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The Duty of Good Faith: A Perspective on Contemporary Contract Law

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A duty of good faith performance inheres in every contract. Many courts get the contours and application of the duty of good faith wrong. These courts' restrictive approach ties the good faith duty too closely to the express terms of the contract, requires subjective bad faith to violate the duty, and narrowly defines the standards of conduct that good faith requires.

This Article, presented at a symposium in honor of Charles Knapp, describes the senses in which the courts get good faith wrong: doctrinal, historical, structural, and political/ideological. In doing so, it applies the critical legal studies approach to the duty of good faith and to contemporary contract law in general. The Article concludes by suggesting the political and ideological significance of the courts' approach to good faith as emblematic of a classical revival in contract law.

* Distinguished Professor of Law, Rutgers School of Law, Camden. For Chuck Knapp, who modeled how to be a member of a scholarly community.

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One of the features of Chuck Knapp's scholarship that has always delighted me is how he links exhaustive and careful analysis of doctrine and cases with broader intellectual and historical themes. In this Article, I want to emulate that approach by looking at the ways in which many courts apply a particular doctrine of contract law and then expand the analysis to consider why they do that and what it means. In the more expansive task, I return to the Critical Legal Studies ("CLS") movement's examination of law and legal reasoning in general and of contract law in particular, a project to which I contributed and with which Knapp engaged. Although CLS is less prominent in scholarly discourse than it used to be, now some three decades after its heyday, it still provides the greatest insight about law available.

I. GOOD FAITH

This Article examines the obligation of good faith, which, as the aphorism states, is implied in every contract. Following its modern reformulation by Robert Summers,[1] the duty of good faith and fair dealing was enshrined in the Restatement (Second) of Contracts Section 205. The black letter of the Restatement did not define the content of the duty, but the comments suggested its scope:

> [G]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness, or reasonableness.[2]

Good faith is also a requirement in the performance of every contract within the Uniform Commercial Code ("U.C.C.").[3] The 2001 amendments to Article 1 added "observance of reasonable commercial standards of fair dealing" to the general definition of good faith in order to supplement "honesty in fact," a requirement that had previously been included only in the Article 2 definition.[4]

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1. *See* Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968). *See also* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

2. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1985).

3. U.C.C. § 1-203 (2001).

4. *Compare id.* § 1-201(20), *with id.* §§ 1-201(19), 2-103(1)(b).

In a recent article, I argued that many courts misconceive the doctrine and therefore make three errors in applying it.[5] First, they tie the obligation of good faith too closely to the express terms of the contract. Some courts refuse to apply the doctrine where there is a facial conflict beyond the asserted good faith duty and an express term of the contract. Other courts require that the good faith obligation be applied to an express term of the contract, holding that good faith has no independent office except to give meaning to an express term. The Utah Supreme Court gave a succinct and stark expression of these limitations in *Oakwood Village LLC v. Albertsons, Inc.*:

> While a covenant of good faith and fair dealing inheres in almost every contract, some general principles limit the scope of the covenant . . . . First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. Second, this covenant cannot create rights and duties inconsistent with express contractual terms. Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.[6]

Second, courts hold that the only actionable type of breach of good faith is an intentional or reckless violation of the standards of behavior—that is, subjective bad faith. Under this view, dishonesty in service of opportunism is the sole measure of bad faith. Even though they may cite the objective standards of the Restatement, these courts require subjective bad faith characterized by ill motive or intention. In *In re Magna Cum Latte, Inc.*—for example, a bankruptcy judge summarized California law to require, for a court to find that a party to the contract had breached its duty of good faith,

> a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.[7]

Third, in describing the standard for good faith, courts define the parties' contract and their objectives narrowly, and therefore limit the sources and scope of the good faith obligation. One vehicle for this narrow approach is Steven Burton's "foregone opportunities" concept, which limits the scope of good faith to not attempting, during the performance of one's contractual obligations, to recapture opportunities—

5. Jay M. Feinman, G*ood Faith and Reasonable Expectations*, 67 ARK. L. REV. 525 (2014).

6. Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, 104 P.3d 1226, 1240 (citations omitted) (quoting Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs., 889 P.2d 445, 457 n.13 (Utah Ct. App. 1994).

7. No. 07-31814, 2007 WL 4412143, at *4 (Bankr. S.D. Tex. Dec. 13, 2007) (citation omitted).

defined in limited economic terms—foregone at the time of contracting.[8] The hypothetical contract approach, featured in a series of Seventh Circuit cases by Judges Posner and Easterbrook are similar. These cases limit good faith to "a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute" in order to achieve efficiencies that the parties, as rational maximizers, would have agreed to at the time of contracting, such as "minimiz[ing] the costs of performance" by "reducing defensive expenditures."[9]

Courts commit these errors because they fail to appreciate how good faith, properly understood, gives effect to the basic principle underlying all of contract law. As stated by Corbin in the initial section of his treatise, "The main purpose of contract law is the realization of reasonable expectations induced by promises."[10] The logic and purpose of the legal enforcement of reasonable expectations is to provide security to parties in their transactions, promote commerce, enable value-maximizing transactions, and all of the other banal reasons discussed in a first-year Contracts course.

The duty of good faith gives effect to the principle of reasonable expectations in cases in which the court wishes to consider the possibility of contractual obligation, but finds the express terms of the contract too limited or too indistinct to form the basis of obligation. Good faith rests on the recognition that contracting parties will incompletely specify their obligations because of the limits of language and the inevitably finite nature of bargaining. Therefore, in some cases, good faith determines the extent of obligation arising from an express term by cabining the discretion that the term vests in a party. In other cases, good faith is further removed from an express term but protects reasonable expectations by giving "business efficacy" to an arrangement that is "instinct with an obligation" even though not tied to a particular contract term, as Judge Cardozo suggested in cases such as *Wood v. Lucy, Lady Duff-Gordon.*[11]

Courts err when they fail to properly apply the reasonable expectations principle in good faith cases. First, because reasonable expectations arise not only from express terms but also from implied terms and the context in which the contract is made, limitations on good faith that give too great a weight to express terms are wrong. The obligation of good faith rests on reasonable expectations that can create duties that go beyond those specified in the express terms of the contract,

8. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980).

9. Mkt. St. Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991).

10. ARTHUR L. CORBIN, CORBIN ON CONTRACTS 1 (1952).

11. 118 N.E. 214, 214–15 (N.Y. 1917) (internal quotation marks and citations omitted).

including even duties that limit a party's ability to exercise rights apparently created by the express terms.

Second, because parties expect that their contracting partners will act consistently, with reasonable commercial standards of behavior, requiring subjective bad faith is wrong because it conflicts with reasonable expectations. That is, of course, why the U.C.C. requires as elements of good faith, both the subjective requirement of "honesty in fact" and the objective requirement of adherence to "reasonable commercial standards of fair dealing."[12]

Third, because reasonable expectations arise from words, conduct, and context in complex ways—"community standards of decency, fairness or reasonableness,"[13]—it is wrong to restrict good faith by conceptions of parties as constricted value maximizers who simply seek to prevent opportunistic behavior or to minimize the joint costs of their relationship. Instead, the proper standard for good faith reaches far beyond such narrow contours to include business sense and community standards.

Accordingly, properly understood as an application of the reasonable expectations principle in cases in which express terms are insufficient to the task, good faith imposes broad obligations beyond those imposed by the express terms, and those obligations include adherence to commercial standards of reasonableness external to the express terms. Courts err when they fail to apply those principles in applying the doctrine of good faith.

II. Doctrine

Thus, my argument is that a large number of courts get the definition and application of the duty of good faith wrong. It is part of the law professors' conceit that, being removed from the press of deciding individual cases and having the luxury of time, we can see things more clearly than judges can, which allows us to see where they have gone astray and lead them back to the proper path. Well, maybe. But, it is certainly true that professors have the time, luxury, and professionally induced desire to look at doctrinal issues in broader perspective. This Article aims to provide that perspective by exploring in what sense the courts are wrong and why I am right, so as to give a better picture of the duty of good faith and its role in contemporary contract law.

The first sense in which the courts have gone wrong is in traditional doctrinal analysis, as described in the previous section. In identifying these errors and suggesting how to correct them, my argument is novel in substance but familiar in form. The legal rule or standard that a party must act in good faith is supported by a principle: the principle of reasonable expectations. The principle of reasonable expectations, in

12. U.C.C. § 1-201(20) (2001).

13. Restatement (Second) of Contracts § 205 cmt. a (1985).

turn, contains a deeper set of principles and policies, namely that courts should enforce obligations that are implicit in parties' agreements, parties are assumed to act honestly and in accordance with general norms of behavior, and so on. The scope of the principles and policies determine the proper application of the duty to act in good faith. In applying the rule, courts have failed to carry through the logic and purpose of the principle. There is a proper application of that logic and purposes—my approach to good faith—which would correct courts' errors.

This doctrinal argument should be persuasive to courts and lawyers. It proceeds from the common ground of the basis of contract law and develops rules, subrules, and applications that decide cases in reasonable ways.

III. HISTORY

A second sense in which courts get the law of good faith wrong is in a historical sense. The restrictive approach to good faith is out of step with the development of contract law over the last century or so. The history of contract law in that period began with the classical conception, which dominated legal thinking in America from about 1870 to 1920. Thereafter, classical law was subjected to sustained critique, which, by the 1970s, produced a new body of contract law conventionally known as "neoclassical."[14] Courts err when they fail to fully incorporate neoclassical principles into their analysis of good faith.

Classical contract law conceived of contract as a field of private ordering in which parties created their own law by making promises and consenting to agreements, in contrast to public law, which involved the imposition of legal obligations by the state. This focus on consent was grounded in a conception of the social world as composed of independent, freedom-seeking individuals, each of whom avidly pursued his own self-interest. The job of courts, accordingly, was to enforce the rights created by the parties' contracts and to refrain from imposing obligation where it had not been assumed. This enforcement took place through the application of abstract, formal rules that defined the elements that give rise to a contract right. Faithful and mechanical application of these rules was thought to protect parties' autonomy from judicial invasion and enable individuals to anticipate the legal consequences of their conduct and calculate the extent to which particular contracts might serve their self-interest.[15]

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14. *See generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004) [hereinafter Feinman, *Un-Making Law*]; Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) [hereinafter Feinman, *Critical Approaches*]. *See also* Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 497 (David Kairys ed., 3d ed. 1998).

15. Feinman, *Un-Making Law*, *supra* note 14, at 4–7.

The critique of classical contract law, which began with Corbin and Llewellyn and extended through their successors in American legal realism and beyond, demonstrated that contract law does not arise from the consent of the parties in a way that is self-executing. Instead, contract law is like tort law and judicial action is like legislative action, in that all necessarily involve public policy judgments. Those judgments must account for the fact that although people have individual desires and interests, they are not just freedom-seeking isolates; rather, they are social beings with the responsibilities and benefits that come from living in a collective society. Even in the world of commerce, exchange occurs in the context of relationships, relationships that are governed by social norms and law as much as or more than by consent. In such a world, the inadequacy of language and the complexity of facts preclude the possibility of a formal, rule-based body of doctrine.[16]

The body of contract law that developed by the 1970s—the law of the U.C.C. and the Restatement (Second) of Contracts, the law described in the Farnsworth and Calamari and Perillo treatises[17]—is appropriately described as "neoclassical" because the elements of the critique supplement but do not supplant the classical elements. In the neoclassical conception, private parties act out of economic self-interest but they also recognize the legitimacy of commercial norms that do not always accord with their immediate self-interest. They consent to agreements that create and define the scope of their obligations, but agreements are founded only partly on consent; obligations also arise from raising expectations and inducing reliance in the absence of subjective assent. Parties specify the terms of their agreements, but incompletely, so their agreements require interpretation and gap filling by a variety of doctrines. And so on.[18]

This historical account restates the doctrinal argument in a different perspective. The error courts commit in restricting good faith is not simply an error in applying principle to rule, but also denies the historical process that has shaped modern contract law. Good faith in neoclassical law is an important supplementary and gap-filling doctrine, and courts need to recognize its value and expansive contours. Parties rarely specify in their agreements that they must observe honesty in fact and reasonable commercial standards of fair dealing, to use the U.C.C.'s terms, but the obligation to do so is generally if implicitly understood. Performance and even termination provisions vest parties with discretion but do not define all of the limits on that discretion; and good faith provides limits beyond those specified. Even beyond filling out the express terms of the contract,

16. *Id.* at 9–10.

17. *See generally* E. Allan Farnsworth, Farnsworth on Contracts (3d ed. 2004); John D. Calamari & Joseph M. Perillo, Calamari and Perillo on Contracts (6th ed. 2009).

18. Feinman, *Un-Making Law*, *supra* note 14, at 13–15; Jay M. Feinman, *The Significance of Contract Theory*, 58 U. Cinn. L. Rev. 1283, 1287–89 (1990).

good faith instantiates the obligation to act in accordance with the norms of business.

IV. STRUCTURE

A third sense in which the courts get good faith wrong becomes apparent by translating the historical account into a structural account of the nature of contract law. From this perspective, courts err in narrowly applying good faith by denying something fundamental about the purpose and nature of contract law.

The structural account translates the historical narrative of classicism/critique/neoclassicism into a conflict between two images or visions of contract law.[19] Much of the problem of classicism, according to the critique, was excess, not error. Furthering individual interests is important, but so is promoting communal values. Rules are desirable but not always realizable so they must be leavened with standards. Private ordering through the market is valuable but requires correction by state regulation. And so on. Therefore, it is necessary to determine appropriate rules and achieve correct results, given both sets of principles.

In conventional terms, the classical model is referred to as "individualist," and the principles of the critique "collectivist," "social," or, even in some versions, "communitarian." Individualist principles express the importance of the individual, the value of choice, and the importance of private ordering with limited legal intervention only to protect recognized and established rights. Collectivist principles embody the importance of community, the value of responsibility, and the role of law in the service of public values.

Just as the models of classicism and critique (and neoclassical law, for that matter) are somewhat stylized and abstracted, so, too, are the models of individualism and collectivism. These are interpretive understandings of large bodies of discourse. Each of the models coheres, in the sense that their elements stick together, but the elements are not logically deduced from fundamental principles. In fact, both models share important elements and techniques, and every legal actor believes in, and from time to time will express, elements of each.[20] No one believes, for example, that the needs of the many always outweigh the needs of the few or the one, or, vice versa, that needs of an individual always outweigh the needs of the community.[21]

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19. *See generally* Feinman, *The Significance of Contract Theory*, *supra* note 18; Feinman, *Critical Approaches*, *supra* note 14, at 839–44.

20. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {*FIN DE SIÈCLE*} 49 (1997) [hereinafter KENNEDY, A CRITIQUE OF ADJUDICATION]; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 211–13 (1979) [hereinafter Kennedy, *Structure of Blackstone*].

21. KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 20, at 46–50.

A few physical metaphors may be helpful. One way to envision contract law is through a core and periphery model. The critique of classical law did not argue that the individualist core of classical thought was false, but only that it was incomplete. Individualism, the power of consent, the importance of private ordering, and the desire for formal adjudication are important values in American society; the essence of the critique was that these values were not the whole story. Therefore, contract law maintains an individualist core with a periphery of collectivism.

In the core/periphery model, the explicit terms of an agreement constitute the core of contractual obligation, but explicit terms are never the entirety of the parties' agreement. Some things are understood though left unsaid, some things would be agreed to if considered, and some things are built in through the background of context and norms that envelop any agreement. Under this conception, the errors courts make in the constricted good faith cases are to understate or ignore entirely the presence of the periphery.

A different and more expansive way to envision contract law is as a balance between elements of individualism and elements of collectivism. The balance can shift from time to time and from issue to issue so one side can outweigh but should never overwhelm the other. In the balance metaphor, the values of private ordering and enforcing only the terms the parties have chosen to include in their agreement need to be balanced against the recognition that agreements are more broadly constituted than the express terms reveal. Moreover, parties should, in any event, be held to community standards of reasonableness. Courts err when they tip the balance too far in the individualist direction. From this perspective, courts err in the good faith cases by tipping the scales too far in favor of express terms and against standards of reasonableness.

The structural account suggests that courts get good faith wrong in favoring individualist values over collectivist values when defining and applying good faith. That there is a wrong answer suggests that there is a right answer and a method for distinguishing between right and wrong. Contemporary law suggests that in fact, there is a method for resolving conflicts, whether drawing the boundary between core and periphery or weighing values in achieving a proper balance. Rules are formulated and cases decided using a mix of deductive reasoning and policy analysis. Particular rules and results may be controversial and disputed, but there is general agreement that courts are capable of formulating rules and deciding cases in a relatively noncontroversial way; when they get the results wrong, as they sometimes do, it is only because they have applied the common law method improperly, not that the method itself is flawed. Therefore, the error of courts in the good faith cases is little more than an error in doctrinal analysis writ large.

The problem with this analysis, from the critical perspective, is that it ignores the indeterminacy critique.[22] In the critical perspective, doctrine is radically indeterminate. A single principle or policy can be used to support opposite conclusions, and a principle or policy can typically be countered by a different principle or policy.[23]

Without restating the entire indeterminacy critique in all its versions here, think about reasonable expectations. The definition of reasonable expectations is in part a normative process. How do we tell what expectations are reasonable, which means what expectations should be reasonable? In defining what expectations are reasonable, when should courts favor individualist values or collectivist norms? Having selected one set of values, in which direction do they lead? And in attempting to balance the values, what is the measure that enables the court to do so objectively? Corbin attempted to provide an answer:

> It must not be supposed that contract problems have been solved by the dictum that expectations must be "reasonable." Reasonableness is no more absolute in character than is justice or morality. Like them, it is an expression of the customs and mores of men—the customs and mores that are themselves complex, variable with time and place, inconsistent and contradictory.[24]

Knapp attacked the CLS indeterminacy critique, suggesting that this way of thinking about contract law and associated work proposing a relational contract theory is "no more 'determinate' than the contract law we have now . . . a scant improvement."[25] Yes and no. "Yes," in that if the indeterminacy critique is correct, these new approaches would not be capable of giving more certain results in particular cases. That is exactly the point of the critique, and if it is correct, that is just the way the world is. But "no" in that the lack of determinacy does not mean a lack of insight.[26] It is in that perspective that there is a political or ideological sense in which the courts are wrong in the good faith cases. The errors courts commit in restricting the application of good faith are not isolated or random. Instead, they are part of a much broader approach to restricting contract law over the past quarter century—a classical revival in contract law.

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22. The same problem is present in neoclassical law's incorporation of the critique as a corrective to neoclassicism. *See* Feinman, *Critical Approaches*, *supra* note 14, at 846–47.

23. The literature is voluminous. For concise statements, see, for example, Feinman, *The Significance of Contract Theory*, *supra* note 18, at 1312–13; John Henry Schlegel, *Of Duncan, Peter, and Thomas Kuhn*, 22 CARDOZO L. REV. 1061, 1065 (2000); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 624 n.40 (1988).

24. CORBIN, *supra* note 10, at 2.

25. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1233 (1998).

26. The CLS approach has "done much in this postmodern period to nudge the complacent rest of us to at least imagine, if only briefly, the possibility of better worlds than this one." *Id.* at 1232.

The core principle of the classical revival restores the emphasis on contract law to private law, both to enhance personal autonomy and to facilitate the operation of the unfettered market as the essential social institution. Richard Epstein summed up the approach:

> [Contract] law can facilitate (not compel, but facilitate) sizable productive interactions which will continue to expand over time and transactions until they embrace all individuals who possess the minimum capacity to engage in contracting at all. The system goes forward in a benevolent fashion because the exchanges are mutually beneficial. . . . The background knowledge of the uniform incentives moving self-interested parties is a more reliable guide to their interests than any public vetting of their deal.[27]

Therefore, the role of contract law is to enforce the bargains that parties have made, not extend obligation beyond those bargains or bring public values such as commercial reasonableness to bear in assessing their validity. Formality reigns, both in the formulation of rules of contract law and in the preference for clear expressions in parties' contracts. Epstein again (and one can hardly tell when Epstein is being hyperbolic): "For all its minor differences, and with a little refurbishing at the edges, we could do as well with the Roman law of contract as we do with any modern system dedicated to the principle of freedom of contract, as our system too often is not."[28] The classical revival resonates throughout contract law. I offer only a few examples, about each of which Knapp has written.

Standard form contracts in paper and electronic form are, of course, the dominant mode of contracting today. To use Knapp's phrase, the classical revival aims to treat form contracts as "sacred cows" rather than "dangerous animals, likely to do harm unless confined and tamed."[29] Through such contracts, dominant contracting parties bind their customers without meaningful assent, notice, or opportunity to pursue other terms. For example, a forum-selection clause included in fine print as the eighth of twenty-five numbered paragraphs on a cruise line ticket sent to the passenger only after the passenger had made a nonrefundable payment constitutes assent, according to the Supreme Court.[30] Ordering a computer system and paying for it with a credit card does not constitute a purchase where a piece of paper shipped in the box with the computer specifies otherwise, according to the Seventh Circuit.[31] As Stewart Macaulay

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27. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 78–79 (1995).

28. *Id.* at 327.

29. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 789 (2002).

30. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). *See* Charles L. Knapp, *Contract Law Walks the Plank:* Carnival Cruise Lines, Inc. v. Shute, 12 NEV. L.J. 553, 554 (2012).

31. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148–49 (7th Cir. 1997); *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1446, 1449 (7th Cir. 1996).

explained the theory of these cases, "misrepresentation is the oil that lubricates capitalism."[32]

At the other end of the contracting process, the point of dispute, the classical revival's reverence for expressed assent and disdain for judicial intervention has resulted in the routine enforcement of contact terms that supplant the legal system as a dispute resolution mechanism.[33] Predispute, dominant parties use mandatory arbitration clauses to deny consumers effective review of the form, substance, or performance of their contracts, as in *Carnival Cruise Lines, Inc. v. Shute*.[34] The selection of arbitration to the exclusion of litigation, the designation of an arbitral forum, and any limitations on the scope of arbitration are routinely enforced, and the possibility of examining arbitration clauses for unconscionability or reviewing the results or an arbitration for error or worse have all but disappeared.

In between those chronological poles, similar effects are evident in other doctrines. In neoclassical law, promissory estoppel offered the promise of a means of subverting the formal requirements of traditional contract law in many cases, making enforceable a promise on which someone relied, even if the promise did not meet the traditional standards for forming a contract.[35] The classical revival's emphasis on formality caused this to be "the revolution that wasn't," as characterized by Sidney DeLong.[36] As with mandatory arbitration clauses, sophisticated parties use the limits of the doctrine as a way of avoiding responsibility for the promises they have made.[37]

Courts' restrictive approach to good faith is of a piece with these developments. Standard form contracts enable dominant parties to dictate terms, and the decline of reliance-based liability allows them to deny responsibility for promises outside written contracts. Restrictive applications of good faith do the same, limiting obligations to express terms and precluding liability for expectations raised outside of the express

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32. *The Gateway Thread: AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1149 (2000).

33. *See generally* Knapp, *supra* note 29; Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009).

34. *See* text accompanying note 30.

35. For a review, see generally Knapp, *supra* note 25.

36. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 943.

37. For example, DeLong catalogued examples of employer statements that do not rise to the level of promises, including:

> "You will be here until you retire"; . . . "You will not have to be concerned about job security because you have a job here as long as you want or until you retire"; . . . "You will have a job until you retire; we'll have you for the next twelve years"; "Your position will never be taken away and you can have it as long as you want it"; "You have full-time, permanent employment"; "I don't see a problem with you working until you are sixty-five."

Id. at 1004–05.

terms. Mandatory arbitration clauses remove contract cases from the sphere of public lawmaking through adjudication, and narrowing good faith focuses on the private and the internal, rather than the public and the objective.

V. IDEOLOGY AND POLITICS

The restrictive approach to good faith is part of a classical revival in contract law, and that movement is part of a transformation in private law generally.[38] In tort law, the classical revival reinstates traditional notions of fault and corrective justice in place of the neoclassical emphasis on compensation and collective justice. Personal responsibility is seen as a focus on the conduct of the injured and not the wrongdoing of injurers, with a goal of unburdening market entrepreneurs. The optimal balance of safety and injury is to be achieved through market forces rather than through legal liability. As a result, the generalization of negligence that characterized the neoclassical expansion of tort law is abandoned and new immunities and special liability rules are established, products liability abandons the move toward strict liability in favor of a pure negligence regime, and damages are cut back. In property law, the notion that property constitutes "a natural and unique set of entitlements" replaces the idea the "property serves human values." Most notably, the law of takings has expanded as a protection against government action that limits individual property rights in pursuit of the collective good.

There is a puzzle here. The classical revival restates, in modern guise, the position of classical law, a position that was critiqued—proven wrong—by a half century or more of scholarship and lawmaking. In 1943, Robert Hale explained why freedom of contract was a bankrupt concept, yet the concept has become a rallying cry in the new generation.[39] Corbin, Llewellyn, Hohfeld, Hale, and other scholars, and Cardozo, Traynor, and other judges demonstrated the emptiness of formalism so only a sophisticated mix of policy and doctrine could address the complexities of commercial transactions, yet Epstein is taken seriously in arguing that there are "Simple Rules for A Complex World."[40] How is this possible?

The answer is ideological, which is to say it is political, and that demonstrates that the courts are wrong in the good faith cases in a much deeper sense than ignoring history or slighting collectivist values. The classical revival of contract law is part of the campaign by political

38. *See* Feinman, *Un-Making Law*, *supra* note 14, at 1–2.

39. *See generally* Robert Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

40. EPSTEIN, *supra* note 27, at 78–79.

conservatives and business interests to reshape American government, law, and society.[41]

Ronald Reagan proclaimed the principal item on the agenda of this campaign most baldly in his first inaugural address: "Government is not the solution to our problems; government is the problem."[42] Government is the problem because it interferes with individual freedom, particularly the individual freedom to pursue self-interest through the market. If government is the problem, then the solution is to reduce the reach of government, including the part of government that exercises authority through the common law. The ability to contract and to have obligation limited to the contracts one has made are essential conditions of freedom, so the role of courts must be to enforce express terms, not to add to them or to assess their reasonableness through doctrines such as good faith.[43]

With this emphasis on personal freedom, contract law becomes envisioned as nonpolitical. It lies within the realm of corrective justice, righting wrongs between individuals according to objective principles of law, as contrasted with the political choices made in electoral politics and in legislation. And back to CLS, in the view of which this position is nonsense of a particularly pernicious kind. The nonsense is that contract law is essentially non-ideological. In fact, contract law, like all law, is deeply political and ideological. The most pernicious error of courts in the good faith cases, therefore, is the attempt to remove law from the realm of policy and politics.

41. *See* Feinman, *Un-Making Law*, *supra* note 14, at 56.

42. JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 151–52 (2002) (internal quotation marks omitted).

43. "Like other aspects of personal autonomy, [freedom of contract] is too easily smothered by government officials eager to tell us what's best for us." Oki Am., Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 316 (9th Cir. 1989).