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# The Human Person and Objective Good Faith in Contract Relations\*

José Carlos Moreira da Silva Filho\*\*

*The “repersonalization” of private law in Brazil holds particular significance for the law of contract relations. The objective principle of good faith is the main nexus between the emerging notion of the dignity of the human being and the ordering of contract relations. In this article, Professor da Silva deepens the discussion of the concept of the “person” in light of its biological, legal and philosophical aspects. He finds a promising perspective for the person as legal subject in the philosophical concept of “selfhood” that recognizes otherness. Building a concept of “selfhood” based on the principles of philosophical hermeneutics and alterity, he establishes an adequate space in which contract relations may be positioned as part of the ongoing “repersonalization” of private law in the Brazilian legal system.*

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\* This article is a revised translation of José Carlos Moreira da Silva Filho, *Pessoa Humana e Boa-Fé Objetiva nas Relações Contratuais: a alteridade que emerge da ipseidade*, in II CONSTITUIÇÃO, SISTEMAS SOCIAIS E HERMENÊUTICA—ANUÁRIO DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO—2005 113-136 (Leonel Severo Rocha & Lênio Luiz Streck eds., Porto Alegre: Livraria do Advogado 2005), ISBN:85-7348-428-4. Professor Francis J. Mootz III of Penn State Dickinson School of Law worked with Professor da Silva to revise his initial rough translation of the published article, and so the current article likely is substantially different in form (but not in substance) from the original.

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## I. Introduction<sup>1</sup>

The principle of objective good faith in contract law is one of the richest themes in contemporary Brazilian jurisprudence. Objective good faith is not simply a feature of the legal regulation of economic relations between two persons. Rather, it highlights fundamental juridical themes that are now emerging with great promise. As the principle is continually refined, objective good faith is being recognized as a constitutive principle of the legal system. In particular, objective good faith persistently establishes the need to question the autonomy and self-sufficiency of the legal system by indicating the close connections it has to the ethical and political systems.<sup>2</sup> Additionally, the principle of objective good faith plays an important role in rethinking the appropriate manner of understanding, interpreting and applying legal texts and norms to particular situations.<sup>3</sup>

However, this new significance of the principle of objective good faith extends beyond legal practice and also plays an important role in the academic debates concerning the “repersonalization” of Civil Law.

1. Editor’s Note: As a service to our readers, the Editorial Board normally checks cited material for both “Bluebook” form and substance.” Parts of this article rely on sources not available in English. Those sources were unable to be “source-checked” in the traditional law review sense, but have been checked for “Bluebook” form. Wherever possible, English translations were obtained and checked. These translations are indicated after the citation to the original source.

2. When describing the philosophy of law as a practical philosophy, Albano Pepe frames this issue in precise terms. The “norm-setting amalgam” that existed in the Greek world was self-justified because it was a unitary system. In contrast, in modernity law is grounded on the dogma of the

... relative emancipation of the legal system in contrast to the other norm-setting orders and other social sub-systems like ... religion, morality, etiquette and social usages, magic, the ownership of goods and wealth, [and] friendship. This ‘autonomy’ of the legal system, this self-referential character, creates a proper realm of law that is distinct from other norm-setting orders. . . . When insulating itself in this manner, law doesn’t lose links with ethics and politics, but it is able to present itself to the social system as dealing with ethical and political questions in a distinctive, autonomous manner. The special role for a philosophy of law, seen as rhetorical in nature, is to recapture the “forgotten” links between law, ethics and politics that are fundamental to a democratic polity.

Albano Marcos Bastos Pepe, *A Filosofia do Direito e a Filosofia Prática—o Ethos Enquanto Mundo Compartilhado: a Questão da Legitimidade no Direito*, [The Philosophy of Law and Practical Philosophy—Ethos in its Condition in a Shared World: a Question of Legitimacy in Law] 116 f. Tese at 20-21 (Curitiba, 2002) (Ph.D. thesis, Federal U. of Parana) (on file with author). This article takes a similar approach to the role of law.

3. See JOSÉ CARLOS MOREIRA DA SILVA FILHO, *HERMENÊUTICA FILOSÓFICA E DIREITO: O EXEMPLO PRIVILEGIADO DA BOA-FÉ OBJETIVA NO DIREITO CONTRATUAL*, [Philosophical Hermeneutics and Law: the Privileged Example of Objective Good Faith in Contract Law] (2nd ed., Rio de Janeiro: Lumen Júris 2006).

This article will address this significance in detail. Although contract law in the United States is shaped by notions of autonomy and individualism, the legacy of contract law in Brazil is rooted in patrimony. The current effort to “repersonalize” the Civil Law is an effort to break this patrimonial heritage and to embrace the significance of the person rather than simply guaranteeing property rights and the right to transfer property to another person.

It is important to note that the effort is to “repersonalize” the law, and not to “personalize” the law. The latter notion would suggest movement toward the autonomous, rational, individualistic and abstract notion of selfhood that arose during the Enlightenment as a rejection of hierarchical conceptions of the subject. The Enlightenment conception of the individual played a central role in liberalism, and continues to be important in the West. However, this abstract concept of the human person proved insufficient to deal with problems that followed in the wake of industrialism. Although all persons were regarded as equal bearers of civil rights in an abstract sense, there was no equality in economic and social relationships. Equality could no longer be viewed simply as freedom from governmental coercion, particularly in countries such as Brazil that have a dramatic concentration of wealth and power. This context has led to the idea that the parties to a contract should be viewed concretely in their differences, rather than abstractly as equal rights-bearing subjects. Cross-cultural exchange in the age of globalization has revealed the need to recognize the concrete idiosyncrasies of others. Although much more could be written on this theme, for present purposes it is enough to note that by using the word “repersonalization” rather than “personalization,” this article participates in the effort to develop a new conception of the human person that extends beyond the Enlightenment concept.

## II. “Repersonalization” of Civil Law and the “Person”

In current legal debates in Brazil, there is an evident intensification of the chorus calling for a cardinal role for the notion of the “human person.” Hymns of praise and joyful singing are intoned on behalf of the fundamental dignity of the human person in a democratic state, and the notion is viewed as connecting the constitution and private law, such that the sharp dichotomy between these areas of law is called into question. In the dialogue calling for attention to the promotion and protection of the human person, phrases such as “the functionalization of private law” and “the constitutionalization of private law” are used especially in connection with property and contract law. But there is a lack of depth in these intonations. Too often, the promotion and protection of the

dignity of the human person is invoked as an empty phrase that legitimizes virtually everything.<sup>4</sup> If there is any concept that should not be relegated to a sterile and idle chatter, it is the concept of the human person, which touches on ethical, political and legal considerations. This is particularly true in our age of globalization, in which social systems exhibit stratification and exclusion and appear not to take full account of Kant's moral categorical imperative to treat each individual as an end and not a means.<sup>5</sup>

History is replete with dramatic paradigm shifts in our understanding of the human condition, and so the ongoing effort to repersonalize Civil Law by transforming our conception of the human person is by no means a unique event. The problem at hand is

4. In fairness, there also is much good work on this theme, and I do not wish to suggest that the constitutionalization discourse in Civil Law is wholly inadequate, or that the attempt to steer the legal system toward the dignity of the human person is wrong. The point is that there is urgency to developing this theme with greater detail and complexity without taking matters for granted. Important work in this field includes: LUIZ EDSON FACHIN, *TEORIA CRÍTICA DO DIREITO CIVIL*, [Critical Theory of Civil Law] (RIO DE JANEIRO RENOVAR 2000); ORLANDO DE CARVALHO, *A TEORIA GERAL DA RELAÇÃO JURÍDICA—SEU SENTIDO E LIMITES*, [The General Theory of the Legal Relation—its sense and limits] (2nd ed., Coimbra: Centelha 1981); CARLOS FERNÁNDEZ SESSARAGO, *DERECHO Y PERSONA* [Right and Person] (2nd ed., Trujillo-Peru: Normas Legales 1995); INGO WOLFGANG SARLET, *A DIGNIDADE DA PESSOA HUMANA E OS DIREITOS FUNDAMENTAIS NA CONSTITUIÇÃO FEDERAL DE 1988*, [The Dignity of the Human Person and Fundamental Rights in the Federal Constitution of 1988] (Porto Alegre: Livraria do Advogado 2001); JUDITH MARTINS-COSTA, *A RECONSTRUÇÃO DO DIREITO PRIVADO*, [The Reconstruction of Private Law] (São Paulo: Revista dos Tribunais 2002).

5. See IMMANUEL KANT, *FUNDAMENTAÇÃO DA METAFÍSICA DOS COSTUMES E OUTROS ESCRITOS*, (São Paulo Martin Claret 2003), *translated in* IMMANUEL KANT, *METAPHYSICAL FOUNDATIONS OF NATURAL SCIENCE* (Michael Friedman trans. ed., Cambridge U. Press 2004) [hereinafter KANT]. We will return to Kant's categorical imperative, but at this point it is important to note that concrete existence clashes with the imperative, and that there is a need for a thorough and sensitive investigation of the human person. Dramatic changes in biotechnology have already compelled a reconsideration of the human person. Lucien Séve writes:

When personal and corporal death are no longer co-extensive, when a grandmother carries to term and gives birth to the son of her daughter, when frozen human embryos are stored, when the Pandora's Box of our genomes is opened, how could we avoid disturbing our representations of ourselves, rendering our relationships unstable, and calling into question the fundamental traits of the human condition? The understanding of the person ha[s] never been so disorganized, and these confusions become all the more significant when they resonate with the vast and profound crises of society that threaten to tear the social fabric by unseating traditional conceptions of marriage, work, schooling and politics and leaving in its place only economic reality as the master value, leading to a general condition of inhumanity. Can individuals remain unscathed with these seismic shifts taking place?

LUCIEN SÈVE, *PARA UMA CRÍTICA DA RAZÃO BIOÉTICA*, [A Critique of Bioethical Reason] 89-90 (Lisboa: Piaget 1997) [hereinafter SÈVE].

inattention to these deeper questions. Even as the phrase, “human person,” is utilized in discourse, too often it occurs in the context of an illusory complacency that can’t break free of old concepts. Alternatively, the transformation of the concept is warped by an unthinking narrow-mindedness that doesn’t take account of the broader significance of ongoing transformations in society.

We may begin by noting that the phrase “human person” would appear strange to many readers: after all, aren’t human beings the only “persons?” As Hattenhauer reminds us, though, in some archaic cultures animals and even objects were considered to be persons. It is only with the rise of western theology that it became dogma that all human beings, and only human beings, are persons.<sup>6</sup> The conquest of America and its abundant natural resources led to the conclusive moment for fixing this dividing line in order to facilitate the exploitation of nature through mercantile capitalism and to address the question of whether indigenous people should be considered persons.<sup>7</sup> If the indigenous people were recognized to be human persons (even if savages), then it was clear that there is something in the concept that unites all human beings and constitutes “humanity,” something beyond group, tribal or community

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6. Hattenhauer writes,

. . . in the legal world a long time was needed for the concept of person to remain circumscribed to human beings. The foundations are found in modern theology, singularly in Thomas Aquinas (1225-1273). In all the pages of the Bible, the Church leaders saw written that man was a creation of God and that, even as a creature, he was at the same time king and master of creation. What differentiated man from God was that he was created, and what differentiated him from the other animals was that he had the divine gifts of reason (ratio).

HANS HATTENHAUER, *CONCEPTOS FUNDAMENTALES DEL DERECHO CIVIL—INTRODUCCIÓN HISTÓRICO-DOGMÁTICA*, [Fundamental Concepts of Civil Law—Historical-Dogmatic Introduction] 14-15 (Barcelona: Ariel, 1987) [hereinafter HATTENHAUER].

7. A famous debate took place in the Spanish city of Valladolid in the years 1550 and 1551 between the theologian and jurist, Juan Gines de Sepúlveda and the Dominican friar Bartolomé de las Casas. The debate resulted from the growing dissatisfaction among the clergy generated by the increasingly violent actions undertaken by the Spanish conquistadors against the indigenous Indians. Sepúlveda argued that the Indians were halfway between men and animals, and clearly were inferior to the Spanish conquistadors. He drew on Aristotle’s opinions about slaves and barbarians to argue for the legitimacy of a war against them, a war which would in fact be an act of emancipation. Bartolomé, known as the first defender of human rights in America, offered a detailed rebuttal that lasted five days, in which he used Aristotle to answer every one of his opponent’s arguments. He concluded that the Indians were much more faithful and religious than the Spanish who waged war against them, and were thus more distanced from the characteristics of wild beasts. For more on this debate, see José Carlos Moreira da Silva Filho, *Da ‘invasão’ da América aos sistemas penais de hoje: o discurso da ‘inferioridade’ latino-americana in*, ANTONIO CARLOS WOLKMER, *FUNDAMENTOS DE HISTÓRIA DO DIREITO*, [From the ‘Invasion’ of America to the Modern Penal Systems: the Discourse on Latin-America Inferiority, in Foundations of the History of Law] 279-330 (2nd ed., Belo Horizonte: Del Rey, 2002).

identity. Modern philosophy provided a secular adjunct to Christian universalism, and eventually the word “person” came to be understood as pointing toward a cultural construction that rises above mere genetic structure.

The human person might be studied as a biological entity, a philosophical concept, and a legal subject.<sup>8</sup> Conflicts between these different senses of the human person are inevitable, particularly in light of the tendency of the philosophical concept to range from the rationalism of Kant to existentialist thinking. Before concentrating on the philosophical and legal aspects, it is fitting to reflect on the human person as a biological fact. Given the intense research in the field of biotechnology, it is a common error to regard the human person as merely biological, a reductionist approach that will be termed “biologistic.” This article will challenge the biologistic conception of the human person from the perspective of Martin Heidegger’s hermeneutical phenomenology.<sup>9</sup>

### III. The Inadequacy of the Biologistic Conception of the Human Person

The biologistic approach to the person attempts to define the human person solely by reference to biological facts resulting from belonging to the human species.<sup>10</sup> This wholly scientific-natural view of the human person attempts to make other perspectives of the person obsolete.<sup>11</sup>

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8. The importance and depth of this issue suggests many other possibilities for focused discussion, including pedagogy, psychoanalysis, and even art. For present purposes however, this article will only suggest these extensions.

9. Lucien Sève undertakes a similar approach by using categories originating from historical materialism. See SÈVE, *supra* note 6.

10. It is important to reemphasize that this article does not question the significance of biological investigation. Instead, the purpose is to criticize a “biologistic” ideology that reduces the human person solely to biological data. The article will argue that biological capacities show themselves only within cultural contexts, and therefore that these social characteristics are important for understanding the human person.

11. In his acceptance speech upon receiving the Kyoto Award in 2004, Habermas criticized the efforts by neurologists to reduce the role of free will and voluntariness in human actions by focusing on biochemical reactions that take place prior to any “voluntary” thinking.

When reason and its logical use are looked down upon as epiphenomena, there isn’t much left of the causal role of self-perception of subjects who are capable of talking and acting. From the neurobiological point of view, reasons have only a descriptive role as to behavior that is produced in a non-conscious manner and explained neurologically. This begs the question why reasons have assumed such significance in the past, and why the association of opinions, reasons and actions has arisen. Reductionist strategies of research question whether one of the two epistemological perspectives may be left by the side, or whether we depend on a complementary crossing of both of these perspectives on knowledge about human persons. Rejecting the epistemological duality of knowledge perspective would mean that the corresponding language games and

This perspective suggests that humans have inborn characteristics that can surface independent of history and social context. The modern efforts of hermeneutical philosophers to distinguish the epistemology of the sciences from the epistemology of the spirit have challenged the biases of biologicistic thinking. For example, in his “life-philosophy” Wilhelm Dilthey attempted to understand human persons within their history rather than as simply natural objects.<sup>12</sup> This form of inquiry suggested that there are two distinct forms of inquiry: the natural-scientific inquiry and the sciences of the spirit.

Martin Heidegger’s groundbreaking work overcomes this tendency toward epistemological dualism that has become part of common sense, without reducing either perspective to the other. Heidegger’s concept of *Dasein* (“being-there”) signals his insistence that any understanding we gain of the world around us or of ourselves is already supported by a world that precedes and sustains us. This world, however, cannot be understood as an objective description of all beings in their substance, but rather, “the one ‘in which’ a factual *being there* lives in his condition of *being there*. *World* has a pre-ontological existential meaning.”<sup>13</sup> Human beings do not simply exist; their way of existing is to guide themselves in a historical trajectory based on the understanding they have of the world, other human beings, and their own nature. Furthermore, this existential understanding is not chosen since the ability

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the explanation models cannot be reduced to each other. Thoughts do not permit translation without a semantic balance in a vocabulary fit for things and events. This raises the question whether we should contemplate the world simultaneously from both perspectives in order to be able to apprehend more accurately. We are at the same time observers and participants of communication.

Jürgen Habermas, *Die Freiheit, die Wir Meinen*, DER TAGESSPIEGEL ONLINE (Berlin, Nov. 14, 2004), <http://archiv.tagesspiegel.de/archiv/14.11.2004/1477636> (last viewed Oct. 14, 2006).

12. Dilthey places fundamental significance on the historicity of experience rather than on the correspondence of scientific investigation and the objective world. The historical world is not an external, objective fact; instead, historicity defines the development of spirit. Historical knowledge is possible because of the homogeneity of the subject and object. Dilthey’s unique approach looked to the manner in which a person acquires the vital context from which knowledge may emerge. The notions of a “life-philosophy” of “experience” makes it clear that we need more than natural science to investigate the human condition. This approach looks not to a transcendental historical subject, but rather to individuals emerging within a historical nexus. Dilthey does not attempt to understand spirit through categories and methods exterior to spirit, but rather by working from within the constitution of spirit. See WILHELM DILTHEY, *INTRODUCTION TO THE HUMAN SCIENCES: AN ATTEMPT TO LAY A FOUNDATION FOR THE STUDY OF SOCIETY AND HISTORY* (Wayne State U. Press 1988).

13. See MARTIN HEIDEGGER, *EL SER Y EL TIEMPO* (México: Fondo de Cultura Económica 1997), translated in MARTIN HEIDEGGER, *BEING AND TIME* (Joan Stambaugh, trans., S.U.N.Y. Press 1996) [hereinafter HEIDEGGER].

to choose is itself premised on a previous understanding that is given by the historical and cultural context as communicated through language.

According to Ernildo Stein,

. . . the arguing manner that locates the deliberation and rationality as phenomena caused genetically is strongly suggested in a kind of vicious circle when it states that the thinking human being is determined genetically. It doesn't realize that what it thinks "genetically" already anticipates and transcends the genetic order. The genetic element that is stated as a cause of deliberation dips already in a preunderstanding, in an auto-understanding that anticipates it as an *a priori*. We couldn't talk about the genetic without it being preceded by something belonging to the order of deliberation, that is pre-understanding. Such a difficulty forces us to realize that human life isn't reduced to the materiality of the biochemical thing, the demand being formulated that human life be constituted by the fact that the human being must understand himself previously . . . thus, deliberative human life exceeds the bio-chemical datum, adding to itself the self-understanding which is more than the genetic components. Human life means more than the adding up of genetic elements that serve as its vector.<sup>14</sup>

In other words, with the development of self-consciousness perception is always mediated by the senses and transmitted to the individual through the historical-cultural horizon in which he or she exists. This horizon surpasses the individual's genetic constitution as soon as he or she comes into contact with others through the mediation of the senses.<sup>15</sup> The term "senses" is not used in a reductionist biologicistic manner, but rather to encompass the "common sense" that is conveyed to the individual from

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14. ERNILDO STEIN, *EXERCÍCIOS DE FENOMENOLOGIA—LIMITES DE UM PARADIGMA* [Exercises in Phenomenology—Limits of a Paradigm] 183 (Ijuí: Unijui 2004).

15. Castor Ruiz develops this theme in an enlightening way:

The relation of the person with the world is never going to be something that is given naturally, and the person's knowledge is never simply a matter of a natural adequacy of the intellect to objective reality since this adequacy is always mediated by the senses. This disrupts the natural condition of truth that has been a basic presupposition of traditional philosophy. There is no longer a natural truth, there is no single form of truth because there is no adequacy from the intellect or from the person to reality; what exists is a meaningful mediation. The human being doesn't couple the objective facts of nature, he interprets them; he never receives them naturally either by reason or by the senses, he mediates them by the senses. Each person must be a hermeneuticist as a condition for interacting with the world in which he or she lives. . . . For us there is no natural world since our world is always a sense of the world.

CASTOR BARTOLOMÉ RUIZ, *A filosofia, a verdade e o sujeito*, in INÁCIO HELFER, LUIZ ROHDEN, URBANO SCHEID, *O QUE É FILOSOFIA?*, [*Philosophy, Truth and the Subject*, in *What is Philosophy?*] 30 (São Leopoldo: UNISINOS 2003).

the very beginning of contact with others.<sup>16</sup>

The central aspect for investigating the person is *alterity*. Umberto Eco explains that this is not an imprecise sentimental propensity,

but rather a founding condition. As even the least technical among the sciences teach, it is the other, it is his gaze that defines and forms us. In the same way as we are unable to live without eating or sleeping we cannot understand who we are without looking at and answering the other. Even the one that kills, rapes, steals, and beats up others does so in exceptional moments and, for the rest of his life he will be begging for approval, love, respect and praise from his fellow men. And even from those he humiliates he asks for the recognition of fear and submission. In the absence of this recognition the newly-born infant abandoned in a forest will not humanize himself.<sup>17</sup>

Notwithstanding their genetic constitution, children who grow up apart from any human companionship do not behave as ordinary human beings. Many documented cases prove this fact, including the so-called “animal-children” (as exemplified in the famous account of Amala and Kamala) and also children that grew up almost totally isolated from human contact (as exemplified in the famous account of Kaspar Hauser).

Two children found living together with a pack of wolves on the outskirts of the village of Godamuri, India in 1920 are the archetypical “animal-children.” Reverend Singh, who accompanied the excursion and recorded his impressions in a diary, reports that he had the feeling that the two children were

two “monsters,” one much smaller than the other, whose faces were hidden by their tangled hair and who were walking on all fours. Both of them behaved exactly like the wolves. As they came out of their cave, they put their heads out first and looked around before leaping out.<sup>18</sup>

The two children were captured and brought back to Reverend Singh’s

16. The existential “being with” (*mitda-sein*) indicates that it is the world in each and every case that one shares with others as part of one’s “there being.” See HEIDEGGER, *supra* note 14.

17. UMBERTO ECO, *Quando o Outro Entra em Cena, Nasce a Etica*, in UMBERTO ECO, CARLO MARIA MARTINI, EM QUE CRÊEM OS QUE NÃO CRÊEM?, [*When the Other Enters the Stage, Ethics are Born, in What Do Those Who Don’t Believe Believe?*] 79-90 (9th ed., Rio de Janeiro: Record 2005).

18. LUCIEN MALSON, AS CRIANCAS SELVAGENS—MITO E REALIDADE 68 (Porto Livraria Civilização 1967), translated in LUCIEN MALSON, WOLF CHILDREN AND THE PROBLEM OF HUMAN NATURE (Edmund Fawcett, Peter Ayrton, & Joan White trans., New Left Books 1972). In this book, Malson supplies a table that lists a number of similar cases, ranging from children brought up by bears and sheep, to children raised by panthers, baboons and leopards. *Id.* at 80-82.

orphanage in the city of Midnapore, where the younger child was named Amala and the older child was named Kamala. Singh's harrowing description confirmed that both children effectively inhabited their world as animals.

With both of them, the skin on their hands, knees and elbows was heavily calloused. Their tongues hang out through thick red lips, they panted and frequently bared their teeth. They suffered from photophobia and day-blindness, and spent their days crouched in the shade or standing motionless with their faces to the wall. They livened up at night, howling and groaning and hoping to escape. Amala—aged one and a half—and Kamala—aged eight and a half—slept only about four hours in twenty-four. They had two means of getting about: on their knees and elbows for short distances and on their hands and feet for longer distances or for running. They lapped up liquids and took their food in a crouching position. Their exclusive taste for meat led them to indulge in the only activity of which they were capable: chasing chickens and rooting around for carcasses or entrails.<sup>19</sup>

This episode confirms that merely because people possess the genetic conditions that enable them to walk upright and to develop language and reasoning does not lead to a manifestation of the characteristics of human beings. Such manifestation is made possible by the cultural inculcation of senses and ways of being that permit individuals to become human beings.<sup>20</sup>

The case of Kaspar Hauser is more complex than the animal-children scenarios. On May 26, 1828, a sixteen or seventeen year-old

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19. *Id.* at 68-69. Amala died one year after being found. Kamala remained prostrated and secluded for weeks, but slowly began to interact with the Reverend's wife and with other children in the orphanage. She learned how to communicate, at first through gestures and eventually by means of a few words that she managed to learn. She also learned, in a very basic way, to express her emotions. After a few years, she learned to walk upright, although she retained a certain wolfish style. Nine years after having been found with the wolves, Kamala died without ever having exhibited more than very rudimentary human features.

20. Lucien Sève comments that,

. . . not having evolved among men, these little girls are totally "wolfisized." Against obstinate beliefs about their human nature, their case shows in a quite evident way the extension and depth of how social reality shapes the person: not only good manners, language, and sociability, but also peculiar traits which might even be considered as exclusively biological, such as standing upright, being omnivorous, and having a full range of sensations and emotions. In all these respects, the human offspring is "totipotent." . . . Heroines of an involuntary anthropological experiment, they teach to whoever cares to listen to them that our effort to understand thinking must move from biology to biography.

See SÈVE, *supra* note 6 at 47.

boy was found in Nuremberg standing motionless, although wavering as if drunk, and holding a letter addressed to local authorities. The letter recounted that he had been raised in seclusion, but the man who raised him could no longer do so. The letter suggested that Kaspar be placed in the care of the cavalry, because Kaspar always said that he wanted to become a horseman like his father. However, Kaspar could not communicate and could barely stand up. The judge with jurisdiction over the case—Paul Johann Anselm Ritter von Feuerbach, father of the philosopher Ludwig Feuerbach and president of the court of appeal at Ansbach—provided the original account of the case. However, his description was soon joined by numerous accounts, including poetry (Rilke and Trakl, in particular), and even motion pictures.<sup>21</sup> Ultimately, the literature included Kaspar's autobiography.

Subsequently, it was discovered that Kaspar had been kept prisoner in a cellar and that his only human contact was with his jailer.<sup>22</sup> Through this minimal contact he had learned a few words: "Horseman I want, like father was," and "horse" (referring to his only toy, a small wooden horse). Kaspar was first taken in by his former jailer, and ultimately by Georg Friedrich Daumer, who had been a pupil of Hegel and Schelling. The young Kaspar began to learn some behavioral habits and he quickly learned the German language, including the ability to read and write. After a while, he developed a sense of religion and otherwise became acclimated to the social norms of his time. He was a novelty, and as news spread, he was visited by many people curious to see him. He proved to be very good at riding and taming horses.

Raffaelli provides an enlightening description of the strange manner in which Kaspar apprehended his world:

Kaspar, although not stupid or insane, was almost completely lacking in concepts and words and showed a totally missing familiarity with commonplace objects as well as with natural events. Therefore, he

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21. Werner Herzog's motion picture, *Jeder für sich und Gott gegen alle* [*The Enigma of Kaspar Hauser*] (1974), is faithful to the historical accounts and especially to the sensitive manner in which the subject is depicted. The leading actor, Bruno S., lends authenticity to his character by virtue of having spent a considerable part of his own childhood in a mental institution.

22. Rafael Raffaelli has built a persuasive argument based on an array of evidence, including recent DNA testing, that Kaspar Hauser was the son of Stéphanie Adreienne Napoleone de Bauharnais, the adopted daughter of Napoleon who was married to Karl, Archduke of Baden. Motivated by the desire to prevent the prince from ascending to the throne and to advance the position of her son Leopold in the line of succession, the Countess of Hochberg apparently substituted the ill son of a gardener for the prince, who was taken away to captivity. RAFAEL RAFFAELLI, *A Inércia do imaginário*, in *CADERNOS DE PESQUISA INTERDISCIPLINAR EM CIÊNCIAS HUMANAS*, [*The Inertness of the Imaginary*, in *Notebooks of Interdisciplinary Research in Human Sciences*] No. 59, 1-23 (Florianópolis UFSC, Nov. 2004).

could easily be taken for “an inhabitant of another planet.” During his period in prison he didn’t have any self-consciousness and didn’t see himself as something separated from his objects. Later, in Nuremberg, he didn’t know how to differentiate the size of objects seen from a distance and believed that objects had their own will. . . . When a mirror was placed in front of him he touched his reflection on the polished surface and then began looking for the person he imagined hidden behind it. Kaspar didn’t know how to differentiate men and women except for their clothing. He felt attracted to feminine clothes—much more colorful—and even mentioned later the wish of becoming a girl in order to be able to wear this kind of garment. . . . It was only much later that he could distinguish between a life of vigil and a dreamlike activity. . . . Kaspar talked about himself employing only the third person and had difficulties understanding “I” and “you.” . . . At first, Kaspar had problems seeing landscapes, open spaces with a variety of figures. A quiet rural scene disturbed him in such a way that he avoided looking out through the window.<sup>23</sup>

Perhaps the most poignant indication of his distress came when Kaspar had acquired clear awareness of his condition; in the Herzog movie, he would ask his mentor with great difficulty and suffering: “Why is everything so difficult for me?” Kaspar stayed relatively isolated in his world, maintaining close contact only with the animals and men who played a fatherly role in his short life. In his autobiography, Kaspar reports that during his captivity he didn’t know the world and didn’t think or dream.

Although dramatic, this story confirms that the world is not simply an objective substance placed in front of the human eye, but instead is the amalgam of perceptions of nature, objects, self and others that is mediated by a sense that is culturally developed. Only a “being there” has a world in the sense that human beings have a world, and “being there” reveals itself as comprised of an existential understanding that cannot be understood in a biological manner, because it extends beyond bio-physiological existence.

#### IV. The Person as “Detached” and “Undifferentiated” Conscience

Hannah Arendt has characterized the philosophical motif of modernity as the universalization of doubt.<sup>24</sup> A constellation of events and shifts in culture led to this new worldview: the Protestant

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23. *Id.* at 19-21.

24. HANNAH ARENDT, A CONDIÇÃO HUMANA 260-292 (10th ed. Rio de Janeiro, Forense Universitária 2001), *translated in* HANNAH ARENDT, THE HUMAN CONDITION 280-284 (2nd ed., U. of Chicago Press 1998) [hereinafter ARENDT].

Reformation dislodged foundationalism in religion, the great navigations revealed a new configuration of the planet and introduced new and different cultures to western civilization, scientific and technological advances expanded the gap between the world of appearances and the world as understood, and René Descartes called into question the very foundation of reality.<sup>25</sup> The only means of addressing such radical doubt is to begin with the rational consciousness that does the doubting (“I think, therefore I exist”). But by beginning with the *cogito*, Descartes effectively projected its computational nature onto the external world, which then was understood in terms of the logic of mathematics. Descartes concluded that the processes of consciousness have a particular certainty and can be the object of an introspective investigation.<sup>26</sup>

Charles Taylor argues that modernity gives shape to a tendency toward insularity that had been forming since Platonic idealism,<sup>27</sup> anchoring the external order (nature, God) in the foundation of subjective consciousness. This process culminates with the emergence of a self that is completely detached not only from all others, but also from one’s own body.<sup>28</sup> The self is like a geometric point, lacking any dimension. Because this abstract consciousness is removed from everything and freed of the body and its passions, it is capable of rendering everything into an object that can be controlled and dominated. A radical polarity is established between subject and object, resulting in a corresponding duel between the philosophies of radical subjectivism and radical objectivism.<sup>29</sup>

John Locke completes the portrait of a subject that objectifies reality

25. As is well known, radical Cartesian doubt expresses itself in the possibility of an “Evil Genius,” that is, of a Creator that makes beings long eagerly for truth but without ever being capable of reaching truth. In his *Third Meditation*, Descartes answers this doubt by offering a “proof” for the existence of God based on the *cogito*. RENÉ DESCARTES, *Meditações*, in DESCARTES—OS PENSADORES, [*Meditations*, in DESCARTES—THE THINKERS] 277-296 (São Paulo: Nova Cultural 1996).

26. ARENDT, *supra* note 25 at 292.

27. Taylor argued that Plato internalized the search for truth because he recommended introspection as a method for the known ideas in the intelligible world to be recollected (in the end, an external truth). In St. Augustine, this turn inward was recommended so that a meeting with the word of God may take place (also a truth situated externally from man). In Descartes, this process finally culminated in the search for the mechanisms of human reason themselves (located in the mind) and this completed the process of interiorizing truth. See CHARLES TAYLOR, *AS FONTES DO SELF: A CONSTRUÇÃO DA IDENTIDADE MODERNA*, [The Fountains of the Self: A Construction of Modern Identity] (São Paulo Loyola 1997) [hereinafter TAYLOR].

28. *Id.* at 223.

29. The objectivity of this Cartesian world and of its notion of substance (*res extensa*) is brought to light in confrontation with the Heideggerian *world* in paragraphs 18 and 21 of *Being and Time*. See HEIDEGGER, *supra* note 14.

by remaining detached from existence, for in his hands the human mind itself is transformed into an object. In his famous book, *Essay on Human Understanding*, Locke argues that ideas are not innate, but rather are produced in the mind through experience as simple ideas, and later become increasingly complex through mechanical associations.<sup>30</sup> His goal is to discard the pre-reflexive knowledge sustained by tradition and to replace it with solid and reliable procedures of thinking. Toward this end, the subject is summoned to take responsibility for himself, to become aware of and to exercise his autonomy. For Locke, the *person* is this autonomous subject. He posits the intimate relation between our concept of *self* and our moral self-understanding. The person is the moral agent that takes on responsibility for his actions in the light of a future retribution.<sup>31</sup> Because we construct a description of reality according to the rules of thought rather than by contemplating a preexisting order, reason is eminently procedural in Locke's account. To reform the world by reason, man must remain aloof from himself; consciousness must be completely detached.

Paul Ricoeur discards this concept of the self at the very beginning of his important book, *Oneself as Another*, when he proposes to develop a hermeneutics of the inquiring self. He argues that the "I" that entertains radical doubt and is reflected in the *cogito* is a hyperbolic metaphysical construction lacking content; in fact, this subject isn't anybody.<sup>32</sup> The *cogito* entertains the question "what am I?," but does not pose the question "who am I?" The Cartesian answer to the first question is that "I" am "a thinking something." Identifying the subject in this way places it outside of the concrete existence of a physical body with a lived history among a diversity of persons. The ahistorical self is an undifferentiated *sameness*.

Taylor uses the English word *self* to refer to the *cogito* and other aspects that set the limits of interiority, building toward his notion of *authenticity*. This usage corresponds to the Portuguese word *si* or the French word *soi*. In Ricoeur's hermeneutical philosophy, however, the *self* is expanded to encompass two different senses. One sense points to the *same* (the *mesmo* in Portuguese, the *gleich* in German or the *idem* in Latin) and the other sense indicates *selfhood* (the *ipseidade* in Portuguese, the *selbst* in German and the *ipse* in Latin). For Ricoeur,

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30. JOHN LOCKE, ENSAIO ACERCA DO ENTENDIMENTO HUMANO 29-137 (São Paulo: Nova Cultural, 2000), translated in JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Oxford U. Press 1975).

31. *Id.* at 226.

32. PAUL RICOEUR, O SI-MESMO COMO UM OUTRO 16 (Campinas: Papyrus 1991), translated in PAUL RICOEUR, ONSELF AS ANOTHER (Kathleen Blamey trans., U. of Chicago Press 1992) [hereinafter RICOEUR].

there is the *identity-idem* which brings to the surface the figure of the *same* or *sameness*, but there also is the *identity-ipse* which points to the figure of the *ipse* or *selfhood*. For the former, it is a question of “what” the person is; for the latter sense, there is room to inquire “who” the person is. After exploring this notion of *sameness*, in the next section of the article I elucidate the notion of selfhood by confronting the inescapable reality of alterity. Having developed a full concept of the *person*, the final section will then bring this understanding to bear on the principle of good faith as utilized to structure legal-contractual relations.

*Sameness* indicates the stability and durability of identity, or the return of the *same* through time.<sup>33</sup> Ricoeur uses the term *character* to represent this concept, and he defines it as “the conjunction of distinctive marks that allows the re-identification of a human individual with the same.”<sup>34</sup> *Character* is acquired through habit, transforming all innovation (*ipse*) that might arise over time as something that may be connected to the *same*. This dialectic of habit and innovation reveals the historical quality of the *character*, precluding assimilation without any questioning to a separate and external subject. Although *selfhood* tends to be eclipsed by *character*, in fact *selfhood* is a fundamental prerequisite for the formation of *character*. We can regard the *character* as the “what” of the “who,” as the part of one’s identity that identifies itself with what always remains the *same*.

Kantian moral philosophy is often invoked in Brazilian legal discourse about the dignity of the *human person* (sometimes only for rhetorical effect), providing a means of locating the mark of the *idem* within the notion of *person*. The prescriptive norm-making dimension of human action is essential for the notion of *person*, as this brings to light one’s interaction with others. In this context, Kant made a unique contribution by emphasizing the inevitability of the deontological dimension, which focuses on duty and responsibility. Duty imports within it the idea of the need to respect others precisely because each is a *human person*.

In Kantian terms, the respect owed to persons is based on an unconditional principle that cannot be subject to the fluctuations of time or other factual circumstances. Duty operates in the field of *morality* (*Moralität*), which is freely accepted once reason outlines the dimensions of duty. The unconditional character of such duty ensures that one’s inclinations are subsumed to a categorical command of morality. To

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33. This notion is found in several kinds of identity, such as numerical identity (permitting recognition of the same thing countless times), qualitative identity (external similarity), and the uninterrupted continuity between the first and the last stage of development of a considered individual. *Id.* at 140-42.

34. *Id.*

determine whether a certain precept or *maxim* (as designated by Kant) is acceptable or moral it must be submitted to the *proof of universalization*, according to which only the precept that is valid as a norm in all situations and for all persons may be considered to be moral. The formulation of the first Kantian categorical imperative is therefore to act as if the maxim of your action should become, through your own will, a universal law of nature.<sup>35</sup> In this respect, the will represents a true practical reason, common to all rational beings. Such practical reason is valid when it operates in accordance with the laws of reason and submits to moral constraint, which can occur through the procedure of universalization. In the last analysis, it is whoever establishes this moral constraint, this obligation, that is the *person*. Kant internalizes in the *person* both command and obedience and indicates that the will is only free when it obeys its moral conscience and when it doesn't yield to the convenient inclinations of the moment. This moral conscience is taken in turn as a *fact of reason*: that is, something that simply exists and must be assumed as a given fact.<sup>36</sup>

Kantian conscience justifies the dignity of the *human person*, because when man conforms to conscience rather than simply submitting to rules he enjoys autonomy and becomes truly free. This self-legislation of conduct may be directed toward indefinitely numerous ends, matter or objects, and is not an empty formalism. Moral autonomy situates people within a *realm of ends*, and leads to the second categorical Kantian imperative, already mentioned above, that demarcates the *respect of the self* (the object of the universalization rule) by pointing toward *respect for the other*, for reciprocity.

We see the emergence of *selfhood* in the Kantian moral conscience because it is based on the necessary ascription (*attestation*) of an action to someone (the “*who*” relative to the *ipse*). However, the difficulty in effectively accounting for the *alter* threatens to dissolve this selfhood into undifferentiated *sameness*. This difficulty, according to Ricoeur, expresses itself in the concept of *humanity* that Kant added to the notion of pure autonomy, aiming at the contemplation of the distinctness of

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35. KANT, *supra* note 6 at 52.

36. Sève criticizes this notion of a “fact of reason,” and instead regards consciousness as a historical construction. The French philosopher questions, “[w]here is the proof that this supposed *a priori* fact isn't in reality reason itself, a conquest of the collective and individual conscience . . ., the aptitude for universalizing the maxim of an action ceases to appear as a faculty of pure reason and begins to be understood as a biographically formed historical capacity. Neither its full identity in time or in social space nor its true independence related to the cultural contexts are guaranteed. Morality is a fact of civilization and its value is not at all less because it is produced and not given, but its universalist reach must be considered in totally different terms—not as received lately but rather as constructed.” SÈVE, *supra* note 6 at 175-76.

people. But in the end, even this move leads to the universality of humankind and does not provide the necessary space for effectively considering the differences among people. Thus, the self implied reflexively by the formal imperative didn't have a monological nature but one simply indifferent to the distinction of people.<sup>37</sup> It is at this level that the *idem* aspect of the Kantian moral identity can be perceived.

We can clarify this distinction by considering the morality of promising as the basis for contract liability. Kant emphasizes the importance of keeping promises by focusing on the trustworthiness of the promissor more than on the expectations or confidence of the promisee, and in his estimation all people are the same with respect to their moral standing. However, by grounding this principle through universalization we lose sight of another trajectory, the application of the maxim to a particular case. It is at the level of application that the alterity of people arises, and the reason for keeping a promise finds another justification: the fulfillment of the expectations of the other.<sup>38</sup> Both the circumstances and the consequences of actions must be assessed in light of both guiding points, so as to fix the boundaries of behavior properly. There is an additional consideration at the institutional level: the need to respect the social-historical horizon within which communities sustain themselves. In the following section, I analyze the *identity-ipse* to determine a more adequate way of harmonizing these different considerations.

#### V. The Person as an Existing Selfhood: the Moment of Alterity

When identity is examined under the focus of the *idem*, the person is something that we talk about rather than somebody who talks. We understand the person by attributing to him a series of qualities that characterize him. As Ricoeur demonstrates, the tendency of philosophers has been to provide an analytic and decontextualized characterization of the person, but once we face pragmatic considerations it is possible to emphasize the notion of *ascription*.<sup>39</sup> Ascription is attributing the predicate of an action to a single person who is perceived to be a physical and psychological unity, which is to say an agent with motivation for acting. Ascription overcomes the tendency to suspend attribution; this suspension occurs, for instance, in the abstract way in which passions sometimes are treated as realities in themselves, separated from any particular person.

In moral terms, ascription permits imputation. There is always

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37. RICOEUR, *supra* note 33.

38. *Id.*

39. Ricoeur develops a particular kind of attribution by drawing on P.F. Strawson's philosophical explorations.

someone to whom a definite duty is attributed, to the extent that we derive moral selfhood from Kantian moral conscience. With Kant, though, the action's singular moment is no longer the main issue as the focus is dislocated from the authorship of action within a unique and existential moment to the universal characteristics that define the action. Action appears as the return of the *same*, that is, the universal aspects that shape all specific identities. So, the *who* is not the existential subject who performs the action, but instead is characterized in abstract terms.

Ricoeur captures the action's singular and existential moment by moving beyond *ascription* to a deeper level which he terms *attestation*. Attestation suggests that the *ipse* is not smothered by the *idem*, and the *self* is identified with the *given word* rather than with the *character*. Ricoeur doesn't confuse identity with something that could be generally perceived, but instead looks to the "who" and an idea of *existence* rather than one of universal *substance*. The persistence of this kind of identity through time is achieved by the word that has shaped it and the word it formulates, leading to an awareness of identity. Self-awareness is thus deeply immersed in temporality, and Ricoeur looks to Heidegger's existential analysis of *being there (Dasein)* for guidance.

Heidegger investigates the "who" of *Dasein* in § 25 of *Being and Time*. Heidegger rejects the notion of the "who" as an object in the world that is completely available to one who perceives. Instead, the "who" transcends existence in some manner. Beyond the everyday and pragmatic meanings that entities (including men) have for others (the quality of being *ready-to-hand*), and even beyond the crystallized accounts provided by scientific and philosophic concepts and theories (the quality of being *present-at-hand*), the "who" has other basic dimensions that cannot be rendered manifest. Philosophy can refer to this dimension and the meanings of everyday life can open up this dimension, but it is only in the existential reality of living that this dimension is realized. Every individual knows that the meanings that guide her are not the product of her own will or consciousness; rather, subjectivity is built by meaning itself, such that one always finds oneself already thrown into a meaningful horizon. Moreover, all persons are mortal, and so all meanings and projects can, and ultimately will, come to an abrupt end.

By acknowledging these two existential limits (our *thrownness* and our *being-towards-death*), Heidegger establishes that we no longer can identify ourselves with absolute determinations. Our existential condition is that we are possibilities projected into the *world*, not as a natural fact but rather as a reciprocal process of being built and being a builder at the same time. Heidegger designates *being-in-the-world* as a main component of *Dasein*. Prior to possibilities is the *potentiality-for-*

*being*; prior to the project is the projective character of *Dasein*. At this fundamental level it is vital to acknowledge that the meaning of the world is a shared meaning, and that consciousness takes shape in our primordial *being-with* others (*Mitsein*). As a basic component of *Dasein*, *Mitsein* gives rise to recognition of the existential and temporal character of existence that we share with others, and leads to mutual respect.

The “who” of the *Dasein* is located in an existential consciousness of himself (*Gewissen*), in the *care* (*Sorge*) or in one’s self maintenance (*Selbständigkeit*). Heidegger writes:

If the “I” is an essential determination of the “being there,” then an existential exegesis is to be made. Then, the question of the “who” can only be answered by verifying phenomenally a certain form of the being in the “being there.” If only by existing is the “being there” in each case “itself,” then so much the period in force of the “himself” as its possible “state of not being itself” are required and then the question should be raised about an ontological-existential way of being as the only adequate access to the problems generated by it.<sup>40</sup>

For Ricoeur, the existential analysis of the “who” that is *Dasein* clearly indicates the ontological status of *selfhood* (*Selbstheit*).<sup>41</sup> It is important, however, that we do not permit the *attestation* to become a sterile abstraction. *Attestation* requires the stability introduced by the *sameness* and so attestation must maintain a steady dialogue with sameness without permitting itself to be cancelled. A dialectic is thus installed between the two forms of identity.

It is only through the pole of *selfhood* that the question of alterity can be adequately situated. An “other” is one who shares the form of being as *Dasein*, and so is perceived as *being himself* and not as being *the same*.<sup>42</sup> Alterity, understood as this strangeness that disrupts the same, doesn’t pertain only to others, but also to one’s own consciousness (in the existential sense) and to one’s own body.<sup>43</sup> There is then an *alterity of itself* and an *alterity diverse of itself*.

40. HEIDEGGER, *supra* note 14.

41. RICOEUR, *supra* note 33.

42. When perceiving others on the *unauthentic* (*uneigentlich*) level of what is *before your eyes*, the *self* ends by being swept away by *the people* (*das Man*), that is by the comfortable uniformity of a “common sense.”

43. When discussing the alterity of one’s own flesh as a “body,” Ricoeur demonstrates that when you insert the question of the body into the dialectics of *sameness* and *selfhood* it is possible to escape Edmund Husserl’s dilemma about how to reconcile the *body* (“another I” that is seen in space along other bodies) and *flesh* (an “I” that cannot be seen and which is outside the objective spatiality, the one that suffers). The flesh undertakes the mediation with the physical world. RICOEUR, *supra* note 33 at 377-80.

These dimensions of alterity reveal its phenomenological character, a concrete form of being perceived as *attestation*. This form of being goes beyond the *self* by recognizing that there is something diverse as to which one is at the same time distinct and dependent, the flesh, the conscience, the other. A second dialectic is thus installed, the one verified between selfhood and alterity. Such a dialectic dismisses for good the *cogito* from the central post it has held since Descartes and also prevents the *self* from resuming this role and thereby suffocating the *alter*.

Emmanuel Levinas incisively treats passivity in its concrete form of understanding alterity. In *Totality and Infinity*, Levinas discusses the clash between *totality* and *exteriority* in the same vein as between the same and the other. Here the other can only prevail in his condition as *face*, or *epiphany* (something that cannot be perceived as a phenomenon), revealing the superiority of ethics over understanding (gnosiology).<sup>44</sup> The other must be accepted with total passivity by the “I” because the other confronts the I from *exteriority*. Levinas installs an absolute separation between the *I* and the *other*, making it impossible for any complete mediation that would reduce the *other* by absorbing it into the *same*.

Ricoeur argues that even after Levinas had fixed the boundaries of the passivity of the *I* when it faces the *alter* in such a sharp and hyperbolic manner (understood as the call towards a *responsibility* when confronting the other, in the manner of an *injunction*), he doesn’t leave any room for making a distinction between the *self* and the *I*, and doesn’t see selfhood as an opening in which the other can be accepted without being suffocated or absorbed into *sameness* and in which the *self* undertakes the responsibility that it is enjoined to accept. In contrast, Ricoeur proposes a “dialectic crusade” of the *itself* and the *diverse from itself*<sup>45</sup> that includes the movement of the other toward the same as much as from the same toward the other.

When facing the other we receive an *injunction* with an ethical dimension. This is joined to the passivity in which the *self* is perceived in its condition of a dialectic pole between *selfhood* and *alterity*. At this point we may return to something that had been considered at the end of the previous section: when the ethical level is introduced, the other effectively shows up at the moment that universal maxims are applied to particular cases and when it is necessary for a moral judgment in a

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44. EMMANUEL LEVINAS, *TOTALIDADE E INFINITO* 176-80 (Lisboa Edições 70, 1988), translated in EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERITY* (Alphonso Lingis trans., Duquesne U. Press).

45. RICOEUR, *supra* note 33 at 396.

particular situation. This activity is designated by Aristotle as *phronésis*, the emergence of ethical judgment within a context that is sensitive to the salient features, including the existence of others and a communal sphere of norms that can be described in some respects as teleological.

In *The Ethics of Authenticity*, Charles Taylor shows that an ethic that turns toward the affirmation of the *self* on the level of authenticity must realize that consciousness is, from the very beginning, in the presence of others. The origin and development of thought, and consequently of autonomy, are dialogic. Authenticity is impossible without being in dialogue with others, but the ethic of self-affirmation too often devolves into narcissism and disregard for others, manifesting the central mistake of contemporary culture that ends by destroying authenticity itself. Taylor reminds us that we live in a time when identity, formerly grounded in a cosmic or theological order, is now grounded through reflexivity on the interiority of consciousness. Because the measure of identity is now the individual, recognition by others has become a critical problem. Non-recognition, or incorrect recognition, is perceived as an offense and a threat to the survival of authentic identity. This trend is corrosive of the individual to the extent that withholding proper recognition can lead one to self-depreciation. Taylor properly notes that the battles over authenticity, autonomy and recognition can only make any sense against a shared horizon. If we consider autonomy independently of the horizon upon which it rests we find only an autonomy placebo, which permits a choice to be made regarding insignificant questions (like choosing from the menu at McDonald's) or the choice itself becomes irrelevant.<sup>46</sup>

All this leads to the conclusion that there is a pressing need to think of autonomy broadly, in terms taking into account the alterity perceived in *selfhood* that leads, as designated by Ricoeur, to an *autonomous solidarity* in which the single individual no longer is self-sufficient. It is a "dependence according to exteriority" that reshapes the Kantian relation between autonomy and heteronomy. Heteronomy is not inevitably a challenge to autonomy; in fact, the positive dimensions of heteronomy reinforce autonomy. By incorporating the dimension of *selfhood* in the notion of *person* we better situate alterity and thus provide a basis for understanding the respect owed to others. From this vantage point we reveal the concrete, existential and relational character of the *human person* that can serve as an adequate basis for promising

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46. Taylor states this concisely, "[t]hings take on importance against a background of intelligibility. Let us call this a horizon. It follows that one of the things we can't do, if we are to define ourselves significantly, is suppress or deny the horizons against which things take on significance for us." TAYLOR, *supra* note 28 at 37.

developments in the Civil Law. In the next section I consider how the task of *re-personalization* can be explored in the context of contract relations by developing the ethical requirement of good faith.

## VI. Good Faith in Contract Relations: A New Focus on Selfhood

Kantian moral philosophy, in which the *person* is characterized by his capacity of taking responsibility for his actions, was central to the modern construction of the *legal subject of rights*. In the nineteenth century, however, attention shifted from the *person* as a theoretical and ethical construction to a more functional configuration of the *person*. After this shift, the subject of rights became defined as the connection that unites correlative rights and obligations, such that a group of terms—including *person*, *subject of rights*, and *legal subject*—began to be used interchangeably as part of a functional account.<sup>47</sup>

Functionalism means that the *legal relation* takes precedence over the place of the *person*. This development originated in the historicism of Savigny, in which law is considered to be a phenomenon that arises within the historical reality of institutions and peoples, and is no longer regarded as being founded on rational human nature (although Savigny's method for studying legal phenomenon is extremely rationalistic and deductive). The systematization of this view overcame the notion of *lifeworld* ("*Lebenswelt*") championed by Dilthey. The misguided nature of this approach is emphasized by Orlando de Carvalho:

Not life but rather life in relation gives birth to Law and therefore only at the level of inter-human relations can Law be correctly understood. Despite the soundness of this idea, Savigny and his successors put it aside in favor of the method that they considered scientific—the reduction of legally relevant material to general-abstract concepts—and thereby Savigny transposed the idea of legal relation to general-abstract concepts to the point that the concrete richness of the idea of legal relations became unrecognizable.<sup>48</sup>

These developments ultimately removed the concept of the *person* from the field, demoting it from a central and superior notion to serve only as an operational concept.<sup>49</sup> Along these lines, Hattenhauer writes:

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47. HATTENHAUER, *supra* note 7 at 19.

48. ORLANDO DE CARVALHO, A TEORIA GERAL DA RELAÇÃO JURÍDICA—SEU SENTIDO E LIMITES, [The General Theory of the Legal Relation—Its Meaning and Limits] 45-46 (2nd ed., Coimbra: Centelha 1981).

49. This development led to the concept of the *legal person*, divorced from the substratum of human life, which motivates my use of the expression *human person*. The conclusive blow for a more compact perspective of the *person* was delivered by the norm-setting system of Hans Kelsen and his *The Pure Theory of Law*, in which he consolidated the notion of a self-regarding legal system separated from the social and

Savigny didn't address the person and its definition; he talked about people only in the plural form. He needed at least two of them for building a legal relation. People became building material, indispensable for larger scale purposes. People no longer were the foundation of Law because their salient attribute was the ability to engage in legal relations: the concept of legal ability.<sup>50</sup>

The person as a concrete individual living with others had disappeared from the legal scene.

After the horrors of the Second World War, legal theorists began to see the need to restore the concepts of the person and human dignity. This rethinking of the subject, especially in the field of Civil Law (the classical legal niche where the *person* lodges), did not amount simply to recovering the jusnaturalistic notions which had slowly devolved into a mere operational and secondary aspect. Rather, there was an effort to rethink the status of the *person* in a fundamental way; this effort became known as the *re-personalization* of law. One of the most striking strategies in this direction was to closely link Civil Law and Constitutional Law. At this time, constitutionalism was also being reformulated with the goal of transforming the Constitution into something more than the Statute of the State, such that the Constitution would play an important role in the promotion and protection of the dignity of the *human person*.<sup>51</sup>

We can see this development at work in the specific field of contract relations, where there has been a growing appeal to consider the *person* as something more than an operational concept or an element of the legal relation. On one hand, there is the constitutional emphasis on the dignity of the *human person*. On the other hand, the growing awareness of the complexity of contract relations that persist over time and involve sophisticated interaction among all the members of the contract has led to the development of *relational theories of the contract*.<sup>52</sup> These two

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axiological areas of knowledge. HANS KELSEN, *THE PURE THEORY OF LAW* (1967).

50. HATTENHAUER, *supra* note 7 at 20.

51. In this respect, see the brief and didactic analysis by DANIEL SARMENTO, *DIREITOS FUNDAMENTAIS E RELAÇÕES PRIVADAS*, [Fundamental Rights and Private Relations] 69-131 (Rio de Janeiro: Lúmen Júris 2004).

52. Teresa Negreiro's work, *FUNDAMENTOS PARA UMA INTERPRETAÇÃO CONSTITUCIONAL DO PRINCÍPIO DA BOA-FÉ*, [Foundations for a Constitutional Interpretation of the Good Faith Principle] (Rio de Janeiro: Renovar 1998) is well known for linking a constitutional analysis of this principle to contract relations. As for the connection of the good faith principle to relational theories of contract, Ronaldo Porto Macedo, Jr. has developed many insights that draw from the work of Ian MacNeil. Here is a particularly insightful passage:

There are elements that make evident the importance of good faith within the relational perspective, mainly the fact that in first place it reminds the incompleteness of contracts, the limits of the human capacity to foresee, the

developments converge in the notion of the good faith principle in contract relations.

The requirement of good faith, especially when construed objectively, is the paradigmatic indication that there is a social and institutional need for contracting parties to trust each other, and for certain parameters of behavior that transcend the will of the parties. However, such parameters cannot simply be frozen in some wholly objective representation at the time of contracting. Analyzing the doctrine of good faith increasingly requires an analysis of the elements peculiar to each contract relation, the parties to that contract, and the changing circumstances that affect them. The duty of good faith refers not to the abstract and fixed moment of formal contract formation in which the parties are judged as contracting agents, but rather to the unfolding time that leads to and follows contract formation as experienced in the daily lives of the parties.<sup>53</sup>

In this new environment, the predictability of contract relations is not achieved by reaffirming the initially stipulated clauses in a formal and atemporal manner. Rather, predictability is achieved by recognizing the ongoing relationship between the parties that sometimes leads to revision or alteration in order to secure the intended objective of the contract. More than ever, contracts are subject to rapidly changing circumstances, and the economic relations supported by the contract require flexibility and adaptability. For example, if a borrower is unable to make payments as required by a loan agreement because, after borrowing the money, he has been laid off and can't find another job (a situation that is virtually a structural aspect of modern society, particularly in an economy such as Brazil's), the creditor has much more to gain if it renegotiates the terms of the contract rather than remaining

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costs and threats to solidarity, the insurmountable barriers for a perfect and silent communication. In the second place it emphasizes, increases the value and makes the element of trust legally protected. Without this no contract can operate. In the third place, it makes evident the participating nature of the contract which involves many meanings and social practices, language, social norms and non-promising linking elements (non-contractual). Thus, the good faith highlights the element of contract relations. Finally, contractual good faith involves a moral conception for doing something correctly and in this sense reports itself to a concept of Social Justice. . . .

RONALDO PORTO MACEDO, JR., *CONTRATOS RELACIONAIS E DEFESA DO CONSUMIDOR*, [Relational Contracts and Consumer Defense] 231 (Max Limonad ed., São Paulo 1998).

53. François Ost ironically notes that the traditional notion of contract is based upon the autonomy of the will; the bringing of a contract into actual existence doesn't take place abruptly (like love at first sight), the temporal dimension of contract formation is linked to human finiteness and concreteness. FRANÇOIS OST, *Tiempo y Contrato—Crítica del Pacto Fáustico*, in DOXA, CUADERNOS DE FILOSOFÍA DEL DERECHO, [Time and Contract—Critic of the Faustian Contract in Doxa, Comments on the Philosophy of Law] No. 25, 607 (Madrid: Universidad de Alicante 2002).

resolutely attached to the initial terms. Cooperation, trust and mutual adjustment are not simply altruistic behaviors. These characteristics are critical even under a pessimistic conception that regards contracting parties as antagonists seeking to maximize their own advantage. François Ost explains the shift in focus from the unitary moment of the *perfect legal act* of contract formation to the ongoing experiences of selfhood as developed in Ricoeur's philosophy.

Seeking to insulate itself within the "perfect" moment of the legal act of formation, the classical approach to contract law relied on a conception of "untouchable selfhood"—whatever may happen in life after formation, the contract would persist unchanged. However, this approach underestimated the imperfections of all our undertakings and predictions, the underdetermination of our intentions, and the inevitable contingencies of unforeseen events. And so, clinging strictly to the terms of the agreement removed from the temporal dimension of real life, classical contract law risked drowning the spirit of collaboration upon which the contract relation is based. By re-establishing the imperfect nature of the contract, the modern concept of the contract recognizes the selfhood of the relationship—that is, its capacity to remain the same and at the same time reinvent itself in another way, when circumstances demand such adjustment.<sup>54</sup>

This contract *selfhood* referenced by Ost is, in fact, the *selfhood* of the parties to the contract, and so provides a more solid foundation to the notion of *person* that is at the core of contract law. Working from this notion of *selfhood*, space opens in which to consider alterity in contractual relations.

In Brazil, the objective good-faith principle is relatively new. The principle had been used with some regularity after enactment of the Consumer's Defense Code in 1990. The principle was reinforced by adoption of the new Brazilian Civil Code in 2002.<sup>55</sup> The introduction of this principle in the written law is understood as a kind of authorization from the legislature to jurists, and especially judges, to elaborate the meaning of objective good faith in contract law on a case-by-case basis.

The principle of objective good faith has been applied in two different ways, first, as a limitation on the assertion of rights by one party to the contract, and second, as a source of new obligations in the contractual relation. An example of the first kind of method is seen in cases involving substantial performance, which is called "substantial accomplishment of the contract" in Brazil. In these cases, the

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54. *Id.* at 613.

55. Article 422 provides that parties to a contract must adhere to the principle of honesty and good faith in the execution and performance of the contract.

performance of one party is incomplete but substantially fulfilled. In this situation the party who has not received full performance cannot cancel the contract unilaterally, although the creditor may receive damages for the delay. The determination of what constitutes substantial performance is determined on a case-by-case basis. For example, in Brazil there is a form of contract called a *fiduciary alienation* that is principally used in the sale of cars and real estate. Generally, the law provides that if the debtor fails to make any payment the creditor may terminate the contract and seize the property that is the subject of the sale through a summary judicial process called “search and apprehension.” Courts have decided that when the debtor has made a substantial number of payments (for example, fifty-six of a total of sixty payments owed), the creditor cannot terminate the contract by means of “search and apprehension” because to do so is contrary to the ethical standards of society.

An example of imposing new obligations on the parties to a contract is seen in cases involving a judicial requirement of disclosure of important information regarding the contract. For example, a bank was held to have a duty to inform an investing customer fully about the capitalization schedule for monthly payments over five years that resulted in her receiving only sixty percent of her payments when she sought to end her relationship. The judge held that the bank had not properly informed its client, and had in fact induced her to understand that she would receive a refund of her money at the end of the plan by use of the following advertisement, “[i]t’s not a savings account, it is a capitalization title with money raffles. At the end of five years you will receive your capitalized funds.” In addition, the bank’s employee paid no attention to her particular condition; she was an elderly and humble woman with little formal education. In these circumstances, the judge determined that the bank’s employee must explain the contractual provisions more carefully. Because the bank’s conduct failed to meet the principle of objective good faith, the bank was required to refund all of her money with interest.<sup>56</sup> The principle of objective good faith has been used in a number of cases that involve loan agreements.

As these cases demonstrate, the principle of objective good faith is connected to the re-personalization of the law because it calls for a focus on the reality of the relations between the parties rather than a literal reading of the contract terms. The courts do not disregard the language of the contract; instead, the courts consider the contractual language in

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56. Juizado Especial Cível de Canoas—RS, Apelação Cível No. 8195704765, Relator: Clademir Missaggia, 1993 (Irena Friedrich v. Liderança Capitalização S/A) (Brazil).

light of the circumstances of the parties and their relationship.<sup>57</sup>

The re-personalization of the law looks to recover the basis of the reciprocity and trust that underlies contract relations. In principle, the contractual promise is a giving of one's word, and there is a moral basis for enforcing the promise because the other party is entitled to count on another's promise under the *principle of fidelity*. When the *word* of the promise receives the legal provision for enforcing obedience it becomes a full contract. At this moment the expectation that the promise generates for the other is transformed into a right, a claim enforceable by law. It is precisely here that the focus on the subjective right tends to obscure the moral roots grounded in solidarity from which the contract springs.<sup>58</sup> The legal system must refuse to close down in this manner, and must embrace the contract relation as one of *autonomous solidarity*.

## VII. Final Considerations

As the *re-personalization* of law continues in Brazil, it will be extremely valuable if the law takes account of the *human person* as we exist, rather than as an abstract bearer of legal rights. Adopting this approach does not mean that we must reject the legacy of traditional legal thinking. By questioning the assumption of the *cogito* and an insular account of individual autonomy we are not recommending that western culture (and cultures like Brazil, which are permeated by countless non-western influences) attempt an impossible return to a previous stage of development that rejects all manner of Kantian influence. Nevertheless, we must proceed by rejecting the increasingly unreal ideal of autonomy as self-sufficiency and turn instead toward a realistic account of a mature consciousness (*selfhood*) that avows its limits and its condition of finitude, because it is precisely in this avowal that the self transcends itself in the perception of its existence, its very flesh, its similarity. We must create a personalism that lives up to Emmanuel Mounier's bold insistence that man is body and spirit, that there is nothing about man that cannot be mingled with earth and blood. The Mexican jurist, Jesus Antonio de La Torre Rangel, rescues Mounier's community personalism for Law:

The central assertion of personalism is the existence of free and

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57. From conversations with Professor Francis J. Mootz III, I understand that a body of law known as "lender liability" developed to protect borrowers from bad faith enforcement of the strict terms of loan agreements, but that there has been a trend back toward a "plain meaning" approach by courts. In Brazil, this area of law has diverged. There are judges who prefer to apply the strict terms of loan agreements (even when they are abusive), and judges who prefer to pay more attention at the circumstances of the parties and their relationship, as part of the re-personalization of law.

58. RICOEUR, *supra* note 33 at 311-13.

creative people. It is considered difficult to give a definition of the person since only the objects that are external to man and may be placed in front of him can be defined. The person is not an object and includes characteristics that cannot be objectified. The person is not an object, but is rather what in each man can not be treated as an object. Man lives a central paradox in his personal existence. Being personal is the specifically human way of existing, but nevertheless this personal existence must continuously be recalled so that man does not become merely an object.<sup>59</sup>

This perspective reveals itself as the adequate soil to bring forth better understandings of contract relations as well as legal phenomenon more generally. The developing doctrine of objective good faith focuses attention on the changing relations between real persons composed of flesh and blood, acknowledging the inevitable unpredictability of human relations in light of our finitude. Good faith analysis suggests the possibility of regarding social relations, even among people having opposed interests, as resting on mutual trust that stands solidly on giving one's word in a scenario of changing life rather than on the abstract level of the *perfect legal act*. This change of perspective is justified both by the present configurations of economic relations in market societies and their inherent interests, and also by the longing for a better society in which the law is put into service of the *human person*, rather than having individuals dissolved into a sameness that then is subjected to the logic of instrumental rules structuring an anonymous market.

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59. JESÚS ANTONIO DE LA TORRE RANGEL, *JUSNATURALISMO, PERSONALISMO Y FILOSOFÍA DE LA LIBERACIÓN—UNA VISIÓN INTEGRADORA*, [Jusnaturalism, Personalism and Philosophy of Liberation—an Integrational Vision] 65 (Sevilha: Editorial Mad 2005).