); Keep Productions, Inc. v. Arlington Park Towers Hotel Corp., 49 Ill. App. 3d 258, 263, 364 N.E.2d 939, 943, (1977) (parol evidence admissible to clarify ambiguity).

Although Williston maintained that courts should employ the objective view of con-
venting the impact of the parol evidence rule by finding ambiguity in the written document, avoid directly challenging the validity of the rule in its traditional form by professing to apply it.\textsuperscript{136}

The "objective test" is a term used by courts to reflect an application of objective standards that are looser than some advocated by the strict objectivists. The "test," however, is too amorphous. Judicial perceptions of the role of objectivity in formation litigation are not uniform, and the various approaches are not always clearly explained or justified on policy grounds. The objective test does not adequately deal with the realistic concerns of evidentiary evaluation, assent, and reliance. The lack of definition and vague preference for objectivity underlying the test give rise to an unprincipled and haphazard approach to the resolution of formation questions. Objective standards have a place in contract adjudication, but the task is to define the role and limitations of such standards in the light of contract policies.

VI. THE PROPER ROLE OF OBJECTIVITY IN CONTRACT ADJUDICATION

The approach to objectivity must not be based on the fallacious assumption that manifestations of assent, rather than assent itself, form the basis of contract. Although contracts can be formed only through the medium of communication, contract law is premised on the belief that communicated conduct or utterances represent underlying contractual intent.\textsuperscript{137} That underlying intent

\textsuperscript{136} See, e.g., Masterson v. Sine, 68 Cal. 2d 222, 225, 436 P.2d 561, 563, 65 Cal. Rptr. 545, 547 (1968). In Masterson, the plaintiff had conveyed his farm to the defendant with an option to repurchase within 10 years. \textit{Id.} at 224, 436 P.2d at 562, 65 Cal. Rptr. at 546. When the plaintiff sought to exercise the option, the defendant contended that the option provision was too uncertain to be enforced. \textit{Id.} at 223, 436 P.2d at 562, 65 Cal. Rptr. at 546. The court held that the option was ambiguous and, therefore, admitted parol evidence. \textit{Id.} at 225, 436 P.2d at 563, 65 Cal. Rptr. at 547. The dissent argued that the option was not ambiguous and that the majority, by contradicting the written document, undermined the parol evidence rule. See \textit{id.} at 231, 436 P.2d at 567, 65 Cal. Rptr. at 551. (Burke, J., dissenting).

\textsuperscript{137} See 1 A. CORBIN, supra note 16, § 9, at 20-21. In contract law, conduct is observed as an expression of the state of mind. \textit{Id.} at 21. Since it is impossible to observe intentions and states of mind directly, for judicial purposes it is conduct that is judged. See \textit{id.} at 20; see also 1 S. WILLISTON, supra note 31, § 9, at 48-49. A promise implies either communication or some action indicating the intent of the promisor. \textit{Id.}
constitutes one of the elements of contract, and it may not be ignored. Although factfinders often will find it possible to infer contractual intent from overt conduct, and although that conduct often will prove to be the best evidence of underlying intent, courts should not pretend that an examination of external manifestations represents the full scope of the factual inquiry into contract formation. Courts cannot treat everything beneath the surface of an objective manifestation as irrelevant. Beneath that surface may exist information vital to a court's interpretation of the true meaning of the communications between the parties.

A. The Role of Objectivity in Determining the Fact of Assent

In section III, it is argued that the states of mind of the parties to a contract are facts that must be established before assent can be found.\textsuperscript{138} Because legal assent is determined in the light of practical limitations on the formulation, expression, and proof of the parties' states of mind, those states of mind are not necessarily overriding or significant factors in deciding whether a binding relationship was formed. There is no argument advanced here for the return to a subjectivity that demands a literal "meeting of the minds." Nevertheless, fair evaluation of the evidence is possible only when all the proffered facts, whether objective or subjective, are placed before the factfinder to enable it to decide whether a contract was concluded and on what terms. This principle should apply even when the case involves manifestations in written form.

Subjective evidence may or may not be a highly relevant component of the testimony.\textsuperscript{139} It is the function of the factfinder to determine the most probable version of the transaction, and a factfinder cannot make that decision accurately if evidence is excluded. Although there is undeniably some danger that the factfinder might be misled or persuaded by questionable subjective evidence, this is a risk inherent in the factfinding process generally, and is hardly a good ground for imposing a general ban on subjective evidence. The factfinder does not have to believe the self-serv-

\textsuperscript{138} See supra note 40 and accompanying text; accord Victory Inv. Corp. v. Muskagee Elec. Traction Co., 150 F.2d 889, 893 (10th Cir.) (cardinal rule in interpretation is to ascertain parties' mutual intention), cert. denied, 326 U.S. 774 (1945); Verhagen v. Platt, 1 N.J. 85, 88, 61 A.2d 892, 893 (1948) (function of court is to ascertain intent of parties).

\textsuperscript{139} See J. CALAMARI & J. PERILLO, supra note 1, § 2-3, at 24 (in certain situations subjective intentions of party may be decisive element in resolution of case).
ING SUBJECTIVE TESTIMONY OF A PARTY, and very often will be able to disregard it without difficulty. Such a scenario may give rise to the argument that it is inefficient to permit the admission of evidence that inevitably will be disbelieved, but that objection assumes that generalized determinations of weight may be made without hearing the evidence. Although that assumption may hold true in some cases, it is not valid when subjective evidence is offered to explain contractual intentions. This type of subjective evidence has too much potential significance to be dismissed in advance by a general exclusion.

In order to decide whether a contract was formed, therefore, the factfinder must weigh not only evidence pertaining to objective manifestations, but also evidence relating to the parties' underlying intentions or interpretations of those manifestations. In some cases, the factfinder may have to deliberate painstakingly over all the evidence in order to distill the fact or terms of assent on the balance of probabilities. In other cases, the task will be less difficult because the manifestation will have an obvious meaning. In such cases, proof of the mere manifestation may create a prima facie case of assent. The apparent meaning of the manifestation

140 Wheeler v. Gerald, 288 Or. 467, 479, 605 P.2d 1339, 1345 (1980) (en banc); Eisele v. Rood, 275 Or. 461, 464, 551 P.2d 441, 444 (1976); 3 A. CORBIN, supra note 16, § 538, at 63. Professor Corbin observed that self-serving testimony concerning intent does not have to be believed, and that it often can readily be rebutted if it is not true. Id. In addition, he argued that a mechanical rule of exclusion is not likely to be the best tool for avoiding the danger of self-serving testimony. Id. at 129. The issue, according to Corbin, should be one of weight, rather than admissibility. Id.

141 See Whittier, supra note 65, at 442. Whittier recognized that a party could falsely claim that he did not subjectively assent and thereby avoid the contract. Id. He noted, however, that "in most cases" the triers of the fact "would not be misled . . . ." Id.; accord 3 A. CORBIN, supra note 16, § 538, at 63 (self-serving testimony will not necessarily mislead trier of fact).

Some cases, while asserting an objective test, do appear to have evaluated subjective evidence and rejected it because it lacked credibility. See, e.g., Praggastis v. Sandner, 40 Or. App. 477, 484, 595 P.2d 520, 524 (1979); Dwellley v. Chesterfield, 88 Wash. 2d 331, 333, 560 P.2d 353, 355 (1972); see also NTA Nat'l, Inc. v. DNC Servs. Corp., 511 F. Supp. 210, 222 (D.D.C. 1981) (asserting objective test, court rejected subjective evidence of one party, but the subjective evidence contradicted both objective evidence and more plausible subjective evidence of other party); Seitzingers, Inc. v. National Bank of Washington, 490 F. Supp. 340, 346 (D.D.C. 1980) (on basis of objective test, court rejected subjective evidence that could well have been excluded on grounds that it lacked credibility in light of other evidence.

142 The efficiency argument is discussed more fully in § VII. See infra notes 169-180 and accompanying text.

143 There is a distinction between a presumption and a prima facie inference. C. Mccormick, supra note 22, at 965 n.4. McCormick observed that the term "prima facie case is
may be so obvious that such meaning will be considered the only tenable one, and assent on the basis of that meaning will be the only plausible conclusion. The normal rules relating to the incidence and discharge of the burden of proof in a civil case can adequately resolve these issues.

This flexible approach to the evaluation of evidence will not result in the unhealthy preoccupation with subjectivity feared by objectivists. That inclination toward the subjective would be held in check by recognition of the principle that evidence of the actual state of mind of the parties, rather than being the dispositive factor, is merely an ingredient in the total factual context on which the apparent meaning of A's utterances in case 2 would probably be considered the only tenable one, and, therefore, would be the basis of the parties' assent. Such a conclusion would be less obvious in the case of B's nod to A in case 1.


See Kidman v. White, 14 Utah 2d 142, 144, 378 P.2d 898, 899-900 (1963). In a contract action, the plaintiff has the burden of establishing that the defendant contracted to perform the obligations sought to be imposed. Id. at 899. The defendant may be bound only to the extent of the terms of the contract expressed or reasonably implied. Id. Once the plaintiff proves such an agreement, a prima facie case is made out and the burden of going forward is shifted to the defendant to establish any facts that would diminish the plaintiff's claim. Hurst v. Jackson, 134 Ga. App. 129, 129-30, 213 S.E.2d 511, 512 (1975).

The law clearly distinguishes underlying motivation or judgment from contractual intent. See, e.g., Leitner v. Braen, 51 N.J. Super. 31, 38-39, 143 A.2d 256, 260 (1958). In Leitner, the court refused to consider evidence by one of the parties relating to his subjective understanding of the amount of his commitment for sponsoring fees for a bowling team. Id. at 38, 143 A.2d at 260. Although the court used the objective test as a justification for disregarding the promissor's intent, a similar result would be reached through a full evaluation of all the evidence; the mistake in underlying motive would not alter the fact that a contractual relationship was intended on the terms expressed. For further examples of cases in which unmanifested reservations of intent would be likely to be held irrelevant, even if evidence of those intentions were admitted and included in the factual evaluation, see North Star Center v. Sibley Bowl, Inc. 295 Minn. 424, 426, 205 N.W.2d 331, 332 (1973); Wheeler v. White Rock Bottling Co., 229 Or. 360, 365, 366 P.2d 527, 529 (1961).
a determination of the existence or the terms of a contract must be based. In short, there is no justification for using the objective test to exclude subjective evidence or to create presumptions from objective manifestations. The factfinder should be entrusted with the task of evaluating all the evidence and distinguishing that which is reliable and credible from that which is not. To the extent that, by expressing a generalized preference for external evidence, the objective test and the parol evidence rule are used to foreclose that determination on the part of the factfinder, they fetter the factual assessment of the court or jury by converting into a legal rule what is really nothing more than an instinctive prejudice against uncorroborated, self-serving evidence.

Objectivity should play no role in the stage of the trial during which evidence is received. The use of objectivity should be confined to the stage at which the testimony of the witnesses has been concluded and the process of factual evaluation begins. The objec-

148 A few cases illustrate the point that subjective evidence is merely part of the factual context, and will not invariably overwhelm the other evidence. See, e.g., Sullivan v. Phillips, 178 Ind. 164, 166, 98 N.E. 868, 868 (1912). In Sullivan, a person offered a reward in the course of his testimony in court to anyone who could uncover certain books of account that had disappeared. Id. at 167, 98 N.E. at 869. When sued by the finder of the books, the offeror contended that the offer was made with the intent that it last only for the length of the proceedings, and with the motive that it enhance his credibility in court. Id. The court, applying an objective standard, refused to take his unexpressed intent into account and held him to the offer as expressed. Id. The result should be the same under an approach that permits the evaluation of his intent as a matter of fact. His failure to express his intent in the offer results in it not becoming a part of the contract; not because it is presumptively irrelevant, but simply because it is not established by the evidence as forming one of the agreed terms.

In Nieminen v. Pitzer, 281 Or. 53, 573 P.2d 1227 (1978), evidence of subjective intent was admitted but rejected as irrelevant after an evaluation of all the evidence, on the basis that the subjective intent could not stand in light of a clearly contrary manifestation of assent, id. at 57-58, 573 P.2d at 1229.

In Frigaliment Importing Co. v. BNS Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960), the court rejected the plaintiff's subjective understanding of the meaning of the word "chicken" used in a written agreement because the plaintiff's interpretation of the word did not accord with trade usage and other contextual evidence, see id. at 119-20. While the court supported its finding with reference to the objective test, the case actually was resolved on the ground that the plaintiff's subjective understanding was factually irrelevant because it did not become incorporated into the contract. Id. at 121.

149 Prejudice against subjective evidence is often apparent from the way it is described in opinions. For example, in Reprosystems, B.V. v. SCM Corp., 522 F. Supp. 1257 (S.D.N.Y. 1981), aff'd in part, rev'd in part, 727 F.2d 257 (2d Cir. 1984), cert. denied, 105 S. Ct. 110 (1984), the court stated that "[w]hat is looked to in determining whether an agreement has been reached is not the parties after-the-fact professed subjective intent, but their objective intent as manifested by their expressed words and deeds," 522 F. Supp. at 1275 (emphasis added).
tive test should be no more than an evaluative standard that is used by the factfinder in the task of extracting from the evidence its findings on the facts. It should be a tool for deciding upon the plausibility of evidence and interpreting its meaning.

When a factfinder evaluates and interprets evidence, it employs a process that is partly deductive and partly intuitive. The finder of fact is faced with a mix of objective and subjective evidence that often is contradictory or unclear. It is the factfinder's responsibility to decide not only what portions of the evidence are credible, but also what the meaning of the evidence is. The factfinder will approach the evidence through its own subjective processes. Since a purely subjective assessment by the factfinder is undesirable, it is necessary for the law to provide an external standard that can be used by the factfinder to keep its subjective responses in check. By requiring the factfinder to evaluate evidence on the basis of a reasonable interpretation of its plausibility and meaning, the law provides a guide that enables the factfinder consciously to control its own subjectivity, and to channel its thinking in the direction of common standards. In this way, a clearly articulated and properly limited objective test enhances the prospects of accurate factfinding. It permits the receipt of all evidence and ensures evaluation in a way that is responsive to community expectations.

B. Objectivity as a Means of Resolving Reliance Issues

As stated in section III, the issue of actual assent is not the only substantive issue in formation disputes. In some cases, even if it is clear that the manifestations of assent did not actually reflect the intent of the manifestor, there is a policy justification for enforcing the putative relationship or term when the equities in favor of the other party so dictate. This will occur when the other party justifiably derived an unintended meaning from a man-

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100 See Zell v. American Seating Co., 138 F.2d 641, 647 (2d Cir. 1943), rev'd, 322 U.S. 709 (1944). Judge Frank remarked in Zell that "when . . . we test . . . behavior by inquiring how it appears to a 'reasonable man,' we must recognize, unless we wish to fool ourselves, that although one area of subjectivity has been conquered, another remains unsubdued." Id.
101 See Bronaugh, supra note 1, at 247.
102 See supra text accompanying note 28. In addition to assent, accountability is an issue. Id.
103 See supra notes 42-47 and accompanying text.
IFESTATION and built expectations on that interpretation. There, the court will have to balance the equities in favor of protecting the reliance of one party against those in favor of not imposing obligations on the other.

The objective theory, although based in part on the policy of protecting reliance, failed to provide an adequate means of testing for reliance. Before holding a manifestor accountable for his conduct, a court, rather than giving its own objective interpretation of such conduct, should evaluate the conduct in light of all the evidence in order to reach a fair decision on whether it is appropriate to hold the manifestor accountable. The states of mind of both the manifestor and the second party are relevant factors to be considered by the court in determining the existence of grounds for accountability.

At the conclusion of all the testimony, objective standards assist in evaluating the evidence that tends to show the fact of reliance. Once the evidence is evaluated, and the intentions of the parties are established, objective standards serve further in determining the relative merits of the alleged intentions. Since reliance must be justifiable, and since the manifestor may be held accountable only if he or she were in some way responsible for the misapprehension, the reasonableness of the conduct or apprehension of both parties will have to be judged by an external

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104 See id.
165 See supra notes 84-86 and accompanying text.
166 See 3 A. CORBIN, supra note 16, § 538, at 48. Corbin suggested that two inquiries are crucial to the determination of accountability. Id. First, the court must inquire into the meaning attributed to the manifestation by the party to whom it was addressed. Id. Second, the court must probe the state of mind of the manifestor to determine whether he or she knew or had reason to know that the other party had given the words such a meaning. Accord United Teachers of Oakland v. Oakland Unified School Dist., 75 Cal. App. 3d 322, 324, 142 Cal. Rptr. 105, 110 (1977) (expressing as an important function the ascertainment of the sense in which promissor believed that promisee understood his manifestation). The correct inquiry, which has become a tentative working test, involves a weighing of all the evidence in order to decide where the equities lie. See Sands v. Sands, 252 Md. 137, 138, 249 A.2d 187, 188 (1969); Embry v. Hargardine, McKittrick Dry Goods Co., 127 Mo. App. 383, 384, 105 S.W. 777, 778 (1907).

107 See 3 A. CORBIN, supra note 16, § 538, at 73-75. The reasonable man test is only one of many potential objective tests that may be applied to determine the fact upon which a finding of reliance can be made. See id. Another such test is that suggested by the Restatement of Contracts, which involves a determination of what the speaker, in using certain words, should reasonably have expected the other party to have understood them to mean. See RESTATEMENT OF CONTRACTS, § 227 comment a (1932).
108 See supra notes 42-43 and accompanying text.
169 See supra note 46 and accompanying text.
standard.

This approach is not likely to place an undue burden on the adjudication process. The absence of presumptive reliance will not necessarily involve a more complex factual inquiry into the existence of actual reliance. In some transactions, the fact of reliance will emerge clearly from the very nature of the transaction, perhaps creating a prima facie showing of reliance.\textsuperscript{160} The clearer the manifestation, and the more obvious its meaning, the less the person acting on the manifestation will have to show to establish such a prima facie case. For example, in Sutton v. First National Bank of Crossville,\textsuperscript{161} a bank had included in its standard form loan application a provision relating to credit life insurance.\textsuperscript{162} The applicant was required, when signing the loan application, to indicate by checking the appropriate box whether he desired the credit life insurance, and had checked the box indicating a desire for insurance.\textsuperscript{163} He subsequently died, and the issue became whether the bank had been contractually obliged to have furnished such insurance.\textsuperscript{164} The court had little trouble finding reliance on the provision in the application.\textsuperscript{165} Even though the applicant was dead and unable to testify to his subjective understanding, the clear import of the form, together with the applicant's signature, in the absence of contrary indications was sufficient evidence of reliance in the context of the transaction.\textsuperscript{166}

\textsuperscript{160} See supra note 145. In certain types of specialized transactions, other policy considerations—for example, the protection of parties outside the immediate transaction—might dictate the need for special rules to facilitate commercial practices. An obvious example of this type of special policy is found in the area of negotiable instruments. The negotiable nature of commercial paper requires that negotiable instruments are capable of being taken at face value as they pass in commerce. In that area of the law, a strict objectivity is therefore appropriate, and it does not offend contract policy generally to provide, as regards remote parties, that signature gives rise to a conclusive presumption of assent. See, e.g., Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061-62 (Utah 1981).

\textsuperscript{161} 620 S.W.2d 526 (Tenn. 1981).

\textsuperscript{162} Id. at 527.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 528.

\textsuperscript{165} Id. at 530-31.

\textsuperscript{166} Id. at 530. Approaches similar to that taken in Sutton are adopted in other areas of litigation involving the accountability of providers of standard forms. See, e.g., H.C. Price Co. v. Compass Ins. Co., 483 F. Supp. 171, 175 (N.D. Tex. 1980) (ambiguity in contract language is resolved against the party who could have avoided ambiguity); First Nw. Nat'l Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1981) (courts frown upon adhesion contracts).

Reliance also may be established objectively if one of the parties overtly manifests assent. See, e.g., Nieminen v. Pitzer, 281 Or. 53, 56, 573 P.2d 1227, 1228 (1977) (evidence that plaintiff did not understand settlement even though she nodded her head in assent when it
In other cases, the facts might well compel a contrary conclusion. For example, when a mass contractor argues for the enforcement of the terms of a standard form contract, the court should not treat the other party's signature on the standard form as creating a presumption, or even a prima facie case, of assent to the form. Furthermore, the form should not generate a prima facie case of or a presumption of reliance on the manifestation in favor of the supplier of the form. Given the circumstances that usually surround the signature of standard form agreements, it is not at all obvious that a signature represents assent, or that the supplier of the form believed or was justified in believing that it did.\textsuperscript{167}

In both cases described above, the perceptions and understandings of the parties to the transaction are relevant, indeed essential, components of the foundation on which a decision on accountability is grounded. Moreover, careful scrutiny of the facts surrounding reliance will not adversely affect the security of transaction; as long as actual reliance is protected, the interests of transactional security are adequately served.

In summary, both the question of assent and the question of reliance are essentially factual issues. In resolving formation disputes, the court must base its decision to enforce an apparent contract or contract term on either a finding of actual assent, or, when actual assent is not shown, a finding that an obligation should be enforced on the ground of accountability. The standard of reasonableness serves as a means of evaluating evidence and, in determining accountability, as a means of deciding whether reliance justifies the imposition of an obligation on a party who has manifested apparent assent. If the objective test is elevated beyond these functions, it deflects the factfinding process and compromises the ability of the court to adjudicate the dispute accurately, thereby undermining fundamental contract policy.

\textsuperscript{167} See Weaver v. American Oil Co., 257 Ind. 458, 464, 276 N.E.2d 144, 148 (1972); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 672, 97 Cal. Rptr. 811, 813 (1971). Although a signature indicates assent, many standardized forms today are deemed unconscionable and against public policy because the signer of such a contract is at a significant disadvantage to the party providing the form. See Weaver, 257 Ind. at 464, 276 N.E.2d at 148. In such a case, the party who submitted the contract must clearly show that the other party understood and assented to the unconscionable clauses. \textit{Id.} Notwithstanding such a showing, the court may be reluctant to enforce the contract. \textit{Id.} see also Blum & Wellman, supra note 29, at 929-31 (discussing significance of clauses deemed to be against public policy).
VII. OBJECTIVITY AND JUDICIAL EFFICIENCY

One of the principal rationales for an objective approach to formation issues is the perceived value of that approach in promoting certainty, curtailing the factual inquiry, and permitting the court to control the process of contract adjudication.\(^{166}\) The preference for objectivity is based in part on the theory that self-serving, subjective evidence is often less reliable and less convincing than evidence of external conduct, especially when there is an apparent conflict between intent and action.\(^{169}\) It is reasoned that because subjective evidence is usually self-serving and difficult to corroborate,\(^{170}\) its admission consumes judicial time, and might endanger the fact-finding process by misleading the trier of fact.\(^{171}\) The argument might be made, therefore, that in order to simplify and shorten trials subjective evidence should be excluded in advance.

Such an argument must be approached with caution. Although subjective evidence often is more likely to be untrustworthy than objective evidence,\(^{172}\) it is not clear that subjective evidence is so consistently unreliable that it unquestionably deserves never to be heard. The factual inquiry should not be truncated, by declaring an entire class of evidence valueless, merely on the basis of conven-

\(^{166}\) See supra notes 50 & 132 and accompanying text.

\(^{169}\) See, e.g., Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1009 (3d Cir. 1980) (courts lack “psychic power” to determine subjective intentions of party and thus rely on objective manifestations of intent); Lubrication & Maintenance, Inc. v. Union Resources Co., 522 F. Supp. 1078, 1081 (S.D.N.Y. 1981) (unexpressed subjective intentions must give way to individual’s actions and surrounding circumstances); Mullen v. Christiansen, 642 P.2d 1345, 1350 (Alaska 1982) (subjective evidence is both self-serving and lacking probative value).

\(^{170}\) See supra note 169 and accompanying text. Admittedly, there are good reasons to view subjective evidence with some degree of skepticism; for instance, subjective evidence is easy to fabricate and difficult to evaluate. See O. Holmes, THE COMMON LAW 110 (1881); see also Mullen v. Christiansen, 642 P.2d 1345, 1350 (Alaska 1982) (evidence of subjective intentions can be used for self-serving ends and lacks probative value).

\(^{171}\) See, e.g., Peterson v. Culver Educ. Found. 402 N.E.2d 448, 453 (Ind. Ct. App. 1980) (promisor’s motive for breaching contract is irrelevant because promisee will be compensated for all damages resulting from breach); Kabil Devs. Corp. v. Mignot, 279 Or. 151, 158, 566 P.2d 505, 509 (1977) (when jury was carefully instructed that their decision could not be based on parties’ private intentions, admission of one party’s subjective intent did not mislead jury).

It should be noted that in some cases, even objective evidence is subject to problems of inaccuracy, unreliability or fabrications. See I J. WITMORE, supra note 18, § 12, at 297. Thus, these problems do not relate to the subjective evidence. See, e.g., Wilt v. Waterfield, 273 S.W.2d 290, 295 (Mo. 1954) (ostensibly valid liquidated damages clause deemed invalid because it had the potential to be inaccurate).

\(^{172}\) See supra notes 170-71.
Subjective evidence sometimes is convincing, and can be discounted when it is not. Many courts, while professing the traditional doctrine in favor of objectivity, have displayed a squeamishness about ignoring subjective evidence. Even courts that apply the objective test are known to sneak a look at whatever subjective evidence is available. Some courts manage to hear the subjective evidence without abandoning their avowed objectivism by finding that the objective evidence is ambiguous or unclear. Others, frankly recognizing the value of hearing subjective evidence, have been reluctant to exclude it, even when the manifestation appeared to be relatively clear. In the absence of ambiguity, objectivist courts frequently have allowed the admission of subjective evidence either by stating that the case is exceptional, or without

172 See, e.g., Zamore v. Whitten, 395 A.2d 435, 440, 443 (Me. 1978) (mutual assent to contract must be manifested, but contract action fails when there is no evidence of intent to enter binding mutual obligation); State v. Sampson, 387 A.2d 213, 216 (Me. 1978) (in case of criminal extortion contract, it is proper to find both that agreement existed and that victim had no intent to fulfill it even though objective manifestation was test); Hamilton v. Boyce, 234 Minn. 290, 292, 48 N.W.2d 172, 174 (1951) (exception to objective manifestations test when one party knows other does not intend to be bound).

174 See, e.g., Wallace v. Rogier, 182 Ind. App. 303, 304, 395 N.E.2d 297, 301 (1979) (hidden intentions not examined, but evidence of sham contract is admissible to defeat action on contract); Capital Warehouse Co. v. McGill-Warner-Farnham Co., 276 Minn. 108, 114, 149 N.W.2d 31, 35-36 (1967) (objective manifestation is essential to making contract, but whole transaction should be examined to determine intent of parties); City of Everett v. Estate of Sumstad, 95 Wash. 2d 853, 855-56, 631 P.2d 31, 35-36 (1981) (en banc) (although “objective manifestation theory” was followed, sale was held binding because buyer was aware of rule that all sales were final).


177 See, e.g., First Nw. Nat'l Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980) (although there was no dispute about meaning of words on note, court admitted evidence regarding intent of parties); Kabil Devs. Corp. v. Mignot, 279 Or. 151, 153-54, 566 P.2d 505, 508-09 (1977) (party's own view of transaction should be admitted as evidence); cf. supra note 172 (Corbin approach to the parol evidence rule). Words are unclear symbols in and of themselves, and therefore always require interpretation. See Matthews v. Drew Chem. Corp., 475 F.2d 146, 148 (5th Cir. 1973).

177 See, e.g., O'Neill v. Corporate Trustees, Inc., 376 F.2d 818, 820 (5th Cir. 1967) (exceptional nature was that one party knew of the actual intent of the other party even though objective manifestations did not reflect such intent); Bernstein v. Kapneck, 290 Md.
any justification or explanation at all. Moreover, it is not uncommon, in cases in which the objective test is applied, for the subjective evidence to be declared inadmissible by an appeals court only after it has been heard at trial. When evidence is excluded at this stage, it cannot be said that the exclusion has saved any time or insulated the factfinding process.

The indications are that, although the objective test may have resulted in the exclusion of evidence and the saving of time in a portion of cases, it has failed to do so in a substantial number of cases. It is possible that arguments in favor of a consistently applied objectivity will never succeed simply because courts will always find it difficult to ignore evidence that is temptingly pertinent, and that may contain one of the keys to resolving the case. The more a court believes it is bound to follow objectivist doctrine, the more likely the court will manipulate that doctrine in order to circumvent it without repudiating it.

In summary, while a rule excluding subjective evidence would likely result in the saving of some court time, it is not at all clear that the rule is a practical one. Even if it could be applied consistently, the rule is not justifiable unless it is clear that the benefit of enhanced efficiency outweighs the cost of compromising the quality of the factual inquiry designed to effectuate fundamental contract policy.

452, 456, 430 A.2d 602, 605 (1981) (doctrine of mistake is commonly used to avoid unwanted results of strict objective view); Shrum v. Zeltwanter, 559 P.2d 1384, 1387 (Wyo. 1977) (cases involving duress, fraud, or mistake often act to relax consequences of objective theory).

178 See, e.g., Tentindo v. Locke Lake Colony Ass'n, 120 N.H. 593, 598, 419 A.2d 1097, 1101 (1980) (trial court must determine intentions of parties based on evidence as a whole regardless of exceptional circumstances); Phillip v. Gallant, 62 N.Y. 256, 282-83 (1875) (subjective evidence admitted without justification); Nieminen v. Pitzer, 281 Or. 53, 56, 573 P.2d 1227, 1228 (1978) (despite court's refusal to recognize defendant's secret intention in nodding her head, testimony of defendant was admitted).

179 See, e.g., American Sumatra Tobacco Corp. v. Willis, 170 F.2d 215, 217 (5th Cir. 1948) (trial court's admission of testimony regarding entitlement to crops is reversible error); Hotchkiss v. National City Bank, 200 F. 287, 294 (S.D.N.Y. 1911) (trial testimony as to creation of a trust relationship is inadmissible since acts did not show such a relationship), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913) ; Mayo v. Andress, 373 So. 2d 620, 623-24 (Ala. 1979) (testimony at trial that defendant never meant to assure apartments would be built on property is inadmissible); Powel v. Burke, 178 Conn. 384, 387, 423 A.2d 97, 99 (1979) (court's contract interpretation reflects parties' objective, not subjective, intent); Langer v. Stegerwald Lumber Co., 262 Wis. 383, 388, 55 N.W.2d 389, 392 (1952) (secret intention of defendant's officers introduced at trial is not binding on plaintiffs); cf. First Nw. Nat'l Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980) (parol evidence admitted at trial but stricken on appeal).
VII. Conclusion

This Article has sought to describe the policies that dictate the content of substantive and procedural rules employed by courts in adjudicating formation issues. The consensual nature of the contract relationship gives rise to a strong policy in favor of recognizing that contracts contain both an internal and an external element. The fundamental policy that mandates the enforcement of contracts demands that courts enforce as contracts only those relationships in which an adequate level of assent is factually demonstrated. Contract policy also demands that protection be accorded to the proprietary interests of those who justifiably have built expectations in reliance on the apparently contractual behavior of others. These policies co-exist with the general policy that courts should conduct litigation as efficiently and accurately as possible. Courts that do not focus on these goals endanger basic contract policy by increasing the risk of unprincipled dispute resolution.

The objective theory, the objective test, and the parol evidence rule have been justified at different times on the ground that they are designed to serve one or more of the foregoing policies. An examination of the content and application of these doctrines, however, brings their justification into question. They appear unnecessary in the advancement of formation policies, and case law demonstrates that they are not, and never have been, applied in a way that balances and accommodates the policy considerations underlying the resolution of formation disputes. The sagging vitality of the parol evidence rule, and the incoherent and inconsistent application of the objective test, exacerbate this problem.

Objective standards, to be sure, do serve a useful function in formation litigation by injecting common standards into the process of dispute resolution, both in the area of factual evaluation and in the task of judging the justifiability of behavior. Their generalized use in the reception of evidence, however, is not tenable. If they are to resolve formation issues in an articulate and principled way, courts must avoid rejecting subjective evidence through blind adherence to the objective test and the parol evidence rule. Courts must permit the factfinding process to proceed so that contract formation disputes may be adjudicated in accordance with underlying policy.