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### *Symposium on Commercial Law*

## Good Faith Obligation in the Unifrom Commercial Code: Problems in Determining Its Meaning and Evaluating Its Effect

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# GOOD FAITH OBLIGATION IN THE UNIFORM COMMERCIAL CODE: PROBLEMS IN DETERMINING ITS MEANING AND EVALUATING ITS EFFECT

JAMES J. STANKIEWICZ\*

## I. INTRODUCTION

Since the adoption of the UCC, many questions have arisen concerning the meaning and impact of the Code's express obligation of good faith. An underlying theme in these questions is whether the Code's obligation has generated a trend toward legal standards of contractual morality.<sup>1</sup> This writer suggests that the answer is yes *and* no; the answer depends on what is meant by the term "good faith" as used in the UCC. The purpose of this article is to show that (1) an evaluation concerning the effects of the good faith obligation in the Code cannot be made until one first defines the meaning of the term "good faith," and (2) the meaning of the term "good faith" should not be based on conclusions drawn solely from Code definitions or from common law interpretations of the term. Judicial application of the term to limited factual situations will not be considered; rather, this article will deal with good faith from the standpoint of its broader meaning as a commercial concept.<sup>2</sup> The method whereby alternative viewpoints toward good faith result in different conclusions concerning the impact of the Code on commercial transactions will be illustrated.

Four questions will be explicitly considered: First, does incorporation of the term "good faith" in the Code prevent alternative conceptual meanings of that term? It will be argued that even though the Code expressly invites interpretation in a comparative manner, statutory incorporation of the term has resulted in limiting

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1. See, e.g., Summers, *Good Faith In General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968), reprinted in R. SPEIDEL, R. SUMMERS & J. WHITE, *COMMERCIAL TRANSACTIONS* 467 (1969) [hereinafter cited as SUMMERS].

2. The term "commercial concept," as used herein, indicates a relationship existing between the obligation of good faith and the law's historic recognition of the unique needs of commerce. For considerations implied in this obligation, which seem to the writer of special importance, see Yntema, *The Law of Obligations*, in *CIVIL LAW IN THE MODERN WORLD* 66-75 (A. Yiannopoulos ed. 1965); F. LAWSON, *THE ROMAN LAW READER* 91-106, 109-10 (1969) [hereinafter cited as LAWSON]; R. POUND, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 181-95 (2d ed. 1913) [hereinafter cited as POUND]; F. WHITNEY, *THE LAW OF MODERN COMMERCIAL PRACTICES* 1-9, 41-52 (2d ed. 1965).

the available sources of meaning to the Code's vague definitions and post-Code case law. Ad hoc interpretations of good faith, which fail to consider the term's possible positive use as a general commercial concept, have been the unfortunate result.

The second question is: What is required to understand good faith as a general commercial concept? It is suggested that the ambitious scholar should attempt to derive the meaning of good faith from comparative sources of law as well as post-Code case law. It will be argued, however, that ambition is insufficient by itself to grasp the potential weight of the good faith concept. Unlike most terms, good faith contains certain social, moral, economic and political biases. Thus, a researcher must combine ambition with introspection; he must attempt to understand his subjective bias toward the meaning of good faith if he is to arrive at objective conclusions concerning the proper effects of the Code's express obligation of good faith. This calls for an evaluation of the researcher's epistemology, philosophy of man and core of legal reference.

The third question is: What possible meanings could good faith have under the Code? It will be suggested that there are at least five possible interpretations of the good faith obligation. Of these five, only one has been used in cases involving the Code. It will be argued that an awareness of alternative meanings of good faith is necessary to save the concept from degenerating into a mere excluder principle (*i.e.*, cases involving "bad faith").

Finally, is it worth spending the energy to search for the general meaning of good faith? It will be concluded that the extra time spent analyzing the general meaning of good faith is well justified. Not only will such efforts result in a more scholarly approach to evaluating the effects of the Code, but they will also have a practical effect on the success of counsel in future good faith cases.

Before considering the first question, it will help to distinguish the terms "commercial concept," "concept," "conception," "percept" and "perception" as these terms are used herein. "Percepts" are sensual stimuli which man receives from external sources and which form the basis of his external knowledge. The totality and quality of one's externally derived knowledge is directly proportional to the opportunity for and capability of receiving percepts. Percepts are self-sustaining stimuli for reaction by the recipient. Thus, animals (*e.g.*, Pavlov's dog) immediately react to perceptual stimuli even though they lack the power of reflective thought. Per-

ception, then, refers to the process by which one receives knowledge from external sources.

“Concepts,” on the other hand, are mental referents which identify, classify and store percepts. Their function is to postpone immediate reaction to new percepts until they are properly coordinated with past percepts stored in the memory. “Conception” is the process by which percepts are organized, committed to memory and analyzed for the purpose of choosing the best possible reaction to the newly perceived stimuli. Unlike perception, conception is a process whereby internal or reflective knowledge is derived. Just as perceptive response depends on the ability of the receiver to sensually receive stimuli, conceptual response depends on the quality and quantities of perception stored in the memory and the ability of the viewer to reorganize and act from this memory. Conceptual knowledge is susceptible to self-evolution by combining one concept with another concept (*e.g.*, velocity + mass = momentum). This, of course, leads one into abstraction and away from concrete percepts. Choice of response to new stimuli (*e.g.*, conclusion and action) is thus ultimately dependent on the quality and quantity of percepts one has experienced in the past, the concepts formed from those percepts and the level of conceptual abstraction of past concepts. If the conceptual level of abstraction is too far removed from new incoming percepts, then the conceptual process ceases to function for the purpose of organizing percepts into meaningful concepts; rather, it begins to function for itself, repelling new perceptual knowledge.<sup>3</sup>

The relation between these terms and the meaning of good faith will become clear if one substitutes the words “external legal authorities” for the term “percepts,” and “bona fides” for the term “concept.” The quality of conclusions concerning the meaning and effect of good faith in the Code is totally dependent on the perceptual and conceptual abilities of the particular legal analyst. If his perceptual background is limited to common law sources, his approach to the meaning of good faith is a priori conceptually truncated; accordingly, so are his conclusions about the term.

It is suggested that the term “good faith” is a commercial concept which historically is broader in meaning than mere moral honesty. Failure of students and officials in law to perceive this fact has

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3. THE WRITINGS OF WILLIAM JAMES 232-58 (J. McDermott ed. 1969).

resulted in a very narrow view of what good faith means, and in some cases, resulted in a belligerent refusal to consider the diversity of its conceptual role in commercial transactions.<sup>4</sup> Like the conditioned dog in Pavlov's experiments, these students and officials immediately react to a new legal concept without reflecting on the fact that their perceptual background may be too limited to properly consider its meanings, much less to evaluate its effects.

## II. APPROACHES TO MEANING

Statutory incorporation of the term "good faith" raises the issue whether it is possible to approach the term's meaning from sources other than the Code's express definitions or subsequent case law interpretations of those statutory definitions. On the surface, this issue involves at least three questions: (1) What is the Code interpretation of the term? (2) Does the Code expressly prohibit external sources of interpretation? and (3) What is and should be the scope of judicial interpretation of a statute? It is suggested that there is a fourth question which is essential to one's approach to the meaning of a statutory term, but which is rarely asked: Is it possible for the average legal analyst to overcome both the intimidating effect of statutory incorporation of a term and the analyst's perceptual limitations in order to raise the issue of possible alternate conceptual meanings?

The Code expressly defines good faith to mean "honesty in fact"<sup>5</sup> and/or "the observance of reasonable commercial standards of fair dealing in the trade."<sup>6</sup> The apparent scheme of the Code is to vary the meaning of good faith according to the status of the party involved in the transaction, requiring only the first meaning for non-merchants and both meanings for merchants.<sup>7</sup> Some courts are in disagreement whether this view is entirely correct; interestingly,

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4. SUMMERS, *supra* note 1, at 202-7, takes the position that the typical judge who uses the phrase "good faith obligation" is mainly concerned with ruling *out* specific conduct and not with formulating positive elements for the phrase. Based on the above observation Summers advises judges to "not waste effort" formulating their own definitions of good faith; rather, they should continue seeking particular forms of bad faith and leave the positive meaning of the term in its present state of ambiguity.

5. See UNIFORM COMMERCIAL CODE § 1-201(19) [hereinafter cited as UCC]. All references are to the 1972 Official Text of the Code unless indicated otherwise.

6. UCC § 2-103(1)(b).

7. Compare UCC § 2-103(1)(b), which expressly defines good faith in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," with UCC § 1-201(19), which defines good faith as merely "honesty in fact."

they base their disagreement on the Code sections which expressly define the meaning of good faith.<sup>8</sup> More important for our purposes than whether the Code establishes a double standard of meaning is the fact that the Code's two definitions are themselves highly ambiguous (*e.g.*, does the phrase "honesty in fact" in 1-201(19) mean something different from "honesty in mind"; or is "honesty in fact" synonymous with "commercial reasonableness" in 2-103, so that a merchant could raise his compliance with expected commercial standards as a defense to charges that he did not act "honestly in fact"?).<sup>9</sup> Some courts have attempted to resolve this ambiguity by seeking to define the Code's definitions and in turn have found themselves developing hair-splitting and mind-boggling distinctions (*e.g.*, between simple and gross negligence<sup>10</sup> or "notice" and "knowledge"<sup>11</sup>). Other courts have recognized the generality of the Code's definitions and have simply abandoned the idea that good faith has a comprehensive meaning.<sup>12</sup> But some courts have neither been stymied nor conquered by the Code's definition of good faith. These are the courts which have resolved the issue by reference to

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8. Compare, *e.g.*, *Sherrock v. Commercial Credit Corp.*, 269 A.2d 407 (Del. Super. Ct. 1970) (holding that the dual obligations of good faith for merchants in 2-103 applies to all sections of the Code, including Article 9) with *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. Sup. Ct. 1972) (interpreting the introductory phrase to 2-103 as meaning that the dual standards imposed by that section only apply to Article 2—Sales Transactions).

9. The possibility that compliance with accepted commercial practices (though patently unfair) may be a full defense to allegations that a merchant did not act in good faith is illustrated by *First Nat'l Bank of Philadelphia v. Anderson*, 5 Bucks Co. L. Rep. 287, 7 Pa. D. & C.2d 658 (C.P. 1956). In discussing the Code's distinction between "honesty in fact" (1-201(19)) and "reasonable commercial standards" (2-103(1)(b)), the court, after implying that there had been a possible breach of subjective good faith, stated:

True, section 1-201 defines good faith as being honesty in fact . . . [N]o evidence was presented, however, indicating that the failure to make inquiry . . . was in any sense a divergence from common banking or commercial practices.

*Id.* at 290, 7 Pa. D. & C.2d at 661.

10. Compare *Chartered Bank v. American Trust Co.*, 47 Misc. 2d 694, 263 N.Y.S.2d 53, (Sup. Ct. 1965) (applying the test of "gross negligence" under § 95 of the Negotiable Instruments Act) with *Van Horn v. Van DeWol, Inc.*, 6 Wash. App. 95, 497 P.2d 252 (holding that even gross negligence will not be considered in determining whether the Code's obligation of good faith has been breached).

11. The difference between "notice" and "knowledge" often reaches incomprehensible levels of distinction, particularly where the issue is whether an assignee of an Article 9 note was a "holder in due course." For a typical case which attempts to make the distinction see *Riley v. First State Bank*, 469 S.W.2d 812 (Tex. App. 1971).

12. In *Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S.2d 570, (Civ. Ct. Rec. 1969), the court summarily stated that, "It is impossible to define 'good faith' comprehensively and exactly"; the court then made the enlightening conclusion that good faith, as used in 1-201(19), means "honesty and perhaps more." *Id.* at 293, 298 N.Y.S.2d at 573.

the historic and classical import of the good faith concept, the normal commercial expectations of the parties, reasonable intent of the drafters,<sup>13</sup> integrated readings of the Code as a whole<sup>14</sup> and the effect of the courts' decision on commerce and the Code's policy of flexibility in commerce.<sup>15</sup> These are the courts which approach the meaning of good faith from the standpoint that it is a commercial concept with a general meaning. To them, the two Code definitions of good faith are perceptually clear because they are conceptually correlated to the policy behind the Code—the advancement of commerce.

Does the Code prohibit students and officials in law from shifting into conceptual overdrive in cases of ambiguity? Not in the slightest! In fact, it encourages a commercial concept approach to the terms within it. Section 1-102 instructs that questions of doubt concerning the Code should be resolved through *liberal* interpretations and applications which further the commercial concept of law, *i.e.*, which make commercial law simpler, less formal and more uniform.<sup>16</sup> Moreover, 1-103 expressly incorporates external sources of law to supplement the Code's provisions, specifically mentioning the concept of law merchant as one of these sources. It provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the *law merchant* and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.<sup>17</sup>

Section 1-103, however, refers to more external sources of supplemental law than just the law merchant. How should that section be interpreted? Does it mean that pre-Code and non-Code case law control transactions unless explicitly displaced by the Code's provisions? If the answer to this question is yes, which non-Code law controls: the law merchant, common law, equity or civil law? A literal reading of 1-103 indicates that courts are free to follow pre-Code law to the extent that it is not displaced by specific Code

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13. See, *e.g.*, *Sherrock v. Commercial Credit Corp.*, 269 A.2d 407 (Del. Super. Ct. 1970).

14. See *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698 (D. Pa. 1968).

15. *Sherrock v. Commercial Credit Corp.*, 277 A.2d 708 (Del. Super. Ct. 1971).

16. UCC § 1-102(2)(a), (b), (c).

17. UCC § 1-103 (emphasis added).

provisions.<sup>18</sup> The Code, however, does not specify which, if any, pre-Code law is paramount. The importance of this question for the meaning of good faith in the Code should prohibit an analyst from arbitrarily excluding a system of law or including one system of law over another. Nevertheless, arbitrary exclusions have been made. Professor Gilmore, in discussing how the Code has changed the past, states:

Surely the principle function of a Code is to abolish the past. At least a common lawyer assumes that this was the theory on which the great civil law codes were based. From the date of the Code's enactment, the pre-Code law is no longer available as a source of law. . . .

*The Uniform Commercial Code . . . is not that sort of code—even in theory. It derives from the common law, not the civil law tradition. We shall do better to think of it as a big statute . . . which goes as far as it goes and no further. It assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive. The solid stuff of pre-Code law will furnish the rationale of decision quite as often as the Code's own gossamer substance.*<sup>19</sup>

It is fairly evident that even if Gilmore is not contending that the common law is the only source of Code meaning, he is at least sufficiently biased against the civil law system to ignore the term "law merchant" in 1-103.

This writer suggests that when considered together, section 1-102, the subject matter of the Code and the doctrinal approach of a common law system provide the true basis for interpreting 1-103, and therefore the meaning of good faith. Section 1-102 clearly states that the Code (which includes 1-103) is to be *liberally* interpreted in order to effectuate the Code's commercial policies, *viz.*, "modernize," permit "expansion" and make the commercial law

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18. In *Nat'l Shawmut Bank of Boston v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967), the court took notice of both 1-102 (which encourages "liberal" construction of the Code) and 1-103 (which states that the Code does not displace supplemental law by implication). The court's rationale was that 1-103 controls 1-102 in the sense that pre-Code case law and concepts are the primary source of Code interpretation absent *explicit* displacement by the Code.

19. Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285-86 (1966) (emphasis added).



“uniform.” The terms in 1-102 are terms of change, not reinforcement; the change intended was from the prior law of commerce, based solely on common law precedents and the legislative acts formed upon those precedents (e.g., the Uniform Sales Act). At the very least, 1-102 means that common law precedents are not the only source of meaning for the Code’s express obligation of good faith.

The subject matter of the Code gives further support to the view that more than common law should be used in interpreting the Code’s meaning. The Code concerns commercial practices; modern commerce demands flexibility, speed and efficiency. The common law doctrine of *stare decisis*, on the other hand, demands stability, deliberation and technical forms of transfer. Recognizing these differences, it simply does not make commercial sense to view the Code as limiting itself to common law sources. This point is well taken in *Sherrock v. Commercial Credit Corp.*,<sup>20</sup> where the court, in discussing the Code’s obligation of good faith for merchants, stated:

While there is no precise definition of the phrase “the observance of reasonable commercial standards of fair dealing in the trade,” nevertheless, departures from customary usages and commercial practices should be viewed as strong indicia that the practice is not reasonable. At the same time, I must be cautious enough to realize that a solution which equates custom and trade usage with only one reasonable commercial standard could be unfortunate for an ever-changing commercial setting. As noted in *Malcom, The Proposed Commercial Code*, 6 Bus. Law 113, 128 (1951), citing the 1950 Committee, comments:

“. . . there immediately arises the very difficult problem of what usages, customs and practices are those intended to be included in the standard. Any lawyer who has ever attempted to prove what usage or custom is will immediately recognize how litigious such a standard could grow to be . . . More serious still is the possibility that “reasonable commercial standards” could mean usage, customs or practices existing at any particular time. *This could have the very bad effect of freezing customs and practices into*

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20. *Sherrock v. Commercial Credit Corp.*, 277 A.2d 708 (Del. Super. Ct. 1971).

*particular molds and thereby destroy the flexibility absolutely essential to the grand evolution of commercial practices—a result which the Code draftsmen certainly would never desire.*"<sup>21</sup>

With reference to the first three questions posed in this section, it may be concluded that incorporation of the term "good faith" into the Code does not mean that the sources of that term's meaning are limited to the Code's express definitions or pre-Code common law interpretations. However, there is still another question to be answered—a question whose import may preclude meaningful analysis of the first three questions. That question is whether a legal analyst will be able to raise the issue of alternative conceptual meanings of good faith after the Code has been enacted.

A subtle distinction in approach to meaning occurs whenever a term of art (*e.g.*, "good faith") is incorporated into a statute which is then adopted by the legislature. Prior to adoption, terms of art are freely accessible to positive, comparative and conceptual analysis, *i.e.*, they may be freely approached from the standpoint of the elements they contain, the affirmative elements they could contain and the theoretical scope of their alternative meanings. Thus, good faith could mean individual moral honesty or honesty in comparison to others or honesty according to standards of conduct set by the public interest. Good faith could extend to all individuals equally or it could be applied on a status basis. In any case, the question of the researcher is always in the form, "What could the term mean?"<sup>22</sup> With the freedom of conceptual and comparative analysis is the coincident freedom of choice over the effects which the meaning of a term generates. A decision to choose one of many conceptual meanings is a decision concerning how society and the future development of law should be affected by the concept underlying the term.<sup>23</sup> The analyst should be aware of this means-end relationship

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21. *Id.* at 711 (emphasis added).

22. The nature of the question when stated in the form "What could or does a term mean?" is conceptual, affirmative and comparative. It is conceptual because of the freedom of reflection allowed by the term "could" as opposed to "did"; affirmative because the question asks what the term's elements are, rather than what they are not; and comparative because of its emphasis on meaning in general without limiting the sources from which meaning may be drawn. This form of question will be hereinafter referred to as the "conceptual affirmative" or "comparative" question in contrast to the "perceptual negative" or "case-oriented" form of question, *i.e.*, what does a term *not* mean?

23. See Olivecrona, *Legal Language and Reality*, in *ESSAYS IN JURISPRUDENCE IN HONOR*

whenever he approaches the meaning of a new term of art. Prior to adoption, most analysts are.

Adoption of a statute, however, creates a subtle distinction in approach to meaning of terms employed therein. The distinction is subtle because the researcher feels that he is still asking an affirmative question, when in fact he is not. It is a distinctly different approach to meaning because statutory adoption discourages conceptual and comparative approaches to meaning. Statutory adoption of the term "good faith" creates an atmosphere conducive to a perceptual case-by-case approach to the meaning of good faith, which, unfortunately, defines good faith by that which it is not, *i.e.*, "bad faith." How does this occur?

Legislative authority controls the courts in the traditional sense that the courts only "apply law" while the legislature "creates law." This attitude not only intimidates many courts which would like to make some law but it also intimidates a researcher who seeks the meaning of terms involved in the law. The legislative imprimatur dazzles with certainty and creates a facade of exclusion—certainty that the term is defined by the statute to the exclusion of other possible conceptual meanings. Adoption triggers what may be called a "negative meaning process" for terms contained in a statute. The process takes place in the following manner: (1) The legislature adopts a statute which contains a term whose meaning is not clear prior to adoption. (2) The researcher, assuming that the overlay of legislative authority has strictly confined conceptual meaning, foregoes conceptual analysis and begins a perceptual analysis of the statute's definition of meaning. The form of his question at this point has changed to: What does the Code say the term means? (3) The researcher is confronted with statutory definitions of meaning which are very general or which are themselves ambiguous terms of art (*e.g.*, 2-103(1) (b), which employs the phrase "reasonable

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OF ROSCOE POUND 151 (R. Newman ed. 1962). In discussing the relation between meaning and the effects on society which flow from a certain meaning, the author succinctly states:

The purpose of all legal enactments, judicial pronouncements, contracts, and other legal acts is to influence men's behavior and direct them in certain ways. The legal language must be viewed primarily as a means to this end. *It is an instrument of social control and social intercourse.* We may call it a directive language in contrast to a reporting language. It is advisable to lay stress on this distinction; for our inveterate habit of regarding language as primarily a means of describing facts leads to misinterpretations.

*Id.* at 177 (emphasis added).

commercial standards").<sup>24</sup> Realizing that the legislature creates law and that the courts only apply law, the researcher turns to a perceptual survey of case interpretations of the statutory term. (4) The courts, mindful of the separation of powers between the legislature and judiciary, interpret the meaning of the term in the narrowest of fashions in order to avoid encroaching on the legislative prerogative. They refuse, in short, to define the term comprehensively and positively, limiting their holdings to the isolated facts before them. Since the meaning of an obligatory term is only discussed when it is alleged to have been violated, most cases render opinions which state a negative meaning for the term, *e.g.*, "bad faith." (5) Confronted by the limited holdings of cases, the researcher's last alternative is to collect and construct a perceptual list of judicial constructions. At this stage, the form of his approach is negative; he wants to know what the term does *not* mean. (6) Finally, after collecting his list of negative meanings, the researcher makes one

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24. In *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1957), Jerome Frank indicates that generality is a characteristic norm of most statutes and the terms which they incorporate. He recognizes that generality allows for flexible statutory interpretations, but he warns that generality may lead to stultifying results if the researcher fails to interpret the term in a proper manner. His position concerning the proper approach to statutory interpretation when applied to the meaning of good faith suggests that there is an inherent danger in approaching the meaning of that term strictly from Code definitions—the definitions' simplicity may overcome their potential for flexibility. Frank states:

The non-lawyer, when annoyed by the way judges sometimes interpret apparently simple statutory language, is the victim of the one-word-one-meaning fallacy, based on the false assumption that each verbal symbol refers to one and only one specific subject. If the non-lawyer would reflect a bit, he would perceive that such an assumption, employed in the non-legal world, would compel the conclusion that a clothes-horse is an animal of the equine species, and would make it impossible to speak of "drinking a toast." Even around the more precise words, often there is a wide fringe of ambiguity which can be dissipated only by a consideration of the context and the background. The literalist should also consider that essentially the same problem arises in construing private writings, such as contracts, trusts and wills.

Judge Learned Hand has often spoken of the way in which literalism in interpretation can thwart the purpose of Congress. The courts, he wrote some thirty years ago, by "scrupulousness to the written word," had at times so interfered with the intention of the statute-maker that the courts fell under public suspicion, and recourse was had, excessively, to administrative agencies. Again and again he has criticized the dictionary theory of statutory construction. It is, he said in a recent opinion, "*one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.*"

*Id.* at 1262 (emphasis added).

last valiant attempt to arrive at a comprehensive definition of the term. He concludes that good faith is that unknown entity which remains after eliminating that which the courts have said it does not mean.

Not all analysts fall prey to statutory intimidation and define good faith by what it is not. Some, like Professor Summers, choose to follow this approach. Summers suggests that good faith is a fiction which is incapable of general meaning because "general definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity. . . . [G]ood faith is best conceptualized as an excluder. . . [with] focus on what judges rule out in using this phrase."<sup>25</sup> The excluder principle to which Summers refers suggests that good faith can only be understood by reference to what courts have in the past considered "bad faith." Gradually, after a sufficient list of bad faith opinions are rendered, the researcher will then be able to infer an opposite list of good faith meanings, happily thereafter knowing what the term means.<sup>26</sup> Is this true?

Assuming arguendo that a sufficient number of post-Code cases exist to compile a list of contra-inferred good faith contexts, Summers' excluder principle in no way changes the fact that the conceptual meaning of good faith will always be unknown prior to determination of its effects. Summers gives us a "boot-strap theory" of good faith meaning: courts are directed to apply the obligation even though they never fully understand what that obligation is—their decisions in themselves will somehow posit a meaning and give the term direction. In effect, the excluder approach says that good faith can never be comprehensively known, but that courts should not be overly concerned because, a priori, their decisions will be based on a correct view of good faith. It is not surprising that analysts who adopt this approach, like Summers,<sup>27</sup> find that the Code has generated new standards of contractual morality: the logic behind their approach compels that conclusion. Because they have no core concept for good faith meaning, they have no standard for evaluating the correctness of court interpretations of good faith. They are forced to conclude that good faith means what the courts say it means.

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25. SUMMERS 473.

26. *Id.* at 471.

27. *Id.* at 467.

Whether a general conceptual meaning of good faith will descend into Summers' "Charybdis of generality" or collide with his "Scylla of restrictive specificity" is arguable; whether that possibility should completely deter the search for a general meaning of good faith is not. To abandon the search merely because a definitional problem of expression *may* presently exist, or may need to be adjusted in the future, is beyond this writer's comprehension. Abandonment of the concept of a general positive meaning of good faith is abandonment of the power to properly evaluate and control how courts will apply the term. It is the trading of unknown possibilities of meaning for the probable negative meanings given by the courts—a handing over of the reins before we even see the horse.

This negative perceptual approach to meaning does not per se apply to every term which is incorporated in every statute. This writer only suggests that it currently is being used to define the meaning of good faith in the Code. As a result, good faith is degenerating into an unknown concept in the Code; it can only be described in a fragmented and negative fashion. This negative approach attempts to reason retrospectively from cases (percepts) to meaning (concepts) at a time when courts and scholars are unfamiliar with the historic concept of good faith (who nowadays quotes the law merchant or Roman theory of consensual contracts?) and in a legal system which prevents case interpretations (percepts) from taking an *affirmative* position on meaning. The negative approach authorizes an analyst to skip the issue of whether the Code desires or prevents interpretation from other systems of law. Thus, the average analyst may never be consciously aware that the Code (as illustrated by our earlier three question analysis) encourages use of civil law sources and conceptual alternatives to determine the meaning of the good faith obligation.

### III. ANALYTIC BIAS

An ambitious scholar may overcome the statutory pressures of incorporation. Ambition, however, is not enough to make his analysis full and objective. Objectivity requires introspection into the analyst's subjective bias toward the good faith concept. Although it may seem comical at first blush to suggest that one could be biased for or against the good faith concept, such bias becomes serious when one probes his own legal subconscious to determine his epistemology, philosophy of man and conceptual core of legal reference.

*Epistemological Bias Toward Good Faith*

Legal epistemology is the jurisprudential method by which a person, perhaps subconsciously, distills the "legal truth" from case opinions or other sources of legal meaning. For purposes of illustration, we may identify and contrast three schools of epistemology: literalist, realist and integrationist. Each of these schools has its own method of extracting the truth.

The first question which a legal analyst should ask himself is to which of the three schools he belongs. Failure to ask this question may result in a subjectively biased search purporting to find an unbiased objective answer. The answer to our original question—whether the express obligation of good faith in the Code has generated new legal standards of contractual morality—is directly related to the answer one gives concerning his epistemological bias; a researcher cannot analyze that which his mind will not let him see in conceptual terms, even though his perception of cases may be excellent.<sup>28</sup>

A literalist concentrates analysis on a court's verbal expression rather than upon what a court does in fact to resolve the issue before it. Good faith has been expressed in contract cases prior to the Code and thus is not a unique term.<sup>29</sup> Nevertheless, since the express term "good faith" was not used with any frequency until after enactment of the Code, it is safe to predict that a researcher with a literalist bias will infer that the Code indeed has generated a trend toward new legal standards of contractual morality. It is easy for a person with a literal bias to find trends because he approaches the issue with an epistemology which accepts the patent surface of things as truth and reality.

One who analyzes trends by reviewing what courts do, as opposed to what they say, on the other hand, is a student of the realist school. His emphasis is upon the de facto remedy and not the verbal surface remedy. A realist will probably concur with the literalist that the Code has caused a trend toward legal standards of contractual morality. Nevertheless, concurrence in conclusions should not

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28. See generally S. COOPERSMITH, *FRONTIERS OF PSYCHOLOGICAL RESEARCH* 123 (1966).

29. Professor Powell in *Good Faith in Contracts*, 9 *CURRENT LEGAL PROBLEMS* 16, 22-28 (1956) [hereinafter cited as POWELL] discusses the pre-Code cases which have used the phrase "good faith," or a similar phrase, to imply terms into, or extract unconscionable terms from, a contract. His conclusion is that the common law never understood the true objective concept—as opposed to the moral subjective concept—behind good faith.

overshadow the difference in method between the schools. Unlike the literalist, the realist does not equate court expressions with truth and reality. The realist believes that expressions of the court may be indicative of a deeper truth which lies beneath the surface of the opinion. Thus, to the realist, such terms as "implied contract," "indebitatus assumpsit" and "quasi-contract" do not mean that courts which use them have failed to recognize a concept of good faith obligation. Such terms may indicate that courts using them did employ a good faith concept, although employing it in a disguised or makeshift form of expression. Since such terms are frequently found in cases antedating the Code, it is easy for the realist to view the use of such terms as an indication of pre-Code recognition of the good faith obligation.<sup>30</sup> In the view of the realist, the Code is generating a trend toward legal standards of contractual morality by recognizing explicitly a concept which had not been expressed in objective fashion before.

A third epistemological approach is the integrationist school which combines the realist and literalist approaches into one epistemology and looks for meaning in both the surface expressions and actual remedies given by courts; an integrationist scrutinizes what a court says *and* what a court does. An integrationist will be especially critical of post-Code cases which use the term "good faith" but fail to provide a remedy which is directly related to the good faith concept, or which grant a remedy based on good faith but fail to express the "good faith obligation" as the reason for that remedy. Of the three schools, the approach of the integrationist is the least susceptible to subconscious bias because it compels the researcher to approach legal analysis in a dual fashion. Accordingly, it should be the best school for arriving at conclusions which are in fact objective.

The threshold question concerning subconscious bias toward good faith contains another facet which is closely related to epistemology, but which is at the same time independent. This facet concerns the extent to which a researcher's philosophy of man will inhibit and condition his analysis of the Code's good faith obligation.

### *Philosophy of Man*

Recognition that subconscious epistemologies may bias the researcher's approach to and evaluation of the Code's good faith obli-

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30. *Id.*



gation does not preclude the possibility that his conclusions may be philosophically biased as well. In the present context, philosophy of man includes (1) one's attitude concerning man's ability to govern himself, and (2) the nature of his responsibilities to his fellow man.

Thus, a researcher must ask himself this second threshold question in order to objectively comprehend good faith and evaluate its effects. He must ask, "What is my philosophy of man and to what extent will that philosophy color my analysis of good faith obligation in the Code?"

Three basic views of man's nature will be used to illustrate the importance of this factor in analyzing good faith. They are termed, quite arbitrarily, the private autonomy syndrome, the public autonomy syndrome and the mixed syndrome.

One who views man as an absolute individual, inherently good, always rational and morally responsible, is a member of the private autonomy syndrome. He defines good faith obligation solely in terms of an individual obligation imposed from within the four corners of a contract. The scope and intensity of the good faith obligation is exclusively determined by the free will of each party to the contract as expressed in the terms of the contract; it is not set by any form of general obligation or law imposed from without:

The parties to a contract, in a sense, make the law for themselves. So long as they do not infringe some legal prohibition, [or create an express good faith obligation in the contract by their own act], they can make what rules they like in respect of the subject matter of their agreement, and the law will give effect to their decision.<sup>31</sup>

It is probable that this type of researcher will find a new trend toward legal standards of contractual morality generated by the UCC because the type of good faith obligation imposed by the Code is not completely subservient to the individual will of the parties as expressed in the contract. As stated in 1-102(3):

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and *except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by*

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31. A. GUEST, ANSON'S LAW OF CONTRACT 1 (1969). The rationale behind the "private autonomy" approach to obligations is discussed in POUND 510-12.

*agreement* but the parties may by agreement determine the standards by which performance of such obligations is to be measured if such standards are not manifestly unreasonable.<sup>32</sup>

The public autonomy syndrome is in opposition to the private autonomy syndrome. One who adopts a public autonomy syndrome views man as inherently evil and in need of externally imposed moral and legal standards. Under this view, man is not the circumscriber of his good faith obligation; rather, he is the circumscribed object of the obligation which is imposed from an external source. This external source of the good faith obligation, in his view, may be the higher moral law (what ideal men would do knowing that "God is watching") or the more powerful positive law of the state (what all citizens must do to avoid jail). Whether this type of researcher will conclude that the Code has tended to generate new legal standards of contractual morality will depend on his interpretation of 1-102(3), which imposes the good faith obligation. Since that section clearly states that the obligation cannot be agreed out of existence, it is probable that a researcher of the public autonomy school will conclude that the Code has generated new standards of contractual morality.

A third type of philosophy, the mixed syndrome, combines the private and public autonomy syndromes into one view of man. It views man as generally rational and the usual definer of good faith obligation, but it concedes that man must be held to externally imposed minimum obligations of good faith. Unlike the public autonomy syndrome, this view places the source of its external obligation in the group norms of commercial society rather than in the positive law of the state or moral law of God. Thus, to one with such a philosophy, the minimal standards of the good faith obligation depend upon the degree of societal interaction, the needs of societal groups at different periods of time, the priority of commercial expectation and practices and the ability of the courts to respond to these interacting interests. A concept of good faith in this context demands that analysis consider all these variables, and recognize that the obligation is imposed from without as well as from within the will of the parties to the transaction. This view, if applied to the commercial field, allows one to predict safely that a researcher will find a trend toward new legal standards generated by the Code. This

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32. UCC § 1-102(3) (emphasis added).

could be safely predicted by noting the impact of commercial transactions on the current American scene. Today, commercial transactions have increased in degree and scope of interaction, impersonality, routineness, speed and importance to the national well-being. This, accordingly, has created within our economy a dependence upon fast money flow, a concern within consumer interest groups about the impersonal form of transfer and a need for standardization of commercial practices at all levels. It is these interests which the researcher must take into account when he considers the meaning, scope and intensity of the good faith obligation; these are the group interests which comprise the external source of the minimal good faith obligation. One who asserts a mixed syndrome philosophy of man is equally asserting, thereby, a mixed attitude toward the meaning and scope of the good faith obligation. Good faith means what the parties to the contract say it means, except that it is subject to a minimal external standard of good faith obligation which, in turn, depends on the relative weight of other affected interests.

Assuming that the potential for subconscious bias through epistemology and through philosophy has been resolved, there still remains one question that the analyst must ask himself if his research and conclusions are to be objective. That question is: To what extent does my conceptual core of legal reference color my analysis of the good faith obligation?

### *Conceptual Core of Legal Reference*

Everyone involved with law has a conceptual core of legal reference. It is the subconscious sum of all prior cases (percepts) and legal theories (concepts) stored and categorized in one's memory, which in turn is used to approach and make sense out of new legal problems or terms (new percepts). In relation to the term "good faith," that frame of reference for most researchers generally emanates from the common law of contracts. As a result, most researchers approach analysis of good faith with a built-in conceptual bias for common law. This conceptual bias for the common law inhibits a researcher's approach to and conclusions about the effects of the Code's good faith obligation.

Good faith could be approached from a civil law conceptual core of reference as well as from a common law core of reference. Such a combination of approaches would greatly increase the validity and quality of a researcher's conclusions:

The utility of, and the many advantages gained from, and ways in which comparative law can contribute to the development of the law and the formation of better legal minds has been amply discussed and demonstrated in the last sixty or seventy years . . . and it does not seem necessary to restate and enumerate them any more.<sup>33</sup>

Some factors have combined to exclude civil law concepts and percepts from most researchers' conceptual core of reference. The exigencies of cramped law school curricula, American nationalism and monetary rewards force the American system of law to exclude authorities dated prior to 1776 or which conceptually strain common law doctrines. As a result, most researchers have conceptual cores of reference limited to the common law and accordingly are prejudiced against terms or concepts which have a civil law flavor. Terms which connote equity or civil law concepts are in for rough going and extremely narrow interpretation.<sup>34</sup> Unfortunately, good faith strikes the common law researcher in just that manner. Through fear (*i.e.*, defense of the common law system) or ignorance, the common law researcher is probably unwilling or incapable of breathing life into the concept of the good faith obligation.

Not all common law analysts are so prejudiced. Some have been exposed to civil law and are able to analyze the meaning of "good faith" through a comparative process. Such persons are therefore better able to evaluate how the common law courts have fared in applying the broad concept to specific factual situations. What does this type of researcher think when he meets the term "good faith" in 1-102(3)?

He recalls that the Greeks used a term similar to "bona fides," which described a universal social norm governing the relationships of its citizens—each citizen owed every other citizen the obligation of acting in a bona fides (good faith) manner.<sup>35</sup> This type of researcher also recalls that the Romans converted bona fides into a basis for legal action:

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33. Wagner, *Research in Comparative Law: Some Theoretical Considerations*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 497, 512-13 (1962).

34. See W. BURDICK, *THE PRINCIPLES OF ROMAN LAW* 35-38 (1938) [hereinafter cited as BURDICK]. Burdick discusses the distrust which common law jurists felt for equity and the civil law. He suggests that Blackstone's early prejudice against civil law concepts may be the seminal influence for the historical antagonism between courts of law and equity.

35. See F. PRINGSHEIM, *THE GREEK LAW OF SALE* 87 (1950).

Upon this structure of bona fides the Roman jurists elaborated a number of legal rules defining the obligation [of good faith] in the majority of normal commercial transactions . . . [with] very little in the texts to suggest that the Roman lawyers were avowedly concerned with ethical principles in their treatment of good faith. . . .

[T]he jurists were concerned to insure that parties to a contract should observe the usual customary rules which applied to each transaction.<sup>36</sup>

He further recalls the use of the term "good faith" in canon law, but with a completely moral foundation for the bona fides obligation. Unlike the Romans, canon law "began by assuming that every promise was binding on the conscience of the person who made it and that failure or refusal to keep [commercial and non-commercial promises] was a breach of that person's duties to God."<sup>37</sup> Finally, he recalls that the canonist concept of subjective good faith in all promises was to a limited extent recognized by the early chancellors at common law:

Even as early as the thirteenth century . . . it was clear that the development of trade, and particularly of foreign trade, required the provision of a general remedy for breach of contract. In each succeeding century the tempo of that need accelerated until eventually, in the sixteenth century the common law courts were driven to devise a remedy through the action of *assumpsit*. But what happened in the intervening years? Several statutes provided summary remedies in local courts. But these were inadequate, and many addressed petitions to the King, praying that their adversaries might be compelled to form the contracts. Of course the words used by them vary a good deal; but *with ever-increasing monotony the plea was that the debtor has acted against good faith and conscience or . . . that the debtor shall be compelled to do what good faith and conscience required . . . . When the Chancellor dealt with the petition he in turn emphasized the duties of good faith and conscience, especially conscience.*<sup>38</sup>

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36. POWELL 26.

37. *Id.* at 21. See also BURDICK 66-76 for a discussion of how the canon law training of early chancellors acted as a catalyst for later incorporation of civil law concepts into common law.

38. POWELL 22 (emphasis added). This observation is more fully developed in BURDICK 77-80.

His conceptual recall of good faith diminishes from this point to the adoption of the Code. This is probably because the common law courts never explicitly expressed the term nor used the defendant's absence of good faith as the theoretical reason for the plaintiff's cause of action.<sup>39</sup> Such a researcher, however, is at least familiar with the concept of good faith and does not render the term suspect at first meeting because of its civil law heritage. Unlike his strictly trained common law colleague, this researcher considers the diverse possibilities of conceptual meaning in his analysis.

The common law doctrines of freedom of contract and manifested assent particularly influence how one trained solely in common law will conceive the meaning of good faith. Doctrinal freedom of contract in its extreme form posits a legal dichotomy between obligations which parties by agreement place in a contract and those obligations which are not on the face of the contract—obligations which may be imposed within the court's discretion but which form no inherent part of the contractual agreement. The nature of the freedom of contract doctrine thus demeans principles of fairness and equity, viewing them as an encroachment upon that doctrine. A researcher trained under its influence is always susceptible to inherent bias against good faith because good faith is a formless obligation which, to him, appears to be an external attack upon the freedom of contract. Since his conceptual core of legal reference is based on the common law's singular theory of contract, he is unable to conceive good faith as a *sui generis* form of contracts. This in turn causes him to defend the citadel of freedom of contract through narrow interpretations of the meaning of good faith.

A similar doctrine which may render a fatal blow to a proper conception of good faith is the doctrine of manifested assent. This doctrine prohibits enforcement of a contract until there is an observable sign of assent to be bound. Most men through experience know that if they are decent to others, others will be decent to them. Based on that experience, it is rational for one man to expect that if he gives his word to another not only will he fulfill his promise but the other man will expect him to do so. Most men, however, have also learned by experience that others do not always keep their word. This underlying distrust has caused all systems of law, in one form or another, to enforce only specific kinds of promises—promises which are clothed in certain forms required by the

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39. POWELL 24-26.

legal system. For reasons of security and evidentiary value these requirements of prescribed form gradually evolved into doctrinal bases of common law. Form eventually became the essence of obligation—one is not bound until he proves that the required technical form is employed. This common law attitude is often so overwhelming that a novice researcher may not be able to conceive of a contractual obligation which does not require manifestation of legal form (e.g., good faith obligation in the Code). To ask him to approach good faith as an independent contractual obligation is to ask that he conceive the possibility of a contract without form. Since it is difficult for him to accede conceptually to the second request, it is impossible for him to approach good faith as a contractual obligation.

A conception of good faith as a contractual obligation is possible, however, if one's conceptual core of reference includes civil law or at least commercial common sense. The Roman law, unlike the common law, does not have a singular theory of contract. It has a "theory of contracts" which provides separate remedies for each type of contract. The Romans categorized contractual obligations into four types: *re*, or real contracts based on the delivery of a thing; *verbal*, or spoken contracts based on the form of an interrogatory; *literal*, or written contracts based on assent manifested in written form; and *consensual*, formless contracts based on the bona fides obligation of commercial conduct.<sup>40</sup> The consensual class of contracts was informal and of course required two parties. "The tendency has been to explain them on economic or business, or as we might say, on functional grounds."<sup>41</sup> Buckland supports the view that in the consensual contracts which rested on bona fides, commercial importance was the real test.<sup>42</sup> The principle of bona fides was the means by which Roman law freed commercial transactions from the technical requirements of form.<sup>43</sup>

A conceptual core of reference which involves commercial experience will likewise help the common law researcher to approach the concept of good faith as friend rather than enemy. Commercial sales transactions are simply moving with such speed and regularity that

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40. LAWSON 92-95.

41. *Id.* at 98.

42. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 412-16, 518 (Cor. 2d ed. 1950).

43. Yntema, *The Law of Obligations*, in CIVIL LAW IN THE MODERN WORLD 67-70 (A. Yiannopoulos ed. 1965).

they have outgrown the common law singular approach to contract theory. They neither require the paternalistic concern for safety nor extensive deliberation which the common law doctrines of manifested assent and freedom of contract provide.

#### IV. POSSIBLE MEANINGS OF GOOD FAITH

A disadvantage of comparative and conceptual approaches to the meaning of good faith in the Code is the burden of selecting which meaning the courts should apply and the standards that should be used to measure a breach of that obligation. Good faith could mean a universal social force, a universal moral law, a contractual obligation inherent only in commercial transactions, an economic fiction or a judicial expedient similar to equity. Under the Greek concept of *bona fides*, the essence of good faith lies in a universally applied social norm that most men will conduct themselves in a reasonable manner toward *A* if *A* acts in like manner toward them. The Greek definition, then, is pragmatic and amoral and universally applied to all transactions. As defined by canon law, however, good faith is a universal moral law imposed on all individual transactions. *A* will act in a reasonable manner toward *B* because *A* knows that he will breach a moral obligation if he acts in any other way. By this view, the individual determines the specific contents of good faith. Thus, canon law provides a totally subjective meaning of good faith in contrast to the objective meaning under Greek and Roman law. A third view which is exemplified by the Code is that good faith means a contractual obligation limited to transactions which can be classified as commercial. Its meaning could be objective or subjective depending upon whether the person involved in commerce is a merchant or non-merchant.<sup>44</sup> The content of its meaning can be determined both by the individual and the commercial norms of the community. Thus, it is a legal recognition of commercial patterns of conduct. *A* expects that *B* will render payment at the conclusion of his work; *B* knows that he must render payment at this time because that is how *C*, *D*, *E*, *F* and *G* have operated in the past. Finally, it is possible to conceive of good faith as a fictional expedient without any conceptual meaning. Thus, economic expansion coincided with the conversion of *bona*

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44. The term "objective" refers to standards of good faith based on customary usage and practices of a trade. "Subjective" means a purely individual and moral standard of good faith.



fides from a social force to a Roman contractual obligation.<sup>45</sup> Likewise, the concept of the law merchant appeared in England at a time of economic expansion.<sup>46</sup> Thus, it may be that the meaning of good faith in the Code is simply recognition of commercial expansion during the 1960's. It may be nothing more than an economically based legal fiction whose meaning will be set by judicial awareness of this country's economic activity. More specifically, good faith under this view is the inherent demand of a dollar bill to be spent at a faster rate. *A* pays *B* in installments for a car which *B* sold to *A*. *B* assigns the accompanying note to *C*, a close friend of *B*. The note and contract of sale both state that *A* waives all rights and defenses against *B* and his assignees. In a suit to enforce the note, *A* may not assert his defenses against *B* and *C* because the necessity of rapid money flow outweighs the charge of bad faith. Good faith could also be viewed as a legal fiction for judicial expansion. Rather than twisting and turning through multiple fictions of warranty, misrepresentation and estoppel, courts may find it much easier to resolve cases by simply holding that there was a breach of good faith obligation. This suggestion finds support in 1-103, which expressly invites equity to join in the interpretation of Code obligations.<sup>47</sup>

The unbiased researcher is presented with another problem, *viz.*, what should be the standard for measuring the good faith obligation? He has at least three choices: social, moral or socio-moral. If he chooses to adopt the Greek and Roman concepts of bona fides, consistency will require that he use an objective standard of good faith based on the normal social expectations or duties of reasonable men under similar circumstances. If he chooses to adopt the canon law approach to good faith, consistency will then require that he apply a subjective moral standard based on individual honesty. It should be noted that under this latter standard it is possible to act in an unreasonable manner, yet still not breach subjective good faith. The Code, on the other hand, adopts a third and mutated standard of good faith obligation which depends on a party's status. It describes the standard in both subjective and objective terms.<sup>48</sup>

Of the five possible meanings of good faith, this writer suggests that the courts have so far only dealt with one, *viz.*, the canon law

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45. POWELL 19.

46. POUND 181-95.

47. UCC § 1-103.

48. See note 7 *supra*.

view of good faith as a morally based concept. This is because those in the legal profession are unacquainted with the historic concepts of good faith, since it has been raised exclusively in the Article 9 context which describes good faith as "honesty in fact" (the subjective view) and because it is usually raised as a secondary defense or claim rather than a primary argument. The trend has been to analyze good faith under 1-201(19) ("honesty in fact") but rarely to analyze it under its objective meaning in 2-103(1)(b) ("commercially reasonable standards"). The unfortunate result is that if good faith is approached under Summers' excluder principle, there is a very good chance that its meaning will degenerate into nothing more than the absence of moral dishonesty. This raises the further danger that customary commercial practices, even though patently unfair, will be equated with good faith in each and every case.

#### V. THE PRACTICAL IMPORTANCE OF MEANING

Aside from the theoretical and long range aspects of good faith meaning, there is a practical significance to one's approach to the term. That practical significance is the difference between who—courts or counsel—will establish the meaning of the Code's good faith obligation. Whether one is counsel for plaintiff or defendant in a case involving the issue of good faith, his chances for success are directly related to his approach to its meaning.

A counsel who approaches the meaning of good faith in retrospective fashion is forced to fit his client's case into factual contexts of past cases. If there are none, plaintiff will probably choose to ignore the obligation of good faith while the defendant will passively await the court's interpretation of the term. Their knowledge of good faith is limited by a definition which states that good faith means what past cases say it does not mean. It is not surprising that neither counsel wishes to argue this meaning before a court of public record.

Counsel who approaches the meaning of good faith in conceptual and comparative fashion, however, is able to stand on the obligation and at least present to the court an affirmative conceptual meaning. If it does nothing else, this type of presentation will enlighten the court as to the positive contents of good faith. The initiative is with counsel—not past cases with limited holdings or with judicial officers who have limited comparative training in law. This type of counsel will anticipate subjective bias and be prepared to offer variable interpretations of good faith in the context of the UCC

to overcome them. In short, the advantage lies with this counsel who properly approaches the meaning of good faith in a conceptual, affirmative and comparative manner.

## VI. CONCLUSIONS

Whether the express obligation of good faith in the UCC has generated a trend toward legal standards of contractual morality is a question which deserves more legal attention than just an answer. It is a question which by nature demands that its recipient reconsider his approaches to meaning and his subjective biases in terms of legal epistemology, philosophy and common law training. It is a question which seeks an answer already within itself because its ultimate meaning as a question, like the conceptual meaning of good faith, controls the effect that it will have on the recipient. The answer is predetermined. What good faith means must be conceptually, not perceptually, derived before one can begin seeking an answer about its effect on society and the future development of the law.

The answer to the above question then is yes *and* no! It depends on which meaning of good faith the questioner had in mind when he postulated the question and the capabilities of the respondent who hears the question. Hopefully, for the successful future of contractual morality, the respondent will at least be ambitious and will turn his talents toward the creation of precedents and not merely toward finding them.

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