

TEACHING GOOD FAITH*

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I. WHY TEACH GOOD FAITH?

Teaching good faith to first-year students is a difficult task, but one well worth the trouble. The very reasons that produce the difficulties pay off in a rich and diverse set of benefits. This becomes apparent in the students' demeanor when the discussion of good faith is initiated very early in the year. Talking about good faith reinforces their conviction that their new profession is indeed an honorable one. They relax. The subject feels familiar to them, and this sustains them in probing the mysterious new legal dimensions of the concept. As a result, most of the class are emboldened to offer their own ideas, and vigorous debate ensues.

One reason for the excitement is that this discussion so soundly contradicts students' common expectations of what law school will be like. Although most are entranced by the prospect of adventure in unmapped territory, they loathe the prospect of memorizing a huge and complex body of "law," by which they mean *rules*. Having signed leases, contracts to purchase automobiles and checking account agreements, they imagine they know what to expect in contracts: lots of words, lots of small print and all of it long, formal and tedious. And following that: memorization. Each exercise that focuses on good faith helps to disabuse them of this notion and to shift their focus away from doctrine towards analysis.

A significant further advantage, as they exchange their anticipated tedium for the heady experience of *studying* law, is that they begin to recognize the uselessness of canned-brief-preparation. Awakened within them is an unsettling but titillating suspicion that contract law cannot be reduced to a capsule to be swallowed at bedtime. Law, they begin to learn, is as much about understanding context as it is about mastering the rules. And, as they discover, the rules, once mastered, are apt to change!

The doctrine of good faith has more than one role in tailoring rules to context so that the result is consonant not only with precedent, but also with good sense and good policy. Exploring the doctrine in each new context

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exercises the students' skills and ingenuity, acquaints them with some basics of the business world and contributes to their understanding of human nature. Moreover, the discussion pushes students to understand each transaction within the moral, normative and economic context of the society in which a court sits.

That good faith doctrine is a common undercurrent for many disparate contracts issues makes its study useful in building students' skills in uncovering common themes in the law. A principal goal in my first-year classes is to teach students how to hypothesize a credible set of exceptions to any general rule by carefully attending to the underpinnings of the rule itself. Their hypothetical exceptions can then be tested against later cases, statutes and Restatement sections. Over time, the process assures students of their dexterity with legal principles, freeing them from the illusion that they must learn everything, leaving them more content to devote more class time to analysis rather than to doctrine. This methodology is especially useful to illuminate issues in which the public good is perceived to be at war with literal fulfillment of private agreement, for example, the pre-existing duty rule or the so-called doctrine of economic waste. Such discussions often implicate good faith analysis.

As the course proceeds, students become aware that the issue of good faith appears over and over again, almost as a leitmotif. Because the meaning, derivation and effect of "good faith" vary from one context to another, students receive useful practice in generalizing the techniques they learn within each discrete legal topic.

The discussion of good faith draws from the class divergent inferences from the facts as well as opinions about them. I have learned over the years that this can produce some difficulties that the instructor ought to try to avoid. Students, especially those who have just completed undergraduate school, often find the disparity of responses unsettling. Convinced of their own ignorance and inexperience relative (they think) to everyone else's, some respond with dismay, others, with excitement; for a few, hostility and determined resistance may follow. Failing to appreciate that inexperience is a universal stage in development, first-year students are liable to measure the relative sophistication of their own inferences against their classmates' and despair of their capabilities. The accompanying sense of personal inadequacy can be devastating, especially given the external indicia of success they are accustomed to. This poses a real danger, not only in their academic lives, but in their personal ones. If their discouragement is especially keen, they may opt out of hard thinking altogether.

How the instructor handles the discussion can make a real difference. One helpful step is to be explicit in reminding students even before the first exercise that time cures inexperience, and that what is new should be all the more exciting for its strangeness. They need to hear that ignorance is not shameful, although the determined maintenance of that condition assuredly is. Law

students are reassured to learn that no one, least of all their clients, will expect them to know everything. I like to remember aloud how much my own clients loved to be questioned about what they did and why they did it. And how they loved it when I listened attentively to their answers! As a favorite teacher of my own, Soia Mentschikoff, was fond of saying: "A lawyer is an expert in whatever walked through the door last." Good faith is valuable for the wide array of contexts it provides in which students with very different backgrounds may contribute meaningfully. Mercantile problems can be balanced with consumer ones,¹ commercial transactions with domestic ones. The variety enables the class to combine meaningful experience and insight in probing doctrine which underlies much of modern contract law.

II. TEACHING GOOD FAITH: AN EXPERIENTIAL BASE

In the first class each year, I challenge my students to an undertaking that has a side benefit of building a personal framework for reference for our discussions of "good faith." My principal purpose, however, is that my students engage themselves in a relationship which is primarily collegial rather than adversarial. To accomplish this, I begin the first class with only the briefest address on the nature of legal study before asking them to introduce themselves, including personal as well as academic background. While their attention is still on each other, I ask them to assume personal responsibility to support each classmate in his or her success in law school. Roughly following a model often used in MBA programs, I ask that they collaborate in their pursuit of their goals in my class, and I encourage them to do the same in other classes.

Incentives to undertake such an obligation may not be readily apparent to them. Understandably, they may suppose that hoarding rather than sharing information and understanding will serve them better in the competition for the dream job. I ask them to weigh the long-term relationships they will forge and the reputations of generosity, perspicacity and trustworthiness they will gain against the immediate and long-term value of a grade. Additional enduring benefits lie in the sense of connection and gratification that comes from sharing.

I doubt very much in any case (and I tell them so) that there are losers under the system I propose, even in terms of grade point average. After all, teaching someone else is notoriously the best way to learn; it boosts everyone's sense of mastery without sacrificing anything. The benefit to those who are taught is obvious, but their contribution is no mean one either: sharing one's own confusion is a gift to those who take part in its resolution. I am persuaded that collaboration maximizes the personal advantage of each individual, and I

1. An added advantage of this strategy is that it reminds students that U.C.C. Article 2 is not limited to transactions involving merchants.

find my students generally eager to embrace that conviction. In finishing, I ask for their express commitment to the shared endeavor.

The commitment I ask of my students illustrates powerfully the extent to which consensual obligations rest upon the details of a relationship within the context of shared purposes. Their responsibilities to one another do not arise from their status as students, or law students, or students in contracts, or even in my particular class.² They are in sharp contrast to the expectations most have brought to law school³ and are voluntarily undertaken. Students' shared purposes can be fulfilled only if each student's effort is not merely for his or her own sake, but is conscientiously intended to serve a fellow's need as well. Their reciprocal duties derive from common purposes and can be identified only by reference to the particularities of my class and its members. No tally of the terms of obligation is made. Later in the semester, when we discuss open quantity contracts, the students' own experiences will lend depth to their appreciation of the reasons why Wood owed a higher duty to Lady Duff-Gordon than Eastern Airlines owed to Gulf.⁴

III. TEACHING GOOD FAITH: A FRAMEWORK FOR ANALYSIS

What follows broadly describes a framework I often use in class to teach good faith. It is designed to carry discussion beyond such definitional components as honesty, reasonableness or fairness. Because good faith is a pervasive concept within contract law, it is useful for linking one issue to other apparently dissimilar ones, or to demonstrate tensions between a general rule and the practical, economic or moral exigencies of a new circumstance. The framework I propose is consequently applied to a host of topics throughout the course. As will become apparent, U.C.C. law is as susceptible to this analysis as is common law. In a two-semester course the same methodology is used for second-semester topics as for first.

My approach to teaching good faith reflects my own perhaps idiosyncratic understanding of the concept. It is certainly no novelty, however, to claim as a principal characteristic for good faith its resistance to any universal definition or description.⁵ Definitions and categories are elusive; good faith is not always

2. Unless the practice has attained customary significance, which I do not believe it has yet.

3. This is by anecdotal evidence informally collected.

4. Compare U.C.C. § 2-306(1) (2000) (ordinary open quantity sales contracts such as *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975)) with U.C.C. § 2-306 (2) ("exclusive dealing contracts" like *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) in which the relationship is essentially one of agency).

5. For a sampling of the wide variety in good faith literature, see, e.g., JACK BEATSON & DANIEL FRIEDMANN, *GOOD FAITH AND FAULT IN CONTRACT LAW* (1995); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); *GOOD FAITH IN CONTRACT* (Roger Brownsword et al. eds., 1999); MICHAEL FURMSTON ET AL., *CONTRACT FORMATION AND LETTERS OF INTENT* (1998); ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997); JOHN C. MCCARTHY,

identified by name even when it is most fundamentally and undeniably at work. It is therefore crucial that students learn to approach the issue by teasing away obscuring verbiage to reveal the real nature of the obligation or condition of good faith. This task cannot be accomplished without appreciating the full context in which the good faith issue arises: historical, political, social, economic, relational, moral and ethical, as well as commercial. I understand these contexts not as separate categories, but as factors that may contribute in varying degrees to an understanding.

The methodology below begins with definitional components of good faith. While definitions may vary, especially at common law, those of the Uniform Commercial Code ("U.C.C.") are sufficiently typical to serve as a useful reference point, so we begin with these. Establishing these definitions in an early class provides a bridge to other doctrine. Good faith often serves as a foundation to or is interwoven with other doctrine. Even when good faith is not overtly relied upon in a statute or by a court, its presence may be suspected when such terms as honesty, reasonableness or fairness are used by courts or in statutes. Especially when the rationale for the stated rule is elusive or unsatisfying, good faith analysis may provide important clues as to what is really going on.

A. *Definitions*

I begin the substantive study of good faith very early in the first semester, just after the first case or two and immediately following a discussion of the most common sources of contract law.⁶ In order to allow students to concentrate upon statutory language, I draw from a case we have already studied for the facts of the problem I give students in class. The assigned preparation is simply to scan the U.C.C. table of contents and to read the

RECOVERY OF DAMAGES FOR BAD FAITH (5th ed. 1990); W. DAVID SLAWSON, *BINDING PROMISES* (1996); Eric G. Anderson, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073 (1988); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984); Robert A. Hillman, *Court Adjustment of Long-term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1 (1987); Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

6. My course emphasizes the UNIFORM COMMERCIAL CODE for its own sake, as a vehicle for statutory interpretation exercise, and as a foil to the common law, which is the dominant focus. The RESTATEMENTS OF CONTRACTS are also introduced at this point.

statutes in Article 1 and in Part 1 of Article 2. I also give a brief summary of the history and organization of the U.C.C. in preparation.

This initial exercise serves a bundle of goals: (1) inquiring into the nature of good faith, particularly its definitional components; (2) introducing the scope of Article 2⁷; (3) emphasizing the “purposive” reading required by the U.C.C., in contrast to many other statutes which may require more literal application; (4) acquainting students with U.C.C. methodology; and (5) pressing analysis rather than brute memorization as the principal task in my class.

The U.C.C. § 1-203 obligation and the definitions in Articles 1 and 2 provide not only a good vehicle to begin statutory construction, but also an excellent basis for this first inquiry into good faith. For one thing, the U.C.C. definitions are a good starting point for the more complex study of good faith content (both under U.C.C. and common law) that will come later. For another, U.C.C. statutes are peculiarly context-dependent, a feature convenient for stressing the contextuality of good faith itself. The U.C.C. explicitly mandates application with an eye to underlying purposes and policies.⁸ Moreover, its definitions often are hedged with the caveat “unless the context otherwise requires.” Students begin to reckon with the insufficiency of doctrine by itself, even in statutory form, to address even the simplest-appearing legal problems. They begin to learn to look for the relative merit of solutions, rather than to engage themselves in a quest for the one *correct* one.

Unnecessary difficulties are reduced by using a simple and familiar fact pattern, such as that in *White v. Benkowski*.⁹ The class will already have completed the discussion of the damages issues in the case. Its facts are simple and compelling. The Benkowskis, having agreed to supply water for ten years to the Whites via an existing pipeline from their well, maliciously shut off the water on several occasions for the purpose of harassing the Whites.¹⁰ The question for discussion is whether the Benkowskis have breached a statutory duty of good faith to the Whites.

Usually someone promptly suggests that such intentional wrongdoing is a breach of the U.C.C. § 1-203 obligation.¹¹ Another student (or I) will point out

7. See U.C.C. § 2-102. “Scope; Certain Security and Other Transactions Excluded From This Article. Unless the context otherwise requires, this Article applies to transactions in goods” *Id.*

8. U.C.C. § 1-102(1). “Purposes; Rules of Construction; Variation by Agreement. (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.” *Id.*

9. *White v. Benkowski*, 155 N.W. 2d 74 (Wis. 1967). I often assign *White* as the first case in Contracts. It is found at page 14 of FARNSWORTH & YOUNG, CONTRACTS (5th ed. 1995).

10. *Id.* at 74-75.

11. U.C.C. § 1-203. “Obligation of Good Faith. Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” *Id.*

that section 1-203 applies only “within this Act.”¹² What “this Act” means seems obvious to them at first, and they typically find it disconcerting to discover that the drafters bothered to reduce it to statute in section 1-101.¹³ A habit of searching for statutory definitions rather than relying on what they suppose “everyone knows” is a hard one to forge, but this is a good place to begin.

The next step, then, is to discover whether the water transaction in *White v. Benkowski* falls within the U.C.C. After concentrating briefly upon the title of Article 2,¹⁴ the class focuses upon the scope provision, section 2-102. This is where the analytical fun really begins. Students are always amazed at the number of issues that require analytical skills in this first simple exercise.

The first mystery is the use of the term “Sales” in Article 2’s title in contrast to the different term “transactions” in its scope provision.¹⁵ I move through this initial dilemma quickly¹⁶ in order to focus on the sale/service question¹⁷ in this water transaction, as well as the issue of moveability posed by the definition of goods.¹⁸ Brief discussion usually produces a working consensus that Article 2 applies,¹⁹ with the caveat that for policy reasons the opposite conclusion might be warranted in the case of a governmental provider of water.²⁰

12. *Id.*

13. U.C.C. § 1-101. “Short Title. This Act shall be known and may be cited as Uniform Commercial Code.” *Id.*

14. U.C.C. § 2-101. “Short title. This Article shall be known and may be cited as Uniform Commercial Code – Sales.” *Id.*

15. *Id.*

16. This is a good time to mention Article 2A.

17. U.C.C. § 2-106(1). “A ‘sale’ consists in the passing of title from the seller to the buyer for a price (Section 2-401).” *Id.* I direct students to the citation and give them a chance to read it, but avoid questions about title in this discussion.

18. U.C.C. § 2-105(1). “‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).” *Id.*

19. The moveability of water, indicated because it is measurable by meter, is upheld by most courts considering the issue (usually for purposes of warranty liability). *See, e.g., Gall v. Allegheny County Health Dept.*, 555 A.2d 786 (Pa. 1989) (sale by local water authority to consumers was sale of goods); *Zepp v. Mayor & Council of Athens*, 348 S.E.2d 673 (Ga. Ct. App. 1986) (sale of goods where sold by municipality to consumers); *Mulberry-Fairplains Water Ass’n, Inc. v. Town of North Wilkesboro*, 412 S.E.2d 910 (N.C. Ct. App. 1992) (town’s sale of water to business was sale of goods).

20. *Cf. Coast Laundry, Inc. v. Lincoln City*, 497 P.2d 1224 (Or. Ct. App. 1972) (no U.C.C. warranty for water sold by municipality to a laundry).

The stage now set, we conclude that U.C.C. § 1-203 probably does impose an obligation of good faith on the Benkowskis. But what, exactly, does such an obligation entail? For this, we must turn to the definitions of good faith.

A general definition of “honesty in fact in the conduct or transaction concerned” is provided in section 1-201(19). Before examining this definition for its content, it is necessary first to inquire whether it is the right definition for the Benkowskis’ obligation of good faith. That requires a search for any other definition that would trump Article 1’s general one. Section 2-103(1)(b),²¹ would seem to govern, this being a sale of goods transaction.²² But there are two problems.

The first is that U.C.C. § 2-103(1)(b) states: “In this Article . . . ‘Good faith’ in the case of a merchant means”²³ The use of quotation marks around good faith indicates that it may apply only to the *term* “good faith” when it appears in an Article 2 statute. The term we seek to define is in section 1-203, an Article 1 statute, making section 2-103(1)(b) arguably inapplicable, even though the good faith *obligation* arises within a simple Article 2 sale of goods. On the other hand, underlying purposes and policies are expressly cognizable in applying U.C.C. statutes.²⁴ In the absence of any discernible policy supporting the restrictive scope that the definition’s punctuation suggests, the policy favoring a higher standard of good faith for a merchant conducting Article 2 business would seem to carry the day. But a second problem arises from the language of section 2-103(1)(b): the Benkowskis do not fit the definition of “merchant” in section 2-104.²⁵ Although their non-merchant status renders moot the issue of statutory construction posed by the quotation marks in section 2-103(1)(b), I choose not to omit it. The inquiry is too valuable, not only for its substance, but for its cautionary effect upon students’ tendency to regard statutes as magic seeds yielding certainty-fruit.

21. U.C.C. § 2-103(1). “In this Article unless the context otherwise requires . . . (b) ‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” *Id.*

22. U.C.C. § 1-201’s definitions defer to those in applicable substantive Articles. They are given “[s]ubject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or parts thereof” U.C.C. § 1-201.

23. U.C.C. § 2-103.

24. Both definitional statutes contain the limiting language, “unless the context otherwise requires,” U.C.C. §§ 1-201(19), 2-103(1)(b) and § 1-201 mandate a purposive reading of U.C.C. statutes. *See supra* note 7.

25. U.C.C. § 2-104. “‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” *Id.* § 2-104(1).

Now attention can be turned to good faith's definitional content. First, the definition we have found to apply is "honesty in fact."²⁶ Does honesty mean simply not lying? Or might it bar intentionally injurious conduct such as the Benkowski's harassment of the Whites? No clear answer is provided in the U.C.C. The best approximation comes from comparing the subjective definition of section 1-201(19) to the mixed subjective/objective definition of section 2-103(1)(b).²⁷ Even though itself inapplicable, the Article 2 statute is permissibly referred to for its implications in construing a sister statute. The Benkowskis' conduct in shutting off the water supply for brief periods in order to harass the Whites seems neither "reasonable" nor "fair." These criteria go beyond "honesty" in section 2-103's merchant provision to supply objective terms by which a party's behavior or motivation may be judged. The standard of reference is not merely the defendant's own internal one; it incorporates, to a large extent, the other party's apparent expectations and the normative standards of the society in which the court sits. The careful provision in section 2-103(1)(b) of the full range of objective criteria ("reasonable commercial standards of fair dealing in the trade") supports the conclusion that its "honesty in fact" component, identical to that of section 1-201(19), is meant as a wholly subjective test.

An interesting question is whether the Article 2 definition expands the strictures upon a merchant party's subjective state of mind, or whether the reasonableness and fairness it requires pertain solely to external commercial standards. If the former, it could lend some credibility to a more restricted reading of section 1-201(19)'s "honesty," omitting motivational factors that implicate normative standards. Perhaps it requires no more of a non-merchant than simply not lying. Even maliciousness might then pass muster.

In concluding the discussion, it is important to put the matter back into the realm of practicality. What are the chances for the Whites to prevail in the effort to make the Benkowskis pay for their supposed bad faith? What remedy may lie, given the court's rejection of punitive damages for even a malicious breach of contract? Is a moral victory meaningful? If the Whites prevail, what will they have had to pay and to suffer in order to do so? Is there any chance of settlement?

B. Distributional Axes for Morphology and Sources

As the first exercise described immediately above illustrates, the formal definitions of good faith provide only a beginning for the inquiry into its

26. See U.C.C. 2-103(1) and *supra* note 21.

27. Compare U.C.C. § 1-201(19) ("'Good faith' means honesty in fact in the conduct or transaction concerned.") with U.C.C. § 2-103(1) ("In this Article unless the context otherwise requires . . . (b) 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.").

meaning and effect. To further the inquiry and to give substance to the definitions, I often focus the discussion by referring to two axes along which important applications of good faith may be distributed. These include: (1) a morphologic axis and (2) an axis of sources.²⁸ They are, of course, interrelated.²⁹

Before describing them in detail, I wish to make clear that my purpose in using them is more procedural than substantive. What it is designed to teach is an approach to good faith issues; the point of the discussion is not to reach *the* correct conclusion (although we do strive to avoid incorrect ones). After all, the most determined effort to classify cases will fail as evolving commercial, political, economic, ethical or normative pressures provide new contexts or undermine old ones. Insofar as inferences rest upon experience, intuition, intelligence and wisdom, more than one conclusion may be justified at any one time. Classmates sometimes cannot agree. This is entirely consistent with my goals, as long as their arguments are well-founded. Disagreement arising from competing factual inferences may make students squirm, but the experience will enhance their practice of law, making them more willing to admit the limitations of their own understanding and more discerning about what questions to ask.

Sometimes students' conclusions vary because the signals given by the courts are ambiguous. Recognizing such ambiguity and learning what to do with it is one of a lawyer's most essential tools; therefore, it ought never be eliminated artificially any more than it should be fabricated. Although I strive hard for clarity where it is obtainable, I try to teach my students not to flinch from real ambiguity. As Lewis Thomas observed:

[L]anguage differs sharply from other biologic systems for communication. Ambiguity seems to be an essential, indispensable element for the transfer of information from one place to another by words, where matters of real importance are concerned. It is often necessary, for meaning to come through, that there be an almost vague sense of strangeness and askewness. Speechless animals and cells cannot do this. . . .

If it were not for the capacity for ambiguity, for the sensing of strangeness, that words in all languages provide, we would have no way of recognizing the layers of counterpoint in meaning, and we might be spending all our time sitting on stone fences, staring into the sun.³⁰

28. It would be a mistake to make too much of the names I have ascribed to these axes of analysis. I have done so for purposes of this article. However, I am using metaphor for exemplary and illustrative purposes, not as serious descriptive categories.

29. The pre-existing duty rule at common-law and under the U.C.C. offers a good opportunity to explore the interrelationship between these axes, as the law of nondisclosure and misrepresentation.

30. LEWIS THOMAS, *THE LIVES OF A CELL: NOTES OF A BIOLOGY WATCHER* 111 (1974).

Applying a consistent framework throughout the course helps students to disentangle the strands of good faith's sources and components. The familiarity of the framework and the accumulation of observation it fosters permit optimal effect from even very brief allusions to it. As Thomas also observed:

We store up information the way cells store energy. When we are lucky enough to find a direct match between a receptor and a fact, there is a deep explosion in the mind; the idea suddenly enlarges, rounds up, bursts with new energy, and begins to replicate. At times, there are chains of reverberating explosions, shaking everything: the imagination, as we say, is staggered.³¹

Such moments give contracts some of its most delightful moments.³²

1. Morphologic axis

The first or "morphologic" axis focuses students' attention upon the flexibility afforded the concept of good faith by its resistance to definition. Its essential quality is dynamic; it takes meaning within a wide range, depending upon context. Within the law of contracts, good faith is analogous to stem cells within the human body. That is, not only does it function as a relatively undifferentiated set of standards, but it is also capable of highly specialized development into discrete rules. Although this axis may be understood to describe the line between good faith standards and rules, I wish to focus not upon the dichotomy, but upon the usefulness of the dynamic relationship between the two poles. The concept is constantly evolving in both directions, which is illustrated by a simple diagram:

Undifferentiated good faith-----Discrete rules

"Undifferentiated" does not mean undefined. Definitions remain pertinent, and this aspect may be assigned independent of definition. Undifferentiated good faith is found in cases where only the results indicate what may be the definitional content; it is equally possible to be found, however, when a clear definition is given. The undifferentiated quality lies in the irreducibility of its real substance to any formula that can yield predictable results without extensive circumstantial details.

Nor is the undifferentiated form simpler than its opposite, any more than a stem cell is simpler than a red blood cell. One is most useful for its potentiality while the other is susceptible of limiting description. In the undifferentiated form, "good faith" is highly contextual; its meaning may be perceived not only by means of logic and precedent, but by experience. Certainly intuition plays a part, as does creative intelligence, in providing the raw material making up what we call "good faith." Of course, not all aspects of the concept are equally

31. *Id.* at 108.

32. My first awareness of Contracts' rich potential for such moments I owe to Professor Richard Hausler, whose teaching I seek to honor in my own. He passed away earlier this year.

permissible to be raised in court. Some may be limited in effect or even excluded by rules of law such as the parol evidence rule or the rules of evidence. But limiting and exclusionary rules are effective only insofar as there is conscious awareness of the nature and source of the information or insight in question.

Even the simplest statutory definition, "honesty in fact,"³³ may vary widely in application when good faith functions in its undifferentiated form. An example is in the qualification of holders in due course under the original (pre-1990) version of U.C.C. Article 3.³⁴ The applicable definition of good faith, drawn from Article 1, tested only the subjective "honesty"³⁵ of the plaintiff. Nevertheless, courts notoriously ignored the limitations of that definition, often merging good faith analysis with the objective standards of the notice issue. Too suspicious circumstances³⁶ or too close a connection with the payee³⁷ might disqualify holders from protection. Although this reduced certainty in planning commercial transactions, it produced individual results otherwise consistent with good policy, allowing defrauded makers of promissory notes to assert their contract defenses³⁸ against those plaintiffs who individually, or as a group, lacked commercial justification to demand protection as super-purchasers.³⁹ In 1990, the drafters of Revised Article 3 finally capitulated, and the wholly subjective definition of good faith met its demise for purposes of negotiable instruments law.⁴⁰ It is anticipated that the new definition will move good faith under Revised Article 3 at least part way towards a set of discrete rules, especially in conjunction with other regulatory protections.

33. U.C.C. § 2-103.

34. Former U.C.C. § 3-302 (1998).

35. U.C.C. § 1-201(19).

36. *See, e.g.,* *General Inv. Corp. v. Angelini*, 278 A.2d 193 (N.J. 1971) (finding no good faith despite the absence of any general duty of a holder to inquire into possible defenses.) The *Angelini* court found a duty to inquire where "the circumstances of which [the holder] has knowledge rise to the level that the failure to inquire reveals a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a defense arising from the transaction." *Id.* at 197.

37. *E.g.,* *Commercial Credit Corp. v. Orange County Mach. Wks.*, 214 P.2d 819 (Cal. 1950).

38. Including what Revised Article 3 calls "claims in recoupment." *See* U.C.C. §§ 3-302, 3-305.

39. Many cases explicitly acknowledge that policy considerations underlie their holdings, rather than the strictures of statutory definitions. *E.g.,* *Jones v. Approved Bancredit Corp.*, 256 A.2d 739 (Del. 1969). "[F]or the reasons of fairness and balance stated in the foregoing authorities, Bancredit should be denied the protected status of holder in due course which would prevent Mrs. Jones from having her day in court on the defenses she would have otherwise had against Dell." *Id.* at 743.

40. The revision of U.C.C. Article 3 added a new provision, § 3-103(a)(4), defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 3-103(a)(4). The definition is strikingly similar to that applicable to merchants under Article 2, § 2-103(1)(b).

“Good faith” as it applies under U.C.C. Article 5⁴¹ is in strong contrast to Article 3, illustrating that analysis of good faith must not end with a formal definition. As it applies to banks issuing letters of credit, the subjective definition of “honesty in fact”⁴² has functioned as a well-articulated rule of law.⁴³ To protect the expectation that letters of credit will be paid solely by reference to the paperwork, it is essential that all bank discretion and judgment about other matters be eliminated. Hence, courts hew closely to the strictly subjective standard in adjudging the conduct of a bank in deciding whether to pay under a credit. Absence of collusion or other overt dishonesty is all that good faith demands of the bank.

It seems paradoxical that the undifferentiated form of obligation may actually foster certainty, at least when its legal effect is independent from the obligation’s content. This is true, for example, when open quantity contracts are tested for consideration under U.C.C. § 2-306(1): validation is a foregone conclusion.⁴⁴ Sometimes, as is true for section 2-306(1), the undifferentiated nature of the obligation is attributable to a lack of factual commonality among the cases within a group. In that case, time will not transform the undifferentiated character. Sometimes, however, when it stems from developmental immaturity (legally, commercially, socially, etc.), an undifferentiated form will evolve into a fine set of rules. Good examples are found in conditions of satisfaction and the rules for open price terms under U.C.C. § 2-305. Ill-framed rules, on the other hand, may relapse into the undifferentiated form, as the discussion below illustrates.

At either end of the morphologic axis, there are plenty of cases in which good faith operates in conjunction with other law. It may be interwoven with more or less related doctrine, for example, substantial performance or economic waste. Or good faith theory may underlie other doctrine without

41. *See, e.g.,* Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958).

42. *See* U.C.C. § 5-102(a)(7) (“‘Good faith’ means honesty in fact in the conduct or transaction concerned”); *compare* § 1-201(19), which is identical. The usefulness of providing the definition explicitly in Art. 5 rather than implicitly through the general mechanism of Art. 1 is that it is more obviously intended that the strictures of the subjective definition be observed by courts.

43. This is even clearer under Rev. Art. 5 than it was under the initial act for two reasons. First, the revision removes the necessity to rely upon the Art. 1 definition by providing it in Art. 5 itself, § 5-102(7). Second, the standard of strict compliance of § 5-108 supports the limitations of the good faith standard.

44. “A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.” U.C.C. § 2-306(1).

explicit acknowledgment, as it seems to do for promissory estoppel, for the doctrine of mitigation or for impracticability.

2. Source axis

The second axis runs from private agreement (assent) at one extreme to societal necessity (policy, broadly speaking) at the other. It can be broadly understood as spanning the range of good faith's sources. It is most natural to associate the parties' "intentions" with the "assent" pole of this axis. Nevertheless, some aspects of "intention," such as malice, motive and opportunism may also invoke strong social policy. Likewise, despite its ordinary placement at the policy end, fairness can be an important, though sometimes unstated, qualification for implying intentions. The objective standard of reasonableness may lie close to either end of this axis, or midway between, depending upon the degree to which the parties have made their expectations explicit.

The second axis is functional rather than descriptive. It relates to the role good faith plays in mitigating tensions between the policy poles of private agreement and societal concerns. Courts' attending to the actual and probable good faith of the parties help keep the law responsive to the normative and moral expectations of the community and of the marketplace. Appreciation of what is generally expected in society in turn contributes to the courts' discernment of parties' expectations, both real and "constructive," a function important not only to long-term "relational" agreements, but also to one-shot transactions where the expectations are expressed in sketchy contract terms or where one party's expectations (for example, a consumer's) are mostly left to the imagination.

As they arise in discussion, various factors associated with good faith may be distributed along this axis in relation to the poles of assent and fairness. One might envision such a distribution as this, for example:

ASSENT-----	POLICY
express terms	
---course of performance	
-----course of dealing	
-----usage of trade ⁴⁵	
-----shared purpose	
-----relationship ⁴⁶	
-----subject matter of agreement	
-----duration of agreement ⁴⁷	
-----race/gender /socioeconomic factors ⁴⁸	
-----efficiency ⁴⁹	
-----motive	
-----ethics	
-----morality	

This chart illustrates a very close identification between express terms and assent, while ethics and morality are matters of social import.⁵⁰ The relationship of the parties fits midway between: it may implicate both the parties' shared understanding and also a court's willingness to give it effect as a matter of social policy.

On the second axis, the good faith of the banks issuing letters of credit under U.C.C. Article 5 may be understood to derive less from the explicit terms of agreement than from policy. The distinction here is smudged a bit, however, because the long-established custom of restricting the bank's obligation to making sure the paper complies with the credit is reflected in the terms of agreement with the applicant. The bank's lack of discretion about whether to pay is part of what makes letters of credit attractive as a payment

45. *But see generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

46. *See, e.g.*, Deborah Waire Post, *The Square Deal Furniture Company*, in AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, *CONTRACTING LAW* 638-39 (1996). So-called "relational contract theory," largely springing from the work of Ian Macneil, is relevant to what I mean by "relationship," but I intend the term in its ordinary sense. For a recent examination of Macneil's work, see Symposium, *Relational Contract Theory: Unanswered Questions*, 94 NW. U. L. REV. 737 (2000).

47. *See* Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 840-46 (2000).

48. *See* KASTELY, POST & HOM, *supra* note 46, *passim*.

49. *See generally* Elizabeth Warren, *Trade Usage and Parties in the Trade: an Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981).

50. The interrelatedness of factors I have elsewhere insisted upon applies here, too. Assent itself is the focus of policies, by which society's welfare is understood to be served by facilitating party autonomy and self-determination. *See, e.g.*, P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 229-30 (1979).

device, especially between strangers in international transactions where the vagaries of local law are sought to be avoided by sellers.⁵¹ The preservation and commercial utility of letters of credit depend upon the banks' invulnerability to persuasion.

C. *Methodology Applied*

Part of the advantage of a consistent methodology is that it fosters disciplined observation and study. It helps students learn that good faith does not, as a rule, override the express terms of an agreement. They eventually realize that "fairness" does not generally mean that all parties share equally in the advantage of any enterprise. The illustrations below represent some occasions for which I have found the methodology useful.

It can be used to great advantage for consideration analysis, in explaining why courts insist on the peppercorn theory in some cases (merchant's promises at arm's length⁵²) and in others, place an apparent bargain under a magnifying glass. Good faith provides a common matrix within which apparently disparate consideration issues are linked to one another. Students can see what the common law pre-existing duty rule has in common with the rules about forbearance to assert invalid claims as consideration or with the courts' treatment of covenants-not-to-compete in at-will contracts. Their ability to generalize from the specific is enhanced, giving them skill to use in new cases.

A good example is *Fiege v. Boehm*,⁵³ in which a young woman agreed to forego a claim of bastardy in exchange for the payment of certain expenses, losses and child support. Later, blood tests revealed that the defendant could not be the father, and he refused further payments. The facts are intriguing enough to generate vigorous debate about how such a case ought to be addressed. It is axiomatic that forbearance to assert a legal claim stands as good consideration only in circumstances that give objective assurance of the good faith of the promisee. Ordinary consideration analysis gives way to a pointed inquiry into the promisor's real volition. Students are at first perplexed by the departure from ordinary consideration analysis. Why, for instance, does the court focus upon the promisee's (the woman's) state of mind rather than the value of the consideration⁵⁴ to the promisor? Why does the court subject the consideration to rigorous scrutiny, and why has the rule been reduced to such picky detail?⁵⁵

51. The buyer's protection is in negotiation for protective documentation, such as third-party inspection certificates.

52. *But see* *McKinnon v. Benedict*, 157 N.W.2d 665 (Wis. 1968).

53. 123 A.2d 316 (Md. 1956).

54. There is no doubt that escaping bastardy proceedings is a valuable benefit!

55. *See* RESTATEMENT OF CONTRACTS § 76 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981).

It is well understood that the answers lie in the general danger of inappropriate demands approximating extortion when promises are made in exchange for forbearance to assert invalid claims. But society's interest goes beyond prevention of actual extortion. The complex rules applied in cases like *Fiege* may be seen to ensure the good faith of the promisee and the probable good faith of others similarly situated. Was she honest with the young man? Does good faith require disclosure that another might be the father, especially given the noncommercial, intensely intimate relationship from which this promise springs? Would the young man reasonably have supposed that he was the one and only, or should he have suspected otherwise? It is apparent that, in addition to honesty, a duty of fairness must be observed by the promisee in such cases. While consideration is the ancient tool by which such requirements have long been implemented, good faith doctrine permeates these decisions. Acknowledging it explicitly allows greater flexibility in the law. The requirements might be fine-tuned to fit the circumstances: for example, in an intimate relationship such as that in *Fiege*, a higher standard of disclosure might be required, in contrast to an arm's-length commercial transaction. For this reason, good faith might make a better tool in these cases in its undifferentiated form, although it has been articulated in terms of discrete rules.

Another advantage of focusing on good faith when the *Fiege* issue is studied is that it enables students to predict where they might expect to find similar judicial responses. For example, they ought to be able to predict with some accuracy what they will find when they study the pre-existing duty rule.

Another consideration issue which profits from good faith analysis is found in at-will employees' covenants-not-to-compete.⁵⁶ The dilemma courts face in such cases is that while the relationship of employment at-will underlines the urgency of the employer's need for the covenant, it also undermines the ostensible volition of the employee because of the threat of being fired, especially when there is a time gap between beginning employment and signing the covenant. These covenants often flunk the ultimate test of meaningful assent, both doctrinally and pragmatically. If the covenant is enforced, the employee loses what is probably the most valuable asset in modern life, the ability to work for a living. The policy end of the second axis must predominate in these cases, where commercial necessity mandates enforcement despite the absence of real assent. The employer's good faith stands in lieu of a traditional bargain, fairness of content and context substituting by necessity for full volition. Because enforceability rests more fundamentally upon economic necessity than upon the employee's assent, the employer carries the burden to satisfy a stringent test of reasonableness and fairness. The employee's disadvantage is weighed up against the employer's

56. *E.g.*, *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

objective and subjective⁵⁷ motivation, its demonstrated need and its lack of opportunistic conduct.

Another consideration issue for which impermissible motivation and opportunistic behavior comes to the fore is in the case of the quantity-determining party's performance in a requirements or output contract.⁵⁸ Fear of opportunistic behavior often invalidated open quantity contracts in the early years at common law. Throughout the twentieth century, the cases have frequently revealed a concern for fairness in a context where courts perceived one party to hold all the cards.⁵⁹ The concern originally was expressed as "lack of mutuality of obligation," which is bilateral contract language for "no consideration." The term "mutuality of obligation" sounds like a mandate of equivalency in the values exchanged, but that is not what it means.⁶⁰ However, in requirements and outputs contracts, it sometimes seems that the early courts made that mistake.

In recent years, having become persuaded of the economic necessity of validation, the courts have overcome their suspicion that the open quantity term inherently represents a danger of overreaching. As a result, consideration is found by statutory fiat,⁶¹ shifting the concern for "fairness" to issues of performance and breach. The question now is whether one party has used the contract terms to achieve an advantage fairly understood to have been bargained away. Open quantity contracts range from small farmers' deals with soup companies to airline's bargains with oil companies. There being no consistent pattern of power or circumstance, answers to performance questions can rarely be given without full contextual detail. Very similar cases can produce justifiably different results.

An undifferentiated obligation of good faith under U.C.C. § 2-306(1) provides a clearly affirmative answer to the consideration question without further analysis.⁶² Good faith provides the standards for performance under

57. Subjectivity often confuses students because, although subjective in content, it must be proven by objective evidence which will not be believed by the trier of fact unless it meets a measure of credibility, that is, reasonableness.

58. See generally Caroline N. Bruckel (this author's former name), *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation*, 68 MINN. L. REV. 117 (1983).

59. Consideration was found in the negative promise of the requirements buyer not to buy the contract quantity from another. Likewise, the outputs seller was held to have sufficiently bound itself by promising not to sell to another. But for "middlemen" or "jobbers," as for new businesses, the higher potential for unfair and opportunistic use of the open quantity term was held to prevent their contracts from being enforceable.

60. Mutuality of obligation merely means that the promisee must have undertaken *something* real in order to make an enforceable bilateral contract.

61. See U.C.C. § 2-306(1).

62. U.C.C. § 2-306(1) measures quantity by "such actual output or requirements as may occur in good faith, . . ."

the statute, which are expressed in both general and specific terms.⁶³ They rest upon assent much more than upon societal norms. When breach is at issue, the undifferentiated form of good faith serves as an ideal tool for the complex and subtle analysis necessary to extract the details of a party's obligation from the contract's context and its performance. Reasonable expectation is the touchstone, but the open quantity term leaves the details unfixed. What is fair may be used as a shortcut to expectation. Opportunistic behavior is barred, but what is opportunistic is defined by reference to context. For example, it probably would not be in "good faith" for a manufacturer-buyer in a fixed-price requirements contract to increase orders in a suddenly rising market if the goal is to make a new business reselling them in direct competition with the seller. But the same quantity increase in the same market would be permissible if the buyer's purpose is to meet the exigencies of an long-planned expansion of its manufacturing business.

In a different kind of open quantity contract where the relationship of the parties is not arms' length, but more typical of agency, the good faith obligation is expressed as "best efforts." The classic case, of course, is *Wood v. Lucy, Lady Duff-Gordon*,⁶⁴ which the U.C.C. has taken up and made statutory.⁶⁵ The rule here is highly developed and discrete, deriving in part from society's demands of such relationships.

Sometimes, though, efforts to make rules out of good faith fail notably. A notorious example is U.C.C. § 2-207. Although subsection (1) functions admirably as a rule-maker,⁶⁶ reversing the common-law mirror image rule so that contracts may be made through an exchange of forms, it has failed miserably at term-setting.⁶⁷ Part of the problem with the statute is that there is no consensus within the legal community as to the crucial aspects of good faith. The dilemma is that forms must be given effect, although no one reads them. In the absence of negotiated terms, good faith serves as a useful

63. The general term is the good faith obligation referred to in the precedent footnote. The statute adds "... except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded." *Id.* The latter language is a specific application of good faith in a yet largely undifferentiated form, except for the effect of a contract estimate, which triggers a specific *rule* of good faith. An estimate in the contract is treated under the U.C.C. as express agreement rather than mere prediction as at common law.

64. 118 N.E. 214 (N.Y. 1917).

65. U.C.C. § 2-306(2).

66. "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." U.C.C. § 2-207(1).

67. See generally Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991).

substitute. The statuté seems to me to utilize that concept in the form of a kind of blanket assent,⁶⁸ by which permission is given to the other party to set terms within the ambit of reasonable expectation, with limitations precluding unfair surprise. Expectation is, for me, the touchstone of the statute's function; the predominant social policy is for efficiency. Others, however, emphasize social concerns, seeing section 2-207(2) in terms of a quasi-political concern for the equal opportunity of the parties to be term-setters.⁶⁹ My own conviction is that a rule-like application of good faith best serves utility without sacrificing fairness.⁷⁰ The courts, however, have abandoned the old rules of formation that gave the statute its backbone, and what has resulted has been a free-for-all in which an undifferentiated melange of assent and policy have resulted in utter chaos.

While the common-law rules giving control over terms to the offeror probably do need a second look when form contracts are used, it seems obvious that section 2-207 has failed as a shortcut for that process. I am persuaded that no rule will resolve this dilemma unless and until the policies which favor each party's careful drafting are reconciled with those which justify the failure to read the forms.

Another example of reverse movement from the highly articulated to the undifferentiated version of good faith is apparent in the fate of the famous case of *Hoffman v. Red Owl Stores*.⁷¹ In allowing damages for a promise made during failed contract negotiations, the court hangs its hat on the relatively well-organized body of rules called "promissory estoppel," a doctrine which may not appear to the novice to have much to do with good faith at all. But the early hoopla over *Hoffman* has not eventuated in a derivative body of caselaw. One good reason may be that it is preferable to cast such holdings in terms of the duty to negotiate in good faith, a duty growing in recognition in the United States and of established importance elsewhere.⁷² Such a duty is specific to a number of factors, including, for example, the stage at which negotiations have arrived, the nature of the parties' prior relationship, the nature and extent of formalized pre-contract commitments between them, the likelihood of harm to one and the other's need to exercise self-interest, the social importance of the endeavor or type of endeavor, etc. *Hoffman's* almost-rule seems to have developed in reverse direction along the first axis, towards the stem cell end. Depending upon the degree of actual agreement in each case, reasons for

68. The term comes from KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

69. See Brown, *supra* note 67, at 913-17.

70. See *id.* at 937-40 & *passim*.

71. 133 N.W.2d 267 (Wis. 1965).

72. FURMSTON, *supra* note 5, at 267-315.

liability may be more or less heavily attributable to societal norms, ethics and morality.

For many issues in which the reasonableness of a party's response to the other's conduct is featured, good faith analysis often adds significantly to mastery. Thus, impracticability doctrine is better understood not as a mechanical set of rules, but as an effort to maintain a consensual relationship along lines reflected by the parties' agreement and conduct. When the parties find themselves thrust unexpectedly into circumstances for which they have made no provision, the problem is to determine whether their relationship ought to survive at all, and if so, by what terms. The answers lie first and foremost in the parties' expectations, which must be understood in the round, in order that their pattern may be projected into the new circumstances. Of course, express terms govern here; as usual, good faith doctrine does little or nothing to undermine their efficacy. In most cases that come to litigation, however, express terms such as applicable warranties or force majeure clauses are lacking. One difficult task, then, is to decide whether the parties' silence ought to be understood as an intended risk-allocator for the new circumstances, signifying that losses are to be left where they fall. It is here that the foreseeability plays a big part, as does the distinction between general adversity and a "contingency." All these factors affect the reasonableness of an expectation that the contractual relationship should be maintained in the face of the new circumstances.

Fairness, the other face of good faith doctrine, comes into play as well, in the absence of any provision by the parties for their plight. Because commercial contracting is largely to do with hedging against financial losses, an expectation that the other, in effect, will stand surety against even a substantial loss, which is directly monetary, seems out of keeping with the expectations that reasonably arise from a commercial deal. On the other hand, when the financial loss is not direct, but flows from unexpected difficulties in performance, the expectation of the other party's accommodation seems more consistent with the essential bargain that was struck initially. For most cases, in which the real difficulty, more or less directly, is financial, the balance may be tipped towards excuse when a catastrophic event can be isolated, removing the exigency from the bargained-for risks. Fairness plays its strongest part when the court weighs up the extent of loss ("impracticability") as a factor.

Distributing this analysis along the two axes proposed herein reveals that the movement in the law from "impossibility" to "impracticability" is not just verbiage, nor does it represent merely a liberalization of the rigor by which agreed terms are enforced. The movement to "impracticability" represents an accommodation of consensual standards to societal ones. It is probable that the better decisions applying impracticability doctrine, even under the U.C.C.'s statutory provisions, and even when the courts seem to be applying a relatively mechanical "rule," are actually conducting a good faith analysis. That they are

testing the parties' relationship for its extendability into uncharted territory can be seen easily in the opinions. It is just as important, although it can be harder, to discern the moral, normative, and perhaps most crucially, economic substructure.

Using the model for good faith analysis also helps reveal that, although often cast in doctrinal terms that tempt students to memorize them, impracticability doctrine actually embraces a form of good faith which lies far from discrete rules, at the undifferentiated end of the spectrum. Its components may not be identifiable at all, though strongly and demonstrably present, like a good perfume. Or the terms of analysis may emphasize reasonable expectations, clustering about the explicit implications from express terms or from the negotiation process. Still again, the nature of a party's dilemma and the scope and circumstances of its loss may be center stage. The undifferentiated concept of good faith serves the courts well in enabling a just response throughout a wide variety of contexts in which no better solution seems to be possible in our society.

In a few cases, however, repeated experience has given rise to conventional rules governing impracticability. This is true for a seller's performance when payment is by letter of credit. Under U.C.C. § 5-108, impracticability does not excuse even an immaterial nonconformance between the documents and the terms of credit.⁷³ That this is consonant with the parties' expectations is so long established as to be axiomatic. The inefficiencies that would attend a departure from the rule brook no exception.

Similarly, a rule concept of good faith is exemplified by U.C.C. § 2-614. Not only does it recognize an impracticability excuse, it goes so far as to require that a substituted performance be tendered and accepted for a particularized set of peripheral contract terms such as berthing or unloading facilities. The mandatory terms of the statute leave a court little or no room for inquiring into the details of the parties' relationship or the terms of their agreement.⁷⁴ In this case, society's concerns for efficiency easily outweigh other interests because the departure from agreed performance is commercially insignificant by comparison to the huge loss to the seller were it unable to trigger the buyer's obligation to take the goods and pay.

Focusing repeatedly on good faith provides opportunities for students to draw connections between ostensibly remote points of law. For example,

73. "Except as otherwise provided . . . an issuer shall honor a presentation that . . . appears on its face strictly to comply with the terms and conditions of the letter of credit . . . Except as otherwise provided . . . and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply." U.C.C. § 5-108(a).

74. The "must" of U.C.C. § 2-614 can be weighed against the general permissibility of variance by agreement, found in § 1-102(3) (" . . . but the parties may by agreement determine the standards by which the performance of . . . obligations is to be measured if such standards are not manifestly unreasonable").

students looking at U.C.C. § 2-614 may remember a similar analysis of the seller's right to cure under section 2-508(2).⁷⁵ That statute has enabled courts to respond aptly to the economic significance of the likely losses if sellers lose the right to a price by a defective tender of goods. It has made a wide swathe through the "perfect tender rule."⁷⁶ The effect is to allow sellers much greater leeway, consistently with reason and fairness, one might say, in correcting nonconforming tenders without losing the right to the price. Courts have apparently seen enough similar cases to forge something close to a rule here despite the statute's notoriously ambiguous language ("a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance"⁷⁷). In undercutting the common law proposition that most sales terms are to be construed as express conditions as well as promises, section 2-508 seems to counter the parties' freedom to contract. But when students are asked whether *explicit* express conditions are governed by section 2-508, they are easily able to demonstrate that the reasonableness of the buyer's response rests in large part upon what risks fairly should be understood as allocated to each party. In the absence of explicit language, the statute allows numerous factors to come into play, including the seller's awareness of the defect, the reasons for unawareness or for a conscious choice to ship nonconforming goods, the parties' past conduct, the materiality of the breach to the buyer,⁷⁸ the extent of loss to the seller if the buyer is excused from performance. Probable expectation here seems to weigh about as heavily as avoiding the seller's forfeiture. Opportunistic behavior and motivation of both parties seems relevant.

IV. CONCLUSION

There are many pedagogical advantages to a systematic approach to the teaching of good faith. While I recognize that there are flaws to the suggestions above, I do not believe that any other model would be immune to that objection. A particular advantage of the approach I use is its flexibility. I do not suppose it to be the only useful methodology, nor indeed is it the only

75. "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender." U.C.C. § 2-508(2).

76. U.C.C. § 2-601. "Subject to the provisions of this Article on breach in installment contracts . . . and unless otherwise agreed under the sections on contractual limitations of remedy . . . , if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest." *Id.*

77. U.C.C. § 2-508(2).

78. See, e.g., the "shaken faith" doctrine in *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195, 205 (N.J. Super. Ct. Law Div. 1968).

one I use myself. It generally serves my purposes well, though, not only because it helps students make sense of each particular day's assignment, but also because it encourages them to place each case, statute or Restatement section within a broader framework of doctrine and policy. It is my hope that their efforts in my class to construct such a framework for themselves will continue after law school, enabling them to choose their legal tools wisely, to apply them confidently and to respond readily and effectively to an adversary's contentions.