Symposium on Jurisprudential Perspectives of Contract

Good Faith in Contract

B. J. Reitier

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GOOD FAITH IN CONTRACTS

B. J. REITER*†

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INTRODUCTION

In a seminal article,1 Summers showed that American contract law is infused with a norm of good faith. Recently, Belobaba and I demonstrated that Canadian contract law is equally characterized by

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* I received much help in producing this article. The Westminster Institute organized the Jurisprudence of Contract Law Project, and others provided the setting and stimulation for my research. I thank the organizers, Michael Bayles and Bruce Chapman for their efforts. The participants at the two meetings at the Institute offered useful advice and corrected some of my errors and overstatements. I thank particularly Ian Macneil and John Swan, who took the time and trouble to offer detailed comments on earlier drafts. (This is not to suggest that any of them would agree with what I have written now.) My thanks as well to Ed Belobaba. Much of the material summarized in the introduction section of this paper is drawn from Belobaba, Good Faith in the Law of Contract, Research Paper: Ontario Law Reform Commission Law of Contract Amendment Project, 1982. (The substance of this Research Paper will likely be repeated in the Ontario Law Reform Commission's Report on the Reform of Contract Law (forthcoming).) Ed also offered helpful comments on the paper generally. Finally, I thank the Social Sciences and Humanities Research Council of Canada, which provided me with a Leave Fellowship that allowed the opportunity for the research and thought responsible for this paper.

a similar norm. In this paper I explore the significance of these facts. I argue that the pervasiveness of good faith in contracts has important implications for theories of contract law, for the relationship between law and society, and for the law in its practical, day-to-day operation.

Many definitions of good faith contract behaviour have been given. In my view, no one definition will suffice universally. Rather, the variety of contexts in which good faith can become relevant in law requires a spectrum of definitions, ranging from exhortations to particularly moral and altruistic behavior, through prohibition of particularly unacceptable conduct. The good faith of which I treat in this paper is far less idealistic than that at one end of the spectrum, and is more aspirational than that at the other end. When I speak of good faith here, I refer to standards of appropriate behaviour relevant in the community. I believe that within any social grouping, there exist views and practices concerning standards of conduct in contract relations that are both widely shared and generally adhered to. These views and practices express in a day-to-day and practical sense the manner in which contracts are or are not to be negotiated and performed. Quite apart from “the words on the paper,” understandings dictate that, for instance, advantage can or cannot be taken of particular rights or situations. The good faith I consider is not necessarily the relevant community’s view of what the most moral and other-regarding contractor would do, though this is certainly a part of good faith more broadly defined. Rather, what interests me here is that community’s view of what range of

2. Belobaba, supra note 1.
conduct is appropriate. The "appropriate" range will include the "very best" behaviour, but will also incorporate less virtuous conduct. It is a circumstance-bound concept that will, in many cases, be reducible to notions of fairness and reasonableness in the circumstances.

It is also essential to appreciate the essential fluidity of relevant communities. In some cases I am primarily concerned with norms prevalent among members of an identifiable enterprise—members of the stock exchange, professoors of philosophy. The good faith that is relevant is the norm to which members of the group hold in their conduct with each other. Yet even here, the relevant community can be and may need to be expanded. Broader constiuencies (participants in capital markets, the University) have interests in the affairs of the smaller groups, and in some cases, the good faith standards that are relevant will be those of the larger groups. My task is complicated by the frequent need to determine which groups to look to in order to identify relevant standards of good faith.

GOOD FAITH IN CONTRACT LAW

While I will not repeat the arguments made elsewhere, it is necessary to summarize the extent to which good faith is a vital norm in contract law. Its most critical significance is in its effects on party behaviour. Empirical research has concluded universally that good faith always has been, and remains, a critical part of the real world of contracts. Parties do not live only to the letter of their contracts (or their pre-contract legal rights), except where living to the letter is accepted as constituting appropriate behaviour.

But beyond this, good faith pervades the more formal contract

4. Belobaba & Reiter, supra note 2.
law of North America. Good faith is hardly a novel notion: its conceptual roots can be traced back to Roman times. Nor is its explicit legislative prescription particularly exceptional. Civil codes of Germany, France, Italy and Switzerland all contain some generalized contractual good faith prescription. In the United States, both the Uniform Commercial Code and the Second Restatement of Contracts include good faith requirements. According to the most recent survey, good faith has been adopted as an explicit, independent, contractual doctrine in at least thirty-two jurisdictions. While there may have been some room for doubt in the United States before these codifications and before the publication of Summers' influential article, the view that good faith is broadly relevant in contract law is now widely conceded.

In Canada, however, the recognition has come much more slowly, and indeed, all dissent has not yet been quieted. In 1956, it could still be argued publicly that "... in English law there is no over-riding general positive duty of good faith imposed upon the parties to a contract," while more recently, an American scholar could claim that, "... the English courts appear to be moving away from the Roman concept of good faith in contractual dealings." While such views were, and are, clear overstatements, it is true that good faith has not yet been appreciated generally to be an integral part of our contract law. Virtually no Canadian or English contracts text mentions good faith in its table of contents or its index, and only one text author has expended effort in attempting to unravel

7. Discussed in Trebilcock, supra note 6, at 6-14.
8. UNIFORM COMMERCIAL CODE (Official Text with Comments) (1972).
11. Canadian lawyers tend to think that the judicial law of England is automatically part of the law of Canada, but that American jurisprudence is foreign. Thus a claim that, "In English law ..." anything is the case, would usually be accepted as describing the Canadian condition. Fortunately, recent developments have shown that we are moving away from this sort of colonial mentality, but it would certainly have prevailed if the statement quoted in the text was made.
12. Powell, supra note 6, at 25.
the strands of good faith analysis that permeate more conventional contracts doctrine.\textsuperscript{15}

Yet, closer analysis shows that the Canadian position can be analogized closely to the American: good faith is integral to our legislative, administrative and judicial law. A computer search of federal legislation employing "good faith" language, for example, revealed forty-seven statutes with one hundred and fifty-three statutory provisions using the language of "good faith" (usually without further elaboration).\textsuperscript{16} Searches of provincial statutes yielded equally impressive results. For example, in Ontario some two hundred and eighty-five statutory provisions, found in one hundred and fifty-six statutes, have a "good faith" component.\textsuperscript{17}

The received tradition that good faith is not part of the Canadian common law must be understood as saying no more than that good faith is not yet an openly recognized contractual doctrine. A number of recent studies have concluded, however, that elements or aspects of good faith permeate, and often dominate many of the modern doctrines of our contract law so that good faith is accepted\textit{ de facto}, if not\textit{ de jure}, as a behavioural and legal baseline.\textsuperscript{18} This was the point made so forcefully by Summers in the American context.\textsuperscript{19} Belobaba has demonstrated elsewhere, and at length, that Canadian law offers the same examples of a subsurface bedrock of good faith as Summers unearthed in his exploration of the foundations of American law.\textsuperscript{20} It is necessary therefore, only to list Summers' "categories" and to offer examples of their acceptance in Canadian law, in order to emphasize my assertion that good faith holds firm sway here.

Summers believed that good faith could be best described in


\textsuperscript{16} See Belobaba, \textit{supra} note 1, Appendix A.

\textsuperscript{17} See Belobaba, \textit{supra} note 1, Appendix B.


\textsuperscript{19} Summers, \textit{supra} note 1.

\textsuperscript{20} Belobaba, \textit{supra} note 1, at 5-7.
negative terms, as an “excluder” of bad faith behaviour. Thus defined, he identified four categories of good faith immanent in American law: bad faith in contractual negotiation and formation; bad faith in contract performance; bad faith in raising or resolving disputes; and bad faith in taking remedial action.

**Bad faith in contractual negotiation and formation**

Here Summers found courts intervening to enforce good faith requirements in cases of negotiating without serious intent to contract, of abusing privileges to withdraw proposals or offers, of entering a deal without a serious intention to perform, of non-disclosure of material facts and of taking advantage of another in driving a bargain. Canadian courts employ theories of negligence, or promissory estoppel to protect against injuries sustained in the course of a party’s good faith reliance at contractual-negotiation or formation stages. Even more obvious Canadian examples cluster around Summers’ category of non-disclosure. Here, many cases now impose liability for material non-disclosure.

**Bad faith in contract performance**

Summers found American courts involved in six examples of bad faith here: evading the spirit of the deal; lack of diligence and slacking off; wilfully rendering imperfect or merely “substantial” performance; abusing powers to determine contractual compliance; and interfering with or failing to cooperate in the other party’s contractual performance. Examples of Canadian courts’ interference for like objects can be found, with particularly well-developed duties of good faith performance in the “slacking off” area. In a great many cases, courts have given damages or have even ordered a party to perform as the court sees appropriate where the party has sought to excuse himself for failure of a condition in the contract. Thus where, for example, a contract is “conditional upon the securing of some specified governmental approval,” the courts have expressly required the anticipated party to try “in good faith” to secure the approval, to make reasonable sacrifices in order to get it, and to refrain from extraneous actions that might increase the difficulty of obtaining the approval, before being able to rely on failure of the condition to escape from the deal.

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22. *Id.* at 220-33.
Bad faith in raising or resolving disputes

Breaches of the duty to act in good faith were found in Summers' research in cases where a party conjured up a dispute; adopted overreaching and weaselling interpretations and constructions of contractual language; took advantage of another to secure a favourable settlement of a dispute, or extorted unfair contract modifications. Canadian research has revealed similar judicial concern. A good example is the unwillingness of courts here to enforce agreements compromising disputed claims until the party seeking to rely on the compromise establishes that his claim was reasonable and not vexatious, that he himself had an honest belief in the chance of its success in litigation, and that he has concealed nothing from the other party that might affect the validity of the compromise. The test has been stated expressly to involve the compromise of a claim made in good faith.

Bad faith in taking remedial action

Summers put four lines of American caselaw under this heading: abusing the right to adequate security for performance; wrongfully refusing to accept contractual performance, or rejecting performance without reason; wilfully failing to mitigate damages; and abusing the power to terminate the contract. Canadian examples can be found for all of these categories, but the clearest cases have arisen with respect to the final one. In a great many cases, courts have policed "sole discretion" termination clauses to prevent arbitrary or capricious termination: the power cannot be used so as to make the contract one that a party might repudiate "at his own sweet will," but must be used "reasonably," or "honestly and in good faith."

The point of this brief overview of Canadian contract law is thus clear: the caselaw provides ample illustration of judicially imposed or implied good faith requirements. While these judicial mandates are particularly obvious in cases involving issues described as pre-contract negotiations, contract performance, raising or resolving contract disputes, and taking remedial action, they are also apparent in more disparate contexts: implication of terms, interpretation of contracts, control of adhesion contracts and fine print disclaimers,

26. Summers, supra note 1, at 243-47.
27. Belobaba, supra note 1, at 13-14.
29. Belobaba, supra note 1 at 15-16.
granting or denying equitable relief, indeed any aspect of contract law that raises possibilities of bad faith behaviour and requires a judicial decision to reaffirm the traditionally accepted norms of good faith, fair dealing and the protection of parties' reasonable expectations. The immanence of a general doctrine of good faith in Canadian contract law is now accepted without significant dissent, and suggestions that reforming legislation establish specifically such a generalized duty are seriously opposed only by those who argue that the exercise is irrelevant. Good faith is thus, equally in Canada as in the United States, a significant fact in our legal process. It is relevant across the spectrum of legal processes and lawmaking. It is involved in the norms of those who generate customary expectations (social views of proper conduct, those whose actions and expectations create custom practice, trade associations and the like); of contracting parties; of the courts and other dispute-resolving institutions (arbitration, conciliation, mediation); and of legislatures and administrative agencies.

**IMPLICATIONS**

The more interesting and still largely unexplored questions relate to the significance of these facts: what does it mean to our views about the institution of contract to appreciate that a norm of good faith is immanent throughout? In this section, I explore the implications of good faith on two issues: (1) theorizing about contract; and (2) the relationship between contract law and society.

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30. See generally Belobaba, supra note 1. For implied terms, see Powell, supra note 6, at 26. For an example of interpretation by this standard, see Staisman Steel Ltd. v. Commercial & Home Bldrs. Ltd., 71 D.L.R. (3d) 17 (Ont. High Ct. 1976). For control of adhesion contracts and fine print disclaimers, see Powell, supra note 6, at 26; Dugan, Standardized Forms: Unconscionability and Good Faith, 14 NEW ENG. L. REV. 711 (1979); Dugan, Good Faith and the Enforceability of Standardized Terms, 22 WM. & MARY L. REV. 1 (1980); and for a recent judicial example, Tilden Rent-a-Car Co. v. Clendenning, 83 D.L.R.(3d) 400 (Ont. C.A. 1978). For examples in equitable relief situations, see, Trebilcock, supra note 6, at 3.

31. For a listing of concurring recommendations for reform, and for an example of the argument that legislative reform is irrelevant, see Belobaba, supra note 18, at 1-4, 17-18. See also generally, Belobaba, supra note 1.

32. Belobaba, supra note 1.

33. Good faith has important implications for a third issue as well: the law in operation. I have written about this issue at length elsewhere. Belobaba, supra note 1. Accordingly, I will not treat the issue here, save to summarize our point in this footnote. Good faith affects each part of the lawmaking process concerned with contracts. It has implications for custom and contemporary customary law by involving that customary expectations are perhaps the major source of contract law. Greater focus on
Theorizing about contract

(a) The importance of contract theory

Common lawyers dislike theory. Founded on the pragmatism of case-by-case decision-making, our judges and lawyers enjoy feeling that they are guided by no more than "precedent," or the words (intention) of a statute. Admission of a role for theory would lead directly into that worst of all worlds: a requirement to address issues of policy directly.

Those naive enough to be able to delude themselves with such talk tend, in my view, to be successful only in applying some theory in an inarticulate, unsophisticated, and sometimes inconsistent fashion. Conscious reflection can often force the M. Jourdan-like realization that they were "talking theory" all along. It can often require them to face the unsuitability of the theory that has guided them.

I believe that it is now essential to attempt to elaborate a modern and useful theory of contract. Much has changed since the traditionally influential theories were propounded. The issues that face contract are vital enough that we can no longer be misguided by false descriptions or by unacceptable prescriptions. The theory must provide a general framework that allows essential features of many disparate phenomena to be grasped and understood in a manageable fashion. It must be accurately descriptive of phenomena in the world: it must be capable of comprehending what has been done in the past, and it must be usefully predictive of developments that should be anticipated. And the theory must be helpfully

and research into this law is required. Good faith offers the possibility of meaningful guidance to contracting parties in accessible terms. It explains their duties to them in a meaningful way and expresses a "morality of aspiration" important to contracting parties. Good faith is critical to judicial processes. It requires continuation of the process of expanding the relevant, and this enterprise offers two consequential benefits: the new evidence will point the way to the resolution of a number of problems—offer and acceptance, the battle of the forms, the relationship of contract to tort, interpretation, standard form contracts, and the control of contract power—that have plagued, and appeared irresoluble in accordance with traditional contract theory; and the enterprise legitimizes judicial attempts to take account of the many and varied values in contract law. Good faith is important to legislative processes too. It suggests fields ripe for legislative intervention, and warns of the danger of legislative intervention elsewhere. Legislative imposition of good faith requirements is an oft-employed regulatory technique. Good faith suggests the need for legislation framed generally in some cases, and most specifically elsewhere. It enhances understanding of the relationships between legislative, judicial and private contracting processes. All of these points are elaborated in the publications cited.
prescriptive: it must explain to policy and decision-makers what directions should be taken, and what paths are not available to them. The theory will not describe or predict the minutiae. Rather, it will provide a way of viewing and of anticipating trends and tendencies that can be expected. This "admission" should not lead to the claim that theorizing at such levels is the "idle stuff of philosophers," beneath the concern of (more practically-minded) lawyers. Lawyers do and must operate on the basis of some theory. My concern is simply to see that the theory used is appropriate.

(b) **Good faith and contract theory**

Appreciation of the depth to which good faith runs in contract assists greatly in attempts to generate useful contract theory. I will consider the general implications of good faith for contract theory, and then proceed to evaluate a number of contemporary theories in the light of these implications.

(i) General implications

Good faith has critical significance for the generality with which a theory of contract must be articulated. More specifically, it casts grave doubt on theories that would purport to state precise rules applicable to all contract relationships. I begin from the premise that in a great many cases, the role of contract law can usefully be described as the protection of reasonable expectations. I do not pretend that this is its exclusive task: for instance, contract law is and must be concerned with the imposition of procedural and substantive values on parties and with mapping out the appropriate sphere for the institution of contract itself. Contract law will allow the disappointment of reasonable expectations in the service of superior goals. Nonetheless, its most basic task remains the facilitation of the projection of exchange into the future by adding its authority and force as security for the due performance of what can reasonably be expected. 34

A substantial element of what constitutes reasonable expectations is "good faith," defined as what the makers of "right conduct" (the parties, the industry, custom, relevant social expectations) accept as being properly done in this sort of case. What good faith requires must differ industry by industry, depending on customary

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34. See generally Reiter & Swan, Contracts and the Protection of Reasonable Expectations, Study #1 in Studies in Contract Law 1-22 (B. Reiter & J. Swan eds. 1980).
practice and expectations. It will differ as contracts tend more to the discrete or the relational. It will differ depending upon whether it is among professionals, among consumers, or between consumers and professionals. It will differ over time: surely no one should suggest that, given prevailing social, economic, political, and philosophical views, good faith would require the same sorts of performance in the mid-eighteenth, early-nineteenth and late-twentieth centuries. As the range of the legally relevant expands, and as we come to recognize that society precedes contract, and that no contract can be seen other than as set in its social context, it becomes apparent that what is common in all of contract can be stated only in the most general terms. What a contract to buy gasoline from a service centre on an expressway, a contract to buy commodity futures on an exchange, a contract to buy consumer goods from a large department store, a contract to develop software, a franchise, a collective agreement, a corporation, an agreement between state governments for the long-term supply of electrical power, or myriad other contract permutations have in common can be expressed only at levels of substantial generality. I therefore begin with a bias towards theory that attempts to deal with what is common to all contract only in terms of general norms, and with a strong skepticism of theory that asserts that identical and specific rules—all contracts are formed by offers and identical acceptances—can be applied with equal felicity, facility, and utility to all contractual arrangements.

A useful theory of contract must, therefore, be "tiered." What is common to all contract will be stated generally, while the operational law more directly relevant to particular contracts or relationships will be specialized along lines that differentiate repetitive and identifiable forms of contract relations.

The tiered nature of contract law is an empirical fact. "Special" rules govern "the law of" mortgages, insurance, landlord and tenant,

35. The concepts of "discrete" and "relational" contracts have been developed by Macneil. See e.g., Macneil, The Many Futures of Contracts, 47 S. CAL. L. REV. 619 (1974); I. MACNEIL, THE NEW SOCIAL CONTRACT (1980). Basically, they refer to poles on a spectrum ranging from largely one-shot transactions between parties who have little other than the transaction linking them (discrete) through contract relations that occur over long periods of time between parties linked closely in many dimensions (relational). Paradigm examples might be the purchase of gasoline at a distant highway service station (discrete) and the collective agreement linking the United Auto Workers and General Motors (relational).

corporations, trusts, agency, sale and carriage of goods, banking, international contracts, and dozens of other recognizable forms of contract relations. Acceptable contract theory must comprehend these special fields. It must also appreciate that the range of contract relations that remains outside these "special" fields is as broad as what is dealt within them. Thus, no model of contract drawn from any particular specialty should be expected to be adequate to deal comprehensively with the range of contracts."

Good faith offers useful insight into the moral bases of contract, and more specifically, into the sources and nature of contractual obligation. Good faith can be seen as the primary basis of contract liability. It entails that contract obligations are seen to arise because we, as society,\textsuperscript{37} think that they should, and only so far as we think that they should. Contracts can be seen to be binding in much the same way as obligations of citizenship bind generally. The obligation to perform contracts should, therefore, arise from a number of bases. To some extent, every contract could be expected to partake (in varying degree) of several of these bases. Some contracts derive binding force from the notion of promise, and from the morality that attends the duty to keep promises. The classic, executory contract for consideration comes readily to mind.\textsuperscript{38} Contracts derive moral force from notions of consent and voluntariness associated with liberal views of autonomy and freedom. Taking individuals seriously and increasing the range of their potential to affect the world requires that we pay attention to undertakings they have chosen deliberately. The invoking of conventions, and consequent moral obligations to honour them, provides a further basis for the morally binding nature of contracts. So too does the duty to avoid doing direct harm to others where the harm can be avoided at an affordable cost.

\textsuperscript{37} The concept of society here, is slippery. In some cases, the relevant society may be (e.g.) the members of some industrial grouping or professional organization. In others, it may be the more general society expressing its views through judicial, legislative or regulatory law. In the latter cases, society may be merely lending its force to the subgroup's views, or it may be imposing other relevant groups' views in their place. The problem is, at base, that of the relevant reference group discussed in the text preceding note 3, supra.\textsuperscript{38} Though perhaps only when such contracts are made between generally non-commercial parties and when they relate to dealings outside of commercial markets that such parties customarily enter (e.g., the residential housing market). It is part of my point that the parties, and we as society, do not see commercial agreements to be equivalent to promises: they are commercial agreements.
But in the final analysis, and almost by way of compendious repetition, contract derives its moral and binding force from our community views on these issues. Contract binds for the same (mix of) reasons that we should refrain from inflicting physical violence on others, or should obey law generally. This fact underlines the necessity that theories intended to address “all contracts” be framed in highly general terms.

Important consequences follow necessarily from these points. First, contract cannot be segregated and differentiated clearly from other, related obligations: there is no sharp divide between contract and other civil duties. This fact is reflected in the “snowflake” theory of contract advanced elsewhere. Contract cannot be segregated effectively or conveniently from other legal conceptual categories. In one dimension, the contract core shades off towards tort in one direction and towards restitution in the other. In another dimension, contract lies on a spectrum between public and private ordering. And in a third dimension, contract lies between individualism and collectivism, between autonomy and social control: while invoked by consent or by (more or less) “voluntary” acts, the fleshing out of contract obligations occurs as one facet of implementing our views of social justice. Here, society must address the question of the balance to be struck between contract as an end in itself and contract as a means of achieving more fundamental social goals. This requirement entails that contract, in any society, is as moral as that society itself.

This view of the morality of contract has significant implications for all of our lawmaking institutions. Counselling supra-pragmatic, aspirational behavior to contracting parties themselves, it reinforces the ability of lawyers and judges to expand the scope of the legally relevant, and to draw on all available sources of insight into our social morality. Perhaps most significantly, it legitimizes and indeed requires the increasing socialization of contract law with which our legislatures and administrators have been engaged for the past two centuries. It offers the fatal stroke to theories of free enterprise that see social control as antithetical to contract, rather than as a critical element of it.


40. Blinkered attention to one or other of these objectives (usually, the former) has been responsible for much of the simplistic thought often brought to bear on contract.
(ii) Implications for particular theories

Recently, it has become quite fashionable to attempt to discern the theoretical basis of contract. Two debates have attracted wide attention. The first relates to the relevance of the law and economics movement to contract; the second opposes the contract-as-promise and contract-as-society poles of a spectrum. My concern is to assess what light good faith sheds on these issues.

My discussion relates almost exclusively to the contract-as-promise debate. The broad utility of the economic approach to law has been widely and, in my view, successfully challenged elsewhere. The economics of contract law suffers from the inadequacies that afflict the law and economics school generally, and the implications of its teaching fall to be discounted equally. Essentially, the challenge holds that the utilitarianism of the economic approach is unsuccessful in its own terms, and that it treats contract as an end rather than as a means. Good faith serves to reinforce the challenge by introducing the problem of values other than economic efficiency, by insistence upon the existence of a richness of values in contracting and contract law. Some economic analysts have chosen to ignore these other values completely, even to the point of attempts to elevate wealth-maximization to the status of a moral principle: their attempts have been rightly criticized. Others have adopted the more realistic approach of trying to factor in extra-efficiency values through broad definitions of utility as individually perceived good. Thus a party can be regarded as pursuing utility in being thoroughly other-regarding, if other-regardingness is perceived as a good by the party. This approach trades the move to reality for the benefits the theoretical model offered. If the good is defined simply as whatever people choose to do, the concepts of efficiency and of its maximization lose all of their descriptive and predictive force. Good faith serves simply as a reminder of the unlikelihood of any approach that elevates a single value to the status of universal solvent of contract.

Good faith provides more direct and independent insight into

42. See, sources cited supra note 41.
43. Weinrib, supra note 41.
the contract-as-promise debate. The notion that contracts are really promises, and that they draw moral and practical sustenance from this characterization, has long been implicit in thinking about contract law. From the paradigm contract that classical economics uses to justify expectations of efficiency from a market economy (the discrete sale of fungibles) through that on which myriad traditional contracts texts premise their analysis ("Will you sell us Bumper Hall Pen?")44, the idea that "contract" and "promise" can be employed interchangeably has exercised a pervasive influence.

The idea that promise is central to contract has received extensive support recently in Charles Fried's *Contract as Promise*.45

At the level of theory I hope to show that the law of contract does have an underlying, unifying structure, and at the level of doctrinal exposition I hope to show that that structure can be referred to moral principles. . . . The promise principle . . . is the moral basis of contract law.46

Fried proceeds to analyze many of the classic doctrines of contract law as promises, in an attempt to demonstrate a coincidence between the law's treatment of these issues and the treatment they would receive at the hands of the morality of promise.

The success of Fried's enterprise can be judged by the descriptive and predictive powers of his theory. In my view, even taking the argument at its highest and as presented by him, Fried fails to prove his hypothesis and, rather, demonstrates only that promise is a relevant element of contract liability in some cases. To be fair, Fried faces his problem squarely. He admits the need for independent principles to compete with promise in cases where no "true agreement" has been reached (as, for instance, in operative mistake and frustration cases). He admits the paucity of "the promise" in many cases, appreciating that much fleshing out in terms of

44. This is a classic phrase from the famous case of *Harvey v. Facey*, [1893] A.C. 552 (Privy Council). In that case, the Privy Council seemingly bought the whole traditional, abstract notion of the requirement that acceptance of an offer mirror the offer, hook, line and sinker. The plaintiff sent the defendant a telegram that read: "Will you sell us Bumper Hall Pen. Telegraph lowest cash price—answer paid." Defendant's reply read: "Lowest price for Bumper Hall Pen £900." Plaintiff purported to accept the "offer" to sell for £900. The Privy Council held that there was no contract. Plaintiff's first telegram had asked two questions, and the defendant had answered only one. Many contract law texts continue to view contracts through such blinkered vision.


46. *Id.* at Preface 1 and at 1.
customary understandings and reasonable expectations must be undertaken in order to appreciate what will be held to have been promised. He recognizes that good faith\textsuperscript{47} is thought to pose the most direct challenge to his concept of contract, explicitly authorizing courts in the name of fairness to revise contractual arrangements or overturn them altogether.

But having identified the weaknesses in his position, Fried's defence of his position presents arguments that seem only to confirm them. For each time he is up against it, Fried shows that the promise principle is inadequate both descriptively and prescriptively to resolve the problems that contract-in-fact throws up. Indeed, at one point Fried retreats so far as to admit what seems to be the precise opposite of his theory:

After all, the law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments. The limits of that liability must depend on judgments. . . .\textsuperscript{48}

Hardly the stuff of promissory determinism!

The inadequacy of Fried's view is well illustrated in his discussion of "HONESTY IN FACT."\textsuperscript{49} Here Fried attempts to explain the spectrum of results achieved in cases where one party fails to tell the other about a matter known to the former, material to the latter, and known (or suspected) by the former to be unknown to the latter. Fried presents three cases: an "easy" case for depriving a non-disclosing, actively concealing vendor of the benefits of the bargain; a "harder" case, in which an investor in information relies on its expertise (without any element of misleading) to secure an attractive deal; and an "easy" case at the other end of the spectrum, where the "informed party" is, essentially, a "known gambler" and the contract can fairly be seen as an understood speculation about risks.

What promise adds to the analysis (or perhaps, criticism) of the results our law would be likely to reach in these cases is well beyond me. The "fraudulent non-disclosure" case turns out (for Fried) to be a case where there is no promise at all because "the obligation of promise does not take hold where the promisor has not knowingly undertaken that obligation . . . the contract did not come into being. . . ."\textsuperscript{50} So the case falls to be decided not by promise, but

\begin{enumerate}
\item As well as duress and unconscionability.
\item C. FRIED, supra note 45, at 69.
\item Id. at 77-85.
\item Id. at 81.
\end{enumerate}
rather, "the competing equities must be used to resolve the inevitable dilemma . . ."51 In the "harder" case, Fried suggests that there is a promise (What distinguishes the promisor's obligation from the first case?) but whether or not it should be allowed to "count" will depend upon conventional views and general background understandings of acceptable conduct.52 These same conventions and understandings make the third ("gambling") case an easy case for Fried, and also serve to explain the exceptional duties of disclosure and fidelity that are cast upon fiduciaries for "efficiency, redistributive and altruistic" reasons (presumably, inter alia).

In the end, Fried would determine the issue of when disclosure is required in all of his cases by reference to socially accepted standards of behaviour. A better argument for the general significance of good faith can hardly be imagined. The variations that can be expected in judicial responses to the "harder" case (depending upon the precise circumstances, the identity and attributes of the parties, the expectations of those in the relevant industry, etc.), are ideal illustrations of the role of the norm of "right behaviour" in resolving disputes. Fried seems to think that he has saved his case by showing that the background understandings and non-promissory values that are factored into decisions prevail before the disputes that give reason to refer to them are decided. While this may respond to unsophisticated versions of the theories of Kennedy or Kronman,53 it fails to respond at all to the argument that duties are defined and thrust upon the parties "because they are so situate and our views of proper behavior in such circumstances are the following . . ."

"The promise" turns out to have virtually no independent significance in resolving the non-disclosure cases. Rather, it serves only as a trigger for the law to begin the sorts of important inquiries into understandings and conventions that really are necessary. The "promise" simply expresses a willingness to get involved in the deal, and therefore to have the law "go to work" on the deal. But this willingness to get involved could as easily be expressed or perceived in terms other than promise. The core of the trigger in the non-disclosure cases could as easily be "agreement,"

51. Id.
52. Id. at 82-3.
53. Fried deals in this way with theories propounded by Kennedy & Kronman. His argument may be valid to the extent that the theories he criticizes would propose efficient or altruistic decisions with a forward-looking component only. However, neither Kennedy nor Kronman would, I believe, suggest that the expectations and understandings of relevant reference groups are not to be considered in determining what is efficient or fair.
"consent," or "voluntariness," as "promise." Pursuit of the law's responsibilities would not be impeded by the loss of the benefits of analogy to the morality or nature of "promise," were the mechanism triggering the law's involvement expressed in other terms.

Similar criticisms can be applied to much of the rest of Fried's argument. The issues that arise for the law he discusses constantly fall to be decided through equities, conventions, restitution, reliance or tort, rather than through promise. And this is only the surface of the indictment. For Fried is not discussing, and his analysis does not help with, the real issues that contract-law-in-fact must address. The discussion takes place entirely in the context of such traditional categories as offer and acceptance, unilateral mistake, consideration and the like. Even assuming that Fried's theory could explain *Dickinson v. Dodds* or *Adams v. Lindsell* (it does not),\(^{54}\) who cares? Does it describe or prescribe results in any case that does matter? Does it help with the responsibilities to be attached to prospective contracting parties,\(^ {55}\) with the battle of the forms,\(^ {56}\) with mass and

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54. In *Dickinson v. Dodds*, 2 Ch. D. 463 (Eng. C.A. 1876) (a leading case on offer and acceptance) an offeror was permitted to revoke on Thursday an option he had promised to keep open until Friday. The offeree had not paid anything for the promise to keep the offer open. But Dodds did make an undisputed promise. Fried says that the law regarding consideration is too confused and incapable of predicting anything for him to have to explain such cases. C. Fried, *supra* note 45, at 37-9. In *Adams v. Lindsell*, 106 E.R. 250 (Eng. K.B. 1881) (a leading case on contracts entered into by mail) defendants were held to have contracted with plaintiffs when defendants' letter was misdirected by them, and was received late by plaintiffs, in consequence. Plaintiffs' mailed reply came back in the usual course of post, even though it arrived later than defendants expected (not then knowing of the misdirection) and after defendants had, accordingly sold the goods. Defendants were "responsible", even though it was clear they were not prepared to promise and had not in fact promised to contract at the later date when the reply was received. The Court said that defendants "must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs" (emphasis added), even though it was quite clear that no such promise had in fact been made.


56. This famous class of case causes problems where the two sides of a deal use their own standard form contracts, and each standard form purports to prescribe the terms of the deal and to exclude the relevance of the other form. The ensuing problem has been termed the accomplishment of the "legal equivalent to the irresistible force colliding with the unmovable object." Matter of Doughboy Industries, Inc., 233 N.Y.S.2d 448 (Sup. Ct. App. Div. 1962).
standard form agreements;\(^57\) with problems of contract interpretation or determination of performance requirements;\(^68\) with enterprise power to impose dangerous or low quality products, externalities or anarchic development?\(^29\) These cases are the stuff of modern judicial involvement with contracts. If Fried's "theory of contractual obligation" does anything, it does little of interest. Directed only at a very limited, and largely extinct-in-fact "core" form of contract, it fails to appreciate any of the lessons of relational contract law. In particular, it ignores the fact that "the promise" is only a very limited part of what makes up the parties' views of their relationship, and the law's (and others') views of what that relationship requires in terms of appropriate conduct or responsibility and of what shall be done in cases of default. As an instruction to judges, contract as promise is woefully deficient in content.

As a prediction or prescription of legislative action, contract as promise is thoroughly bankrupt. Indeed, Fried does not even mention legislation, or a role for it, in his discussion of "contract law." Fried deals with an institution that exists in large part only in the minds of some academics, seemingly for their amusement. Good faith offers significant insight into why that institution cannot exist in the real world, and it remains, as Fried feared, a fatal indictment of the view that there is much general utility in the notion of contract as promise.

A somewhat more promising theory is suggested by Atiyah in his extensive \textit{Rise and Fall of Freedom of Contract}.\(^60\) Atiyah argues that in the nineteenth century promise achieved prominence as an

\(^{57}\) The issues arising from the fact that many contracts are not dickered over, or individually scrutinized (as were, in theory anyway, those on which classical contract was founded) are immense. They were brought into the glare of general scrutiny by Kessler's famous article, Kessler, \textit{Contract of Adhesion—Some Thoughts About Freedom of Contract}, 43 \textit{COLUM. L. REV}. 629 (1943), and a great many authors and cases have considered them since. \textit{See e.g.}, Dugan, \textit{Standardized Forms}, \textit{supra} note 30; Dugan, \textit{Good Faith}, \textit{supra} note 30.

\(^{58}\) These issues arise in a great many contexts. One field that generates much litigation has had occasion to consider them frequently. This is the field of real estate transactions, and specifically, of vendor and purchaser law. Here questions of interpretation arise constantly in respect of lot size, conditions, and attributes of purchased property. The question of what sort of title is to be conveyed is litigated constantly, raising issues of the standard of performance required. This sort of litigation bulks large in the overall load of civil litigation, but the issues are the same sort as tend to be the most frequently fought-over in other fields as well.

\(^{59}\) \textit{See generally} Reiter, \textit{supra} note 39.

\(^{60}\) Atiyah, \textit{supra} note 15.
independent principle of contractual liability replacing earlier, more socially-based theories, but that over the twentieth century (in particular), the process has been reversed. Atiyah does not make clear precisely what his theory of contract's state now and in the future will be: this is to be presented in a forthcoming companion volume to *The Rise and Fall*. However, he does suggest that much comfort will be drawn from the notions of benefit and reliance, concepts developed by Fuller and Purdue.61 Liability will be imposed on parties because, and to the extent that, they have received benefits from others, or have suffered losses through (reasonable) reliance.

It is obviously unfair to criticize Atiyah's theory—he has not yet presented one. However it is worth attempting to assess, from the perspective of the lessons of good faith, how far any theory based on benefit and reliance could possibly carry us. In my view, good faith suggests that benefit and reliance are clear advances over promise, but that they are still only partial answers, way-stations along the route to acceptable theory. They are thus characterized correctly by Macneil as "intermediate contract norms,"62 parts of the package needed to appreciate contract usefully.

The problems with benefit and reliance relate to their failure to break cleanly enough from the paradigm "bargain" of classical contract theory. The notions are useful insofar as they move beyond promise to appreciate that when benefits change hands and when reasonably expected reliance causes easily avoided harm, these social facts may serve as sources of social concern. But their focus and strength still lie with the small and discrete contract between two moderate-sized contracting parties. The model is "party-bound," appearing to test benefit and reliance from the perspective of the parties, and failing to focus more broadly on the context in which benefits are given and reliance occurs. This party-bound focus obscures two critical issues. First, relevant reference groups, and not just the two parties, must be involved in decisions about benefits and reliance. Which benefits must be compensated, and which may be retained without (full) recompense? What, indeed, will be held to count as benefits? Or as retention? What reliance is at the risk of whom? Why should reliance be undertaken at another's expense? And most revealing, what reliance is reasonable (and what should be done in terms of protecting it)? A two-party focus cannot

help us with these issues. Second, a moment's thought indicates that contractual liability is imposed for a plethora of reasons beyond benefit and reliance. These two reasons are vital to a certain range of contracts (in particular, to many of the cases around which our classical law of contract was fashioned) but they can be employed only with great difficulty, or not at all, to many of the issues that contemporary contract law raises. For instance, the notions are not helpful (or, at best, are not adequate) in determining what standards of decency we will require of those procuring contracts from others. This issue has come up often of late, as courts flesh out the standards of behaviour required of those who enlist franchisees and guarantors, or who deal with neophyte businessmen.63 Similarly, the notions shed little light on issues of power and procedural justice that arise from large-scale enterprise, standard forms and widespread market-failure: the problem of "exemption clauses" has been before our courts incessantly for several decades.64 Nor do these ideas assist with the great issues: confrontation of the fact of differential endowments and the extent to which we are prepared to allow the differences to be asserted, and the balancing of contract values and other social values.

Reliance and benefit, like promise, enclose too small an area to be a comprehensive theory applicable to all contract. Comfortably applicable to only a part of contract in judicial lawmaking, they fail to take account of the subtlety of private lawmaking and offer only limited guidance to legislators.

The weaknesses of contract as promise, and of benefit-reliance, are the strengths of the theory ranged at the other end of the spectrum, Macneil's "relational contract law." Relational contract law is nothing if not expansive. It addresses contract behaviour from the perspective of everyone interested in contract; from first party contractors, through judges, legislators and those who conceptualize about contract. And it is capable of comprehending an exceptionally broad range of contracts, from the trade of market fungibles through the multinational corporation to the state and the international community. Relational contract law is, at once, quite simple, and exceedingly complex. Its essence is the simple point that no contract (or other) transaction is ever "wholly discrete." Rather, to some extent, every contract contains "relational elements" that go beyond the purely economic aspects of the exchange involved. These

63. See authorities cited supra note 55.
64. See authorities cited supra note 57.
relational elements require that understanding of contract take account of them. And the beginning of understanding is the appreciation that contract is a social institution:

The fundamental root, the base, of contract is society. Never has contract occurred without society; never will it occur without society; and never can its functioning be understood isolated from its particular society.

The complexity of the theory derives from its attempts to elaborate the implications of these basic facts across the range of contract relations. At this level, Macneil identifies "intermediate contract norms," discernible in various ways and to differing extent in contract relations. Appreciation of these norms allows insight into the nature of contract. Specific focus on some of them suggests potentialities for, and potential dangers of the institution.

Good faith supports Macneil's work, encourages its continuation, and suggests directions for its elaboration. Relational contract law appears to accept thoroughly the lessons of good faith. It does not focus on any single paradigm to the exclusion of other sources of contract liability: reciprocity, implementation of planning, effectuation of consent, and restitution and reliance (the cornerstones of contract-as-promise and of benefit-reliance theories) are norms only included along with such others as role integrity, solidarity, power, and harmonization with the social matrix. It does not divide contract sharply, either from other sources of liability, or from other aspects of our social life. It offers "rules" about contract at the sort of general level that good faith demands, allowing as well for the elaboration of more specific rules for specialized fields in terms of the same norms, but as particularly applicable to the circumstances of each speciality.

Good faith is not listed among the intermediate contract norms, and it may be that "proper behaviour" could be added in order to enhance Macneil's descriptive accuracy. If it is true that parties recognize socially determined obligations to act in particular ways, that judges refer to such norms for standards for dispute-resolution, and that legislators frequently act to assert them as well, then a descriptive theory ought probably to acknowledge good faith explicitly. Relational law suffers little from failing to acknowledge the norm expressly: the whole theory is instinct, with a sense of our

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65. I. Macneil, supra note 62, at 1-2. (emphasis in the text).
66. Id. at 36-70.
obligation to examine what the parties, and what we, as society, expect from contract, if we are to begin to understand the institution. Macneil’s elaboration of the intermediate norms reflects a clear appreciation that relevant views of appropriate behaviour will determine the contours and significance of each norm in different contractual relations. What unique substantive content good faith would add, if included as an intermediate norm is not clearly or easily apparent. Certainly, elements of what good faith involves are incorporated within such norms as reciprocity, role integrity, solidarity, harmonization with the social matrix and supra-contract norms. It is not necessary that good faith stand alone in order to be properly included in Macneil’s list: all of his norms are interwoven and each partakes of elements of all of the others. Perhaps the independent significance of good faith lies in four important elements of contract to which it counsels attentiveness. First, it reminds us of the incompleteness of written or even oral records of contracts. The limits of human foresight, the costs and threat to solidarity of increased specificity, and the insurmountable barrier to complete communication attributable to our individuality ensure that no record of a contract can be complete and identically understood by all. Second, it entails “trust,” an element in whose complete absence no contracting could occur. Third, it points out the participatory nature of contract. Contracts are never two-party affairs, but borrow heavily from various surrounding communities, from language for communication, through industry practice to the supra-contract, general social norms and finally good faith stresses the moral element present in even the most hard-nosed commercial agreement.\(^7\) Contract is a form of social behaviour infused with notions of doing right. Present throughout the other intermediate norms, this fact, without which contract could not exist, merits independent attention.

Relational contract law has been criticized for its complexity and for its generality. Critics argue that it is incapable of providing useful guidance to lawyers, judges and legislatures. Good faith puts such criticisms into perspective. The need for generality in any realistic theory has already been demonstrated.\(^8\) What remains to be done with rational law is to elaborate in two dimensions. First,

\(^7\) Particularly in such contracts, where whole person relationships may be absent and where the cash nexus is the sole motivating force of the deal. Such transactions are possible only because participants understand that, e.g., industry standards of appropriate behaviour will prevent excesses and will allow for adequate predictability of the other side’s likely conduct.

\(^8\) See text accompanying note 36 supra.
the specialty-laws must be derived from the overarching theory. While it may be true that the nine intermediate norms will not "solve" a concrete contract case, or direct enactment of a particular statute, this fact is neither surprising nor significant. No great theory of anything is self-applying. Elaboration of relational law can show the appropriate interplay of the norms in the consumer mortgages, franchise, corporate law, or other specialty fields. This is a job of detail, and it is already being undertaken by Macneil and others. The tiered law that good faith predicts explains both the level of Macneil's general theory and the need for detailed specialty-work before the theory can be "applied" with facility.

The second dimension in which elaboration is required presents greater difficulties. Relational law stands idle, like a huge machine waiting for current to be switched through it. Macneil has attempted to build a neutral model of the institution of contract, and there is no reason to criticize him for choosing such a goal. In its present state, the theory can illuminate, and this is no mean achievement. But it cannot truly bite on judicial problems, it cannot direct legislatures and inspire private contractors until our society's views about contract are plugged into it. Relational contract law operates as the medium through which our social philosophy relevant to contract is brought to bear on the institution-in-fact, as it operates in the world.

Macneil does not fail to appreciate the need to power his model. He knows that what drives it will differ by society, and that in the end, "supracontract norms" will determine the place and shape of contract as an historical fact. Good faith operates as a compendious expression of our considered views on the role of contract. In the institutionalized search for these views, we will find the power that will switch relational law on, for our society, and that will demonstrate and enhance the practical utility of the theory.

The matter is not as difficult as it might appear. At least within many of the specialty fields, or within common sorts of relations, our views of what constitutes acceptable behaviour can be discerned. While it might be better, and even possible, to generalize a theory of our social philosophy from, and in respect of these relations, it is unnecessary to do so: the specialized theory can resolve the specialized problems. It is outside of these fields, and where our philosophy is weak, that we founder. It is in such areas as pre-

69. I. Macneil, supra note 62, at 70.
contract torts, defining the standards of conduct required of one who would enlist a franchisee or guarantor, or deciding how far advantage can be pushed that our philosophical failures come home to roost. Relational law will have to address the philosophical issues directly as it moves from universal theory to practical application.

Can we derive a social consensus at the level required? In my view, good faith, as manifest in all contract behaviour, offers real hope that diligent inquiry will yield adequate working hypotheses. This issue is explored in greater detail, below.

**Contract law and society**

Two important elements of this interaction are implicit in everything that has been said above. First, contract, defined as the process of projecting exchange into the future, is a pervasive fact in modern society. Contract is an element of some of the most trivial of our social relations, but is involved in the most fundamental of them (up to and including the state itself) as well. Its norms are, therefore, to a significant extent, our norms too, and the study of contract can tell us much about ourselves. Second, contract draws its sustenance, indeed its substance, from society. Durkheim was clearly right when he recognized the priority of society to contract. Durkheim's point can even be expanded, for not only is contract pervasive, but, as well, all of our lawmaking institutions are involved in its preservation, operation and limitation. From custom through judging to legislation, society makes contract.

I will survey two further consequences of the recognition of good faith: its implications for liberalism, and its implications for solidarity.

(a) **Implications for liberalism**

Good faith requires a blurring of any proposed line between the private and the public. Good faith sees contract liability as imposed by society because this is thought to be desirable. Society is the backdrop and the medium for contract. Social control of contract (whether by way of limitations on contract power or of positive duties imposed on contracting parties) is pervasive. The duty to contract and to perform in good faith is elaborated and enforced through institutions as diverse as peer pressure and property

70. See cases cited supra note 55.
71. DURKHEIM, supra note 36.
seizure. In fact, the reintroduction of good faith into descriptions of contract represents part of the process of the resocialization of contract law (of law generally) required after the nineteenth-century's attempts to disembarrass contract of complicating elements of morality. While this nineteenth century attempt failed to exert significant influence on contract-in-fact, it did make its mark on descriptions and theories of contract. There, the very aim of contract was seen to be the freeing of individuals from the bonds of societal limitations on their activities, expressed through such restrictive institutions as the guilds, closed towns, custom, convention and natural law, as perceived through reasoned reflection.

Good faith represents a different perception of empirical facts and an alternative aspiration. It accepts the fact and necessity of a major role for custom and convention in contract. It includes as a positive norm, and not as an unfortunate element to be promptly excised, that contract power should be controlled, that the exercise of contract power may, in many circumstances, be tantamount to the exercise of public power, and that boundaries of decency ought fairly to be imposed upon each. By reintroducing the social into contract, legitimacy concerns that may properly be raised about social control from will-of-the-parties, contract-as-promise perspectives are dissipated. Good faith is both the means through which society reacted to nineteenth century assaults and reasserted the primacy of the social to the economic and the individual, and the evidence of the general success of this "spontaneous social reaction."72

The predominance of community standards in one of our most fundamental and pervasive institutions provides important data that should be considered in the contemporary liberal revival. At least three issues should be influenced by these data. First, it appears difficult to begin at the classic liberal starting point, the individual. The bounds of the individual, and of individual potential to affect the world, are much set by communal views of appropriate behavior. Indeed, and as I shall elaborate below, our very perceptions of many individuals are conditioned by and premised upon their group membership and their shared group morality. Glendon’s The New Family and the New Property,73 in beginning with the relationship of individuals to groups, and evaluating what the sup-

port of these relationships entails and requires, is a recent example of the sorts of new departures for liberalism that the recognition of good faith will require.

Second, it is apparent that increased sophistication must be brought to bear on the contract-as-freedom/contract-as-coercion debate. If norms of proper behaviour operate through the contract institution, norms that assert society’s redistributive interests and its concerns about power and other externalities emanating from contract, then it is apparent that contract is a far more subtle and complex institution than its supporters on the right and its opponents on the left would have us believe. Havighurst spoke of contract as a blend of equality for the strong and equality for the weak. It is just this complexity of contract that has escaped its most ardent supporters and critics, and that is expressed in society’s true view that contract is a Good Thing, so long as it is kept within the bounds of the acceptable, of good faith.

Third, good faith requires that progress be made in understanding our own views of liberalism if we are to know more about contract. This point was raised earlier, in my discussion of the need to “power” Macneil’s model. Here, I assert that we can understand contract better only if we know ourselves better. Inquiry into the contours of good faith shares much of the same space as inquiry into what our liberalism is and what it requires. To a great extent, good faith becomes the liberal debate in the contract field, for the issues to be resolved are such as the following: “How far is it appropriate to allow endowments to assert themselves? (And which endowments?)”; “How far should we permit contract to externalize its consequences?”; “To what extent is consumer demand an appropriate determinant of the good?” Good faith searches for answers to these classic liberal questions in our institutionalized responses to them, believing that what we do is a strong expression of how we feel about these matters. Good faith permits such inquiry directly, in ways in which contract-as-promise (for instance) cannot: it can distinguish among promises and can cope with social change that will vary our views on which contracts are good contracts.

75. Obviously, if contract is defined as “the relations among parties to the process of projecting exchange into the future,” I. Macneil, supra note 62, at 4, contract can be neither good nor bad, it is just a part of life. I use “contract” here in a more limited sense, as the private or free enterprise pole of a spectrum that might have authoritative dictatorship (of the right or the left) at the other pole.
(b) **Implications for solidarity**

Durkheim feared that increasing specialization would ultimately threaten the possibility of society. The division of labour would replace “mechanical solidarity” with “organic solidarity,” and would reduce the common conscience to little except an individual ethos. In *The New Social Contract*, Macneil attempted to assuage these fears. Accepting Durkheim’s criterion of solidarity, “sources of a clear shared morality uniting a whole society,” and his view that “Everything which is a source of solidarity is moral, everything which forces man to take account of other men is moral, everything which forces him to regulate his conduct through something other than the striving of his ego is moral and morality is as solid as these ties are numerous and strong,” Macneil identified “at least” four important sources of the common conscience in modern society beyond that of a straightforward individual ethos: “a high level of technological and capital determinism; norms arising from the division of labor itself, including among others all the common contract norms; a morality of sacrifice; and fear.”

Good faith contributes to the understanding of solidarity in modern society in three ways: it provides support for Macneil from a slightly different perspective; it allows for elaboration of a couple of these points; and it suggests further potential sources of solidarity. As I argued above, exchange, and institutions for its functions, are large parts of our social fabric. If I am right about the significance of good faith in contract, then contract and exchange institutions contain within them elements of altruism and other-regardingness. Life in contractual society partakes of the self-fulfilling-prophecy nature of international law: good faith (morality) is a fact; it is generally regarded as a virtue; and it is generally honoured. Indeed, good faith stands to engender a higher degree of compliance than international law, for it evolves and authorizes harsh sanctions ranging from peer pressure through application of formal legal sanctions. The solidarity-potential of good faith and its sanctions must be enormous, for the law of good faith and its sanctions bubble up in large part from their social base.

Good faith also suggests that contract serves as a basis of mechanical solidarity. This point can be reached if we see contract to be, in part, a means (as its early supporters did) rather than solely an end in itself. The end towards which contract militates is pro-


gress towards the goals of our liberal ideology: recognition of our moral equality, and decision-making through rational discourse. The struggle is not individual against individual, but rather all of us together striving through the best mechanism we can devise to reach shared goals (including shared goals of rights to individuality and privacy). Good faith is thus not a brake on individual liberty, but rather a constant reminder that contract is partially a means and not only an end, and that the means must be constrained if the end is to be approached. A shared belief in the liberalism underlying contract may well serve as the single greatest source of solidarity (Who doesn't believe in the high-sounding phrases of our Constitutions?). Good faith is the concrete expression of our view that the nexus of contract is greater than the cash nexus and is not solely directed at it.

Two further features of contract in contemporary society provide grounds for optimism. First, our society is replete with heavily relational contracts. For many of us, contractual associations are central facets of our lives, even to the extent of defining our self and peer images as "philosophy professor," "trade union steward" and the like. The essence of many such associations is found in mechanical solidarity and in sharing. The norm of good faith is pervasive, not only within the association but also in members' behaviour (as representatives of the group) in extra-group contacts. Glendon's work demonstrates how these associations replace not only the individual as the relevant focus of our inquiry, but also such formerly vital relationships as the family. Glendon counsels attention particularly to the role of industrial associations that she claims are becoming the primary groups in our modern times. But such syndicalism approximates very closely the "occupational groups" that Durkheim suggested as the cure for sagging solidarity in specialized societies. The norms of good faith, mutual respect, and altruism that Durkheim required are precisely those that hold these groups together.

The enhanced significance of voluntary (and especially occupationally based) associations allows for speculation about the role of the fact and of a norm of "participation" as a source of solidarity. The fact has been the subject of much recent work of those concerned with employment, in particular. These writers stress the importance of employment as a form of self-expression, as a source of identity and as the vital link that allows most of us participation

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78. M. Glendon, supra note 73.
80. For instance, and for further sources see, Beatty, supra note 41.
in our central exchange institutions (and thus in our social life), in addition to its financial support function. This participation in institutions that, in a partially capitalist economy (at least) serve as centres of government, links us all, in much the same way that citizenship, as expressed in equal participation (civil rights and voting), creates sentiments of community.

Good faith is involved in two aspects of this participation in contract. First, it allows for the possibility of the merger of self and other-interestedness that permits the existence of long-term voluntary associations. Second, it serves as the mechanism to protect participatory rights in much the same way as due process protects our more formal and general citizenship rights. This latter function can be particularly well observed in the context of employment relations. There, express duties of good faith protect employees' participatory rights in their jobs against bad faith dismissal: to protect the right of collectivities of workers to participate in collective bargaining; to protect minorities within and without the collectivity from bad faith abuses of power and to limit externalities that may arise from the collective bargaining process. The rise to prominence of the significance of participation counsels social action to extend its reach to the contractually-at-risk, or dispossessed.

81. Good faith is the standard required explicitly in many collective agreements, in order to terminate a workers' employment. Good faith has also been used as a limit on seemingly-open powers of termination. Fortune v. N.C.R., 364 N.E.2d 1251 (Sup. Jud. Ct. Mass. 1977); Prozak v. Bell Telephone Co. of Canada [1982] 37 O.R.(2d) 761 (H.C.I.). The requirement to bargain in good faith is imposed legislatively on both management and labour representatives in many jurisdictions, and orders have been made requiring parties to obey their duty to bargain in accordance with this standard. Bargaining agents are often subjected to duties of good faith in fairly representing all members, even non-union members, of their bargaining units. And society everywhere has reacted to the fact that labour disputes can wreak significant harm on parties not directly privy to them by judicial and legislative enactment of elaborate codes of permitted and prohibited labour practices.

82. Macneil has warned of the problems involved in imposing good faith from the outside: bureaucratic imposition of norms, if it works at all, yields progeny different from that produced by self-germination. Macneil, Values in Contract: Internal and External, 78 Nw. U.L. Rev. ___ (1983). Two points occur, nonetheless. First, the social action counselled, can well be (and may best be) spontaneous: our role could be no more than to notice facts and raise consciousness. Second, a less-than-best solution may be required in any event. Recognizing that parasitic use of institutions is not "natural" use of them, the artificial replication of healthy norms elsewhere might, over time, power a self-fulfilling prophecy. The inclusion of the dispossessed in mainstream norms can enhance both their own self-respect and our views of them. The dangers are clear: destruction of healthy institutions, at least capable of caring for the losers, and further harm to the self-respect of the latter following failure in vain enterprises. But the crisis that is coming as we realize that we will not be able to continue to have (and to assuage with) materially more cries out for bold responses.