Will Kindness Kill Contract?

Douglas K. Newell
ESSAY

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There's mischief afoot in the land of contract. The way we used to think about contracts and the parties that make them has been challenged. The challengers either see, or yearn for, a kinder, more cooperative world where contracting parties are more allies than adversaries. Some suggest there may be a duty to come to the assistance of the other party to the contract in times of trouble.1 The most extreme challengers paint a world where individual self-interest looks like selfishness, and conformity to vague community standards appears as kindness and cooperation.2 The challengers wish to define “the contract” of the parties broadly to include circumstances occurring before and after the traditional point of formation. They see in this broader relational view of contract patterns of flexibility and cooperation which should influence a court's determination of each party's legal obligations.3 To a degree this view of contract has already taken hold through the law’s recognition that trade usages and dealings of the parties may in appropriate cases be part of

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1. See generally Robert A. Hillman, Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, 1987 DUKE L.J. 1 (arguing that court adjustment is good policy in certain situations); Richard E. Speidel, Court-Imposed Price Adjustments Under Long-Term Supply Contracts, 76 NW. U. L. REV. 369 (1981) [hereinafter Speidel, Court-Imposed] (favoring court-imposed price adjustments when an advantaged party fails to accept an equitable adjustment proposed in good faith); Richard E. Speidel, The New Spirit of Contract, 2 J.L. & COM. 193 (1982) [hereinafter Speidel, New Spirit] (suggesting that an advantaged party acts in bad faith when it fails to accept a proposed modification that would be enforceable if accepted).


their contract. As, and if, this broader view becomes more completely accepted, further change in the law is inevitable. In this Essay I wish to briefly suggest where we are on this road from individualism to sharing, where the visionaries of cooperation might wish to take us and the legal theory they might use for the journey. If they succeed we may one day discover that we have a new theory of liability. I think of it as implied fiduciary liability but prefer to call it "commercial palimony." In palimony, as you may recall, cohabitation sort of slides into marriage. In commercial palimony ordinary contract sort of slides into partnership. I will argue that a major purpose of forming a traditional contract is to set limits of liability—between what the law requires and what should be left to individual discretion and conscience. As the contract and the relationship blur together, that function may be lost. I will return to this theme in my conclusion.

Our story begins with a case involving a contract between an asphalt paving contractor and an oil company. Their dispute tells much about where we are and hints at where we might go.

Prior to 1963 Nanakuli Paving & Rock Co. performed relatively small paving jobs such as driveways and service stations on the island of Oahu. Nanakuli’s management wished to expand and compete with the largest paving contractor on Oahu for major roads, airports and other large paving contracts. At the same time, Shell Oil Co. had only a small percentage of the asphalt supply market on Oahu and no asphalt terminals in Hawaii. Shell wished to build an asphalt terminal on Oahu and to take a chunk of the supply market away from Chevron which supplied the largest paving contractor.

In 1963 and again in 1969, Nanakuli and Shell entered into long-term asphalt supply contracts. The contracts committed Nanakuli to purchase all the asphalt it required from Shell and to pay "Shell’s Posted Price at time of delivery." The purpose of the arrangement was to promote Nanakuli by guaranteeing asphalt supply at a discounted price (the discount came from commissions paid by Shell pursuant to a

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5. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981).
6. Id. at 780.
7. Id. at 780-81.
8. Id. at 780.
9. Id. at 780-81 & nn.9-10.
10. Id. at 781.
11. Id. at 778, 780.
companion distribution contract). Shell, on its part, would prosper from the growth of Nanakuli’s business by expanding Shell’s share of the Oahu asphalt market, thus justifying the cost of the new asphalt terminal.

Between 1963 and 1974, the parties appear to have had a very close business relationship. Officials of Nanakuli called it a partnership and the Ninth Circuit opinion characterized it as “close, almost symbiotic.” For example, Nanakuli used the Shell logo and colors on its trucks and Shell was heavily involved in assisting Nanakuli to obtain expansion financing.

Sadly, their beautiful friendship came to an end in January of 1974 when, as a result of the Arab Oil Embargo, Shell raised its posted price for asphalt from $44 to $76 per ton. Nanakuli claimed it was entitled to the lower price for 7,200 tons of asphalt, which it ordered to fulfill its obligations under bids and contracts made before it was notified of the price increase. Unfortunately for Nanakuli there had been recent management changes at Shell and the new executives insisted upon the higher price.

Nanakuli sued Shell for breach of the 1969 contract based upon Shell’s failure to “price protect” Nanakuli. “Price protection” was defined as the supplier maintaining the old price on a quantity or for a time period sufficient for the purchaser to complete work committed at the old price. Nanakuli first asserted that in 1969 all material suppliers in the asphaltic paving trade price protected and thus, there was a usage of trade incorporated into the Nanakuli-Shell contract. Secondly, Nanakuli asserted that on the two previous occasions between 1969 and 1974 when Shell raised its price, Shell had price protected Nanakuli and thus this course of performance should be used to interpret their obligations. Finally, Nanakuli argued that “even if price protection

12. Id. at 780-81.
13. Id. at 780-81 & n.10.
14. Id. at 781.
15. Id. at 778.
16. Id. at 781.
17. Id.
18. Id. at 777, 786.
19. Id. at 788.
20. Id. at 786, 788-89.
21. Id. at 777.
22. Id. at 778 n.4.
23. Id. at 778.
24. Id.
was not incorporated into their contract” Shell was obligated to provide it “because price protection was the commercially reasonable standard for fair dealing in the asphaltic paving trade in Hawaii in 1974.”

As might be expected Shell responded by relying upon the express price term in the written contract: “Shell’s Posted Price at time of delivery.” Shell argued that “price protection” could not be reasonably construed as consistent with that term, and therefore the express term should control. Shell further argued that the two occasions Shell price protected Nanakuli were simply waivers by Shell of its rights rather than a course of performance interpreting those rights.

The jury returned a verdict for Nanakuli and awarded $220,800 in damages. The trial judge granted Shell’s motion for a judgment notwithstanding the verdict and gave judgment for Shell. Nanakuli then appealed to the Ninth Circuit.

The Nanakuli case affords an opportunity to examine major changes from the classical contract law of Williston to the realism of Llewellyn incorporated into the Uniform Commercial Code. Shell’s legal position would have been much stronger under classical contract law. A classical theorist would have focused upon the written contract between Shell and Nanakuli executed on April 1, 1969. This writing would be “the contract.” The classical rules would have made it very difficult to explain or supplement, let alone contradict, the writing with evidence of anything that happened before or after April 1, 1969. This preference for the writing was a result of at least three beliefs of the classicists. First, contracting parties had the ability to determine, as of the moment of contracting, their respective rights and duties for the entire term of the

25. Id.
26. Id. at 779.
27. Id.
28. Id. at 777.
29. Id.
30. See Roger W. Kirst, Usage of Trade and Course of Dealing: Subversion of the UCC Theory, 1977 U. ILL. L.F. 811, 812 (“In the Williston theory the written agreement was emphasized; the certainty of a writing was to be preserved and not undercut by extrinsic evidence.”); see also 4 WILLIAM H. PAGE, THE LAW OF CONTRACTS § 2145, at 3735 (2d ed. 1920); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 95, at 349-50 (Walter H.E. Jaeger 3d ed. 1957); John E. Murray, Jr., The Realism of Behaviorism Under the Uniform Commercial Code, 51 OR. L. REV. 269, 274 (1972) (discussing various rules based upon “the sacredness of the writing”).

If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court. The court will give that language its natural and appropriate meaning; and, if the words are unambiguous, will not even admit evidence of what the parties may have thought the meaning to be.

1 WILLISTON, supra, § 95, at 349-50.
contract and the ability to accurately express those rights and duties in the writing.\textsuperscript{31} Second, the writing was a more accurate record of the agreement of the parties than other evidence and thus preference for the writing reduced the possibility of perjury and fraud.\textsuperscript{32} Finally, there would be less certainty and more litigation if the writing could be routinely attacked with outside evidence.\textsuperscript{33} One will, of course, never know but Shell would likely have been the winner if classical contract law governed their dispute with Nanakuli.

Enter Karl Llewellyn and the Uniform Commercial Code. Llewellyn, the most famous of the realists, believed that “the contract” of the parties consisted of the bargain-in-fact of the parties tempered by rules requiring minimum commercial morality.\textsuperscript{34} Llewellyn’s vision is best set forth in U.C.C. § 1-201(3) which states: “‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance . . . .”\textsuperscript{35} The bargain in fact is ongoing and not static. Llewellyn believed that to truly understand the bargain of the parties the

\begin{footnotesize}
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\item See 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 610A, at 513-14 (Walter H.E. Jaeger 3d ed. 1961); see also Thompson v. Libbey, 26 N.W. 1, 2 (Minn. 1885) (stating that where the parties to an agreement “have deliberately put their engagements into writing in such terms as to import a legal obligation, . . . it is conclusively presumed that the whole engagement of the parties . . . was reduced to writing”); Note, The Parol Evidence Rule: Is It Necessary?, 44 N.Y.U. L. Rev. 972, 982 (1969) (stating that the effect of the parol evidence rule is “to encourage parties to embody their complete agreement in a written contract and thereby to foster reliance upon it”).

\item See 4 WILLISTON, supra note 31, § 610A, at 514 (“[A]fter interpretation has called to its aid all those facts which make up the environment and setting in which the words are used, the words themselves remain the best and most important evidence of intention.” (footnote omitted)); see also Charles T. McCormick, The Parol Evidence Rule As a Procedural Device for Control of the Jury, 41 YALE L.J. 365, 366-67 (1932) (observing that juries are unlikely to take into account the unreliability of some witnesses); Note, supra note 31, at 982-83 (stating that one of the purposes of the parol evidence rule is “to prevent juries from being misled by false testimony”).

\item Hatley v. Stafford, 588 P.2d 603, 610-11 (Or. 1978) (Lent, J., dissenting).

\item John E. Murray, Jr., The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code, 21 WASHBURN L.J. 1, 19-20 (1981).

\item U.C.C. § 1-201(3) (1995); see also id. § 1-205(1) (“A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”); id. § 1-205(2) (“A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.”); id. § 2-208(1) (“Where the contract . . . involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.”).
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writing must be viewed in context. He had little faith in the ability of contracting parties to completely and accurately express their bargain in one writing at one time. On the other hand, he believed courts could and should sift through all of the facts surrounding the transaction of the parties to find the bargain-in-fact.

Most of Llewellyn's ideas were included in the U.C.C. (Hardly surprising when you consider his major role in drafting it.) Since the U.C.C. had been enacted in Hawaii, it governed the Nanakuli-Shell dispute. In particular, the U.C.C. allows both trade usage and course of performance to explain or supplement express written terms and course of performance to waive or modify such terms. The express written terms only have preference over trade usage or course of performance where it is unreasonable to construe them as consistent with each other.

As was to be expected, Shell argued that Nanakuli had failed to establish that "price protection" was either a trade usage or a course of performance. Further, as noted earlier, Shell argued that it was unreasonable to construe "price protection" as consistent with "Shell's Posted Price at time of delivery." The Ninth Circuit found substantial evidence to support the jury verdict, reversed the trial court and reinstated the verdict for Nanakuli. The opinion stresses that Shell could produce no instance where price protection had not been practiced

36. See, e.g., KARL N. LLEWELLYN, THE BRAMBLE BUSH 89 (1960) ("No language stands alone. It draws life from its background."); see also Patterson, supra note 3, at 191-99 (noting Llewellyn's advocacy for including trade usages and course of dealing in the Code to put the agreement in its proper context).

37. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960) (maintaining that parties generally assent to no more than a "few dickered terms, and the broad type of transaction"); see also Patterson, supra note 3, at 175 ("The new conception engineered by Llewellyn presupposes that the meaning of the agreement of the parties does not depend exclusively or even primarily on the written terms of one or another document.").

38. See JoEllen Mitchell-Lockyer, Common Law Misrepresentation in Sales Cases—An Argument for Code Dominance, 19 FORUM 361, 371-72 (1984) (discussing how Llewellyn wanted courts to find "terms of fact" and not just rely on legal labels); see also Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 626 (1975) (stating that Article 2 is a guide to "law finding"); Murray, supra note 30, at 276-77 (noting that Article 2 endorses flexible standards through empirical verification).

39. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 777 n.2 (9th Cir. 1981).
41. See id. §§ 1-205(4), 2-208(2).
42. Nanakuli, 664 F.2d at 778-79.
43. Id. at 779.
44. Id. at 806.
in the trade\textsuperscript{45} and that though Shell had only price protected twice during the contract term, those were the only occasions where it was appropriate.\textsuperscript{46} The court struggled to reconcile price protection with the price term but ultimately concluded that it did not totally negate or entirely swallow the price term.\textsuperscript{47}

That, in capsule form, is the \textit{Nanakuli} case as it is regularly discussed. The opinion endorses a broader meaning of the contract and freer use of trade usage and course of performance than classical theory or some cases interpreting the U.C.C. from a more classical perspective. Llewellyn would probably have liked the opinion. What interests me most, however, is the tail end of the majority opinion and the concurrence which responds to it. On the last two pages of a twenty-nine page opinion, the majority and concurring opinions discuss the applicability of good faith to the Nanakuli-Shell dispute.\textsuperscript{48}

The U.C.C. imposes an obligation of good faith in the performance of every contract or duty.\textsuperscript{49} Article 2 of the U.C.C., covering sales of goods, defines “good faith” in the case of a merchant as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”\textsuperscript{50} The majority accepted Nanakuli’s argument that Shell breached the obligation of good faith when it raised the price from $44 to $76 a ton without giving Nanakuli notice in advance and when it refused to price protect work already bid at the old price.\textsuperscript{51} The majority concluded that evidence presented by Nanakuli that Chevron gave at least six weeks notice when it raised its asphalt price to $76 was sufficient relevant evidence of commercially reasonable standards of fair dealing in the trade for the jury to find that Shell’s conduct was not in good faith.\textsuperscript{52}

Judge (now Justice) Kennedy specially concurred saying that a finding of bad faith was appropriate where, as here, there was evidence of custom and usage regarding price protection in the asphalt paving trade.\textsuperscript{53} He warned, however, that juries should not be permitted to import price protection “from a concept of good faith that is not based

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 793.
\item \textsuperscript{46} \textit{Id.} at 794.
\item \textsuperscript{47} \textit{Id.} at 805.
\item \textsuperscript{48} \textit{Id.} at 805-06.
\item \textsuperscript{49} U.C.C. § 1-203 (1995).
\item \textsuperscript{50} \textit{Id.} § 2-103(1)(b).
\item \textsuperscript{51} \textit{Nanakuli}, 664 F.2d at 806.
\item \textsuperscript{52} \textit{Id.} at 805-06.
\item \textsuperscript{53} \textit{Id.} at 806.
\end{itemize}
on well-established custom and usage or other objective standards of which the parties had clear notice."

The above discussion of good faith by the Nanakuli court is the jumping off point for the remainder of this Essay. The following questions interest me: (1) If there is no applicable course of performance, course of dealing or usage of trade, is Shell ever required to come to the aid of a troubled party like Nanakuli? (2) If so, when and why? (3) How would such a duty affect contracts and contract law?

Good faith performance is required by both the U.C.C. and the Second Restatement of Contracts. The U.C.C. has two possibly relevant definitions of good faith. In Article 1, which applies throughout the Code, the drafters said "honesty in fact" was good faith, while in Article 2, which covers sales of goods, they said that "in the case of a merchant" good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Numerous critics concluded the U.C.C. definitions were inadequate at best and futile at worst.

The problem with the honesty definition is that it is too narrow. Dishonesty is most likely bad faith but other things can be as well, e.g., abusing bargaining power to coerce a modification, interfering with the other party's performance, arbitrarily and capriciously exercising a power under the contract, and so forth. The honesty definition was apparently chosen by Code drafters in order to enact the "pure heart and . . . empty
head" doctrine of good faith purchase. That doctrine protected honest but stupid bankers from defenses when they took negotiable instruments (e.g., checks or notes) without knowledge of the defenses but under circumstances that should alert a reasonable banker. Nevertheless by placing the definition in Article 1, which applies throughout the Code, the drafters extended its sweep to other situations where it seems woefully inadequate.

The merchant definition in Article 2 is better. By adding "the observance of reasonable commercial standards of fair dealing in the trade" language, the drafters appear to reach a much broader range of conduct. There are, however, two significant problems. First, by its terms this definition only applies to merchants and to sales of goods. Consequently, it apparently would not apply to non-merchants or to non-sales transactions such as a financing transaction governed by Article 9 of the Code. The second problem is that the merchant definition enacts the morals of the marketplace. Critics have long suggested that good faith should mean more than what is the standard of behavior in the trade.

The Second Restatement of Contracts provision on good faith is the result of the efforts of many of the critics of the U.C.C. provisions. It merely "imposes upon each party [to a contract] a duty of good faith and fair dealing in its performance and its enforcement" without attempting to define that duty. Gone are references to honesty, merchants or commercial standards. The Comment to Section 205 suggests the following broad meaning: "Good 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."

The strength of this provision is also its weakness. It is deliberately vague, thus permitting a court to proscribe a wide variety of conduct.

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62. See generally Summers, supra note 58 (stating that good faith should apply to a number of situations at different intervals in the contracting process).
64. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).
65. Id. § 205 cmt. a.
However, it will necessarily be difficult for a party to determine in advance precisely what conduct is bad faith. In addition, the Second Restatement itself is not law but merely expert opinion on what the law is. When and whether a Court will use this standard is a significant issue.

None of the above “good faith” standards were thought by their creators to create a general duty to come to the aid of a troubled party. Even the strongest advocates of a kinder, gentler law of contracts did not place much hope for change in the mainstream pages of the U.C.C. or the Second Restatement. Certainly the honesty standard is of little use as a vehicle for change. Recently, however, some commentators have begun to explore the possibility that broader good faith standards might sometimes impose a duty of assistance in long-term contracts. It is to those arguments I now turn.

Imagine for a moment that most business executives were really altruistic and the morals of the marketplace demanded concern for others over short-term self interest. Suppose most executives would be flexible and would aid the troubled other party to the contract rather than insist upon performance according to express written terms. If so, the good faith obligation upon a merchant to perform according to “reasonable commercial standards of fair dealing in the trade” might take on new meaning. Instead of simply forbidding a merchant from acting like J.R. Ewing on “Dallas,” the merchant might be required to act like some new sensitive, caring business executive played in my soap opera by Alan Alda.

There is in fact some serious support for such an argument. Professor Stewart Macaulay of the University of Wisconsin Law School interviewed numerous business executives about contracts and contract

66. Summers, supra note 63, at 834. It is hard to prove a negative. However, the absence of discussion of the issue by most commentators is certainly some indication and Summers seems quite clear on the point.

67. See generally Kennedy, supra note 2 (describing an altruistic world as a contrast to existing contract law in the United States); Unger, supra note 2 (same).

68. See, e.g., Hillman, supra note 1; Speidel, Court-Imposed, supra note 1; Speidel, New Spirit, supra note 1. In 1994 the Permanent Editorial Board for the U.C.C. opined that a court should use good faith as a tool in interpreting contracts within their commercial context. The Commentary of the Board endorses a very broad meaning of the parties' contract. However, only brief attention is given to the implications of this broad contextual interpretation and consequently it is unclear under what circumstances, if any, the Board might support the use of good faith to impose a duty of assistance. See PEB Commentary on the Uniform Commercial Code, Commentary No. 10 (Final Draft Feb. 10, 1994).
law. His empirical research suggests that business executives prefer to settle disputes and work things out. They try not to rely upon the written contract and do not quote contract clauses at one another. One executive told Macaulay: “One doesn’t run to lawyers if he wants to stay in business because one must behave decently.” The executives interviewed rarely used litigation and suggested that a contract lawsuit had overtones of bad faith.

In addition to the work of Macaulay, one making this argument could point to the case of Columbia Nitrogen Corp. v. Royster Co. In that case, the seller sued the buyer when the buyer refused to purchase the stated quantity because of a price rise. A consultant to the fertilizer industry was asked whether contracts for a fixed quantity were enforced. He responded: “I have never heard of a contract of this type being enforced legally. . . . [T]he fertilizer business is always operated under what we call gentlemen’s agreements. . . . [T]his custom exists ‘regardless of the contractual provisions.’”

The Columbia case involved an argument concerning trade usage. However, just as in Nanakuli, the usage evidence seems relevant for a good faith theory as well. It would appear that the standard for admission of evidence on the good faith issue would be less rigorous than that to prove a usage. To show a trade usage you must prove: (1) a “practice or method of dealing;” (2) regularly observed “in a place, vocation or trade;” (3) so “as to justify an expectation that it will be observed with respect to the transaction in question.” All that you need for merchant good faith is to prove a “commercially reasonable standard of fair dealing in the trade.”

71. See Macaulay, Non-Contractual Relations, supra note 69, at 61.
72. Id.
73. Id. at 61, 65; Macaulay, Elegant Models, supra note 70, at 507.
74. 451 F.2d 3 (4th Cir. 1971).
75. Id. at 7 n.3.
76. Id. at 8-11.
77. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 779 n.7, 785 n.17 (9th Cir. 1981).
79. Nanakuli, 664 F.2d at 806; see also U.C.C. § 2-103(1)(b) (1995).
There is a serious problem with this argument for a good faith duty to be flexible, assist the other party, and not rely upon express written terms of the contract. It is very difficult to separate assistance and flexibility that a troubled party should expect as a matter of legal right from that which could be hoped for as a matter of courtesy or convenience. If assistance and flexibility are only a discretionary, sometime thing in the trade, they can hardly be considered a standard of fair dealing. Much of Professor Macaulay's research indicates that while business executives may prefer to work things out for reasons of business expediency, they understand the written contract is available as a last resort.80 One commentator who favors imposing this good faith duty has suggested that it be limited to situations where the troubled party will otherwise suffer extreme hardship.81 He argues that it is in these cases that a troubled party should reasonably expect assistance.82 Of course, putting a limit on the good faith duty also means that this commentator can avoid the possibility that this good faith duty might significantly diminish contract rights. The trouble with his chosen limit is that it is counter-intuitive. As Fuller noted many years ago, the least likely time for a merchant to act like Alan Alda (my words, not Fuller's) is when there is a lot at stake.83 The majority opinion in Nanakuli suggested the same concept when, with respect to the good faith issue, it considered only the testimony that Chevron price protected, and not the testimony that suppliers of aggregate (rock) to Nanakuli did so.84 The court reasoned that the suppliers of aggregate were not in the same position as Chevron and Shell whose prices had risen dramatically because of the oil embargo.85

This argument for a duty to assist depends upon the court allowing detailed testimony regarding the facts of the transaction. Then perhaps testimony of Professor Macaulay or kindly business executives could be heard concerning how businesses acted or would act in a similar situation and why. Ultimately the jury86 will simply have to impose a standard.

80. See Macaulay, Non-Contractual Relations, supra note 69, at 65-67.
81. Hillman, supra note 1, at 13.
82. Id.
83. See Lon L. Fuller, Some Observations on the Course in Contracts, 20 J. LEGAL EDUC. 482, 482-83 (1968).
84. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 805-06 (9th Cir. 1981).
85. Id.
86. This assumes, of course, a damage action like Nanakuli where there is a jury. Professor Hillman seems to be concerned with the judge, not the jury. See Hillman, supra note 1. His hypothetical case involves a plaintiff buyer seeking the equitable remedy of specific performance and
The more specific the testimony as to what precisely a business executive would do under the circumstances, the more likely the judge will admit the evidence and the jury will in fact find a failure to observe "commercially reasonable standards of fair dealing in the trade." Llewellyn's solution to this problem was a merchant jury that would hear the evidence and be able to determine merchant standards. His proposal was never enacted into the U.C.C. and the result may be that the jury verdict will represent general community standards of fairness.

Perhaps this is really what happened in the Nanakuli case. The jury heard evidence of what Chevron, the largest and only other major asphalt supplier, did under similar circumstances. Chevron's action took place at the time of the price rise, long after the execution of the contract, and is therefore not a usage of trade. The court says this is sufficient evidence to support the jury verdict for Nanakuli. Maybe so, where Chevron and Shell really are the asphalt trade, though this evidence, by itself, seems pretty slim.

Justice Kennedy's concurrence, however, seems on track in suggesting that all of the usage evidence on the specific practice of "price protection" was critical to the decision. Repeated instances of a specific practice help to show that the "price protection" was a standard of behavior and not just a courtesy.

the defendant seller relying upon a commercial impracticability defense. Id. at 15-19. Among other issues, Professor Hillman considers the power of the judge to reform a contract to achieve justice. Id. at 19-25.

I am more interested in the implications of good faith in a damage action such as Nanakuli where a jury is deciding the good faith issue. I think a jury is more likely to impose community morals upon the parties. See Patterson, supra note 3, at 180-84. Numerous cases leave the good faith issue to the trier of fact. See, e.g., Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 175 (8th Cir. 1987) (trier of fact should decide good faith); Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 979-80 (5th Cir. 1976) (jury should decide whether notice was in good faith); First Tex. Sav. Ass'n v. Comprop Inv. Properties Ltd., 752 F. Supp. 1568, 1574 (M.D. Fla. 1990) (determination of good faith is for trier of fact); Karibian v. Paletta, 332 N.W.2d 484, 487 (Mich. Ct. App. 1983) (trial court erred in granting summary judgment without submitting good faith purchaser question to jury); Kearney & Trecker Corp. v. Master Engraving Co., 560 A.2d 1320, 1322 (N.J. Super. Ct. Law Div. 1988) (the reasonableness of seller's refusal to consent to buyer's revocation of acceptance would be jury question). Professor Hillman's views on juries and good faith are unknown to me.

87. Nanakuli, 664 F.2d at 806.
89. Nanakuli, 664 F.2d at 772.
90. See id. at 784-85; U.C.C. § 1-205(2) (1995).
91. Nanakuli, 664 F.2d at 806.
92. Id.
In the end, the crucial question is whether Shell violated "commercially reasonable standards of fair dealing in the trade." The intent of this definition was apparently to limit contracts by imposing minimum commercial morality. However, failing to price protect does not seem inherently unfair. There is no general tort duty to rescue. It is only unfair if the contract of the parties as broadly defined gives Nanakuli reason to expect "price protection" as a matter of right. Therefore, we need a broader standard of good faith based upon the contract of the parties.

Even if the merchant standard was sufficient, it would only help if merchants are like Alan Alda and the transaction is a sale of goods. Suppose, however, that business executives really are not that much different from the rest of us. There are a few J.R. Ewings and a few Alan Aldas and the rest are spread out along a spectrum in between. Or suppose our transaction is not a sale of goods and thus the merchant good faith standard is not applicable. Is there any way the broader good faith standard of the Second Restatement might be used to impose a duty to assist a troubled party?

The first step would be to convince a court to apply the broader standard. In a non-U.C.C. case (e.g., an employment or real estate contract) the chances are good since the Second Restatement is supposed to be the expert’s statement of the general law of contracts. In a U.C.C. case, the problem is tougher. The argument for the broader standard would be based on section 1-103, which provides that the Code may be supplemented by general principles of law unless the principle has been displaced by a particular Code provision. Of course, the argument against the broader standard is that the honesty standard or the merchant standard, whichever applies, has displaced the broader standard. Opinion on the question is divided. Proponents of the broader standard rely upon the drafting history and the stated Code policy favoring liberal construction, while detractors argue that the Code has defined good

93. Id.; see also U.C.C. § 2-103(1)(b) (1995).
94. See Murray, supra note 30, at 276-77; see also Summers, supra note 58 (noting that courts have found that good faith should be a standard by which all people should observe in their dealings with each other).
96. See supra text accompanying notes 63-65.
99. U.C.C. § 1-102(1) (1995); see supra note 36.
Assuming the broader standard is applied, where would a duty to assist come from? The drafters of the Second Restatement saw "good faith" as a principle enforcing the spirit of the contract by requiring faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Consequently, the place to start is the contract. The argument for a duty to assist begins with the very open definition of agreement in the U.C.C. mentioned earlier: "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." A court is directed to look not only at the writings but at all the surrounding circumstances whether before or after the writing was executed.

The argument is further supported by the relational theories of Ian Macneil. Macneil developed a broad, descriptive social theory of contract. The theory suggests that more exchanges are based upon relations than upon discrete transactions. It also suggests that wealth maximization is not the only goal of contracting parties and offers preservation of the relationship, harmonization of conflicts and reciprocality, among others, as additional goals.

So if we were to look at the entire relationship of Shell and Nanakuli, what would we see? Assuming there was no established trade usage or course of performance, the court could still consider all facts reflecting on dealings between the parties. For example, it was an almost symbiotic relationship akin to a partnership; there was regular cooperation between the parties; the Oahu paving market was very small and there was complete trust among suppliers and pavers; Shell’s representative was often in the Nanakuli office and attended bid
openings;\textsuperscript{109} when Nanakuli wished to expand its plant, Shell supported the idea by giving an additional volume discount\textsuperscript{110} and by helping Nanakuli obtain a bank loan;\textsuperscript{111} and, this contract was an effort to join together so that Nanakuli’s paving business and Shell’s asphalt supply business would thrive on Oahu.\textsuperscript{112} The argument for a duty obligating Shell to assist Nanakuli is simply that the spirit of this more expansive contract demands it. As one commentator puts it: “[A]s a result of the circumstances at or after the time of contracting, each party reasonably expected the other to act consistently with its interests by being flexible and cooperating to preserve the relationship when serious trouble arose.”\textsuperscript{113} Nanakuli would expect assistance and Shell ought to provide it.

Suppose, however, that Shell does not provide assistance (as it in fact did not). Should Nanakuli have an action for breach of contract or simply a reason to distrust Shell and refuse to do business with it in the future? When we broaden our inquiry to take in all the facts, we again face the problem of distinguishing legal duties from voluntary acts.

One advocating a relational duty to assist would like the jury to consider everything about the relationship.\textsuperscript{114} He would like the judge to give the jury a very open instruction on good faith.\textsuperscript{115} The jury, left

\begin{itemize}
\item \textsuperscript{109} Id. at 783.
\item \textsuperscript{110} Id. at 781.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. at 780-81.
\item \textsuperscript{113} Hillman, supra note 1, at 7.
\item \textsuperscript{114} See Patterson, supra note 3, at 208-09.
\item \textsuperscript{115} For an example of an open good faith instruction based upon the \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 205 cmt. d (1979), see United States Nat’l Bank v. Boge, 814 P.2d 1082, (Or. 1991):
\end{itemize}

\begin{quote}
Now I further instruct you that there is an obligation of good faith in the performance and enforcement of every contract. The purpose of the good faith doctrine is to prohibit improper behavior in the performance and enforcement of contracts. The phrase “good faith” is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Subterfuges and evasions violate the obligation of good faith and performance even though the actor believes his conduct to be justified, but the obligation goes further. Bad faith may be overt or may consist of inaction and fair dealing may require more than honesty. When one party to a contract is given discretion in the performance of some aspect of the contract, the parties ordinarily contemplate that the discretion will be exercised for particular purposes. If the discretion is exercised for purposes not contemplated by the parties, the party exercising discretion has performed in bad faith. Id. at 1085 (quoting the trial court’s jury instruction on good faith). The Oregon Supreme Court reversed and found the instruction in error because the U.C.C. in the case only required honesty in fact. Id. at 1091.
\end{quote}
to ponder the close relationship, could find for the plaintiff by imposing a community standard of appropriate behavior on the defendant.

CONCLUSION

So what we have is “commercial palimony.” If Shell is liable, it is because its relationship with Nanakuli evolved into something like a partnership. The agency of transformation is the jury utilizing a broad good faith standard applied to a vast array of facts (all of the surrounding circumstances).

There are significant problems with this theory. First is the question of whether good decisions will be made. A court performs two functions: it settles disputes and it provides guidelines for future behavior of others. The “commercial palimony” theory may not perform either function well. Perhaps Llewellyn’s merchant jury could sift through all the facts and find the truth of the matter with no better road map than the good faith standards provide. It is less likely that an ordinary jury can. Even more serious, such an open factual inquiry means the guidelines for future behavior will be necessarily vague.

More importantly, there is a difference between a relationship and a contract. Not every action has legal consequences. The promoters of a good faith duty of assistance are blurring the line between law and society. Relational values are important and society has relational ways to enforce them (if you behave like a sleaze your reputation will suffer). As Macaulay suggests, most parties to close relations will never see the courthouse. Law, however, is about drawing lines, setting limits, and establishing rights. Shell ought to know why it will be held liable. Nanakuli and Shell, as commercial parties with attorneys, can draft a partnership agreement if they want the assurance that the courts will impose partnership liability. If they would like to target the price term, they could provide a gross inequities adjustment provision which requires good faith bargaining in the face of substantial change and provide for arbitration if the parties cannot agree. If each party is willing to leave assistance in times of trouble to the good graces of the other, there will be an occasional disappointment.

116. See supra note 86 and accompanying text.
117. See John Kidwell, A Caveat, 1985 Wis. L. Rev. 615, 618.
118. See Macaulay, Non-Contractual Relations, supra note 69, at 61; Macaulay, Use and Non-Use of Contracts, supra note 69, at 17.
119. See Hillman, supra note 1, at 4.
A proponent of the duty to assist admits the duty should not exist when the parties are holding contract law as a club in reserve. But when does a party like Shell not hold contract law in reserve? Our proponent answers: "Suppose, however, that the parties contract under circumstances creating an expectation of flexibility, without acknowledging the contract club. Under traditional objective assent theory of contract formation, the club is lost." Here finally we have it. Parties to a contract apparently must warn each other that they really mean it. That was supposed to be the function of entering the contract in the first place.

The "commercial palimony" theory elevates the community, through the jury, over the individual parties. It places great faith in the jury and very little in the parties. The theory devalues the functions of form (the act of executing a writing warns the parties of the potential significance of their acts, evidences their seriousness, and draws a line between legally significant and insignificant acts). Contract rights become fluid, not settled. A party may drift into added liability with no clear signposts.

The signposts are key. I would not wish that we return to the classical theory of Williston. Expanding the definition of contract to place more emphasis upon trade usage and actual dealings of the parties seems a great improvement. These devices focus upon specific practices of the parties or in the trade which can be proven and which the parties would assume are part of the deal. To the extent good faith involves adherence to specific proven practices, as in the actual Nanakuli case, it seems fine as well.

As the law currently stands, there is no generally recognized good faith duty of assistance. However, as previously discussed, a contracting party who has assisted the other party in a particular way before or during the term of the contract may be legally obligated to continue the practice. In addition, some courts seem willing to consider a previous general pattern of cooperative behavior as a factor in a decision to limit the right of a contracting party to subsequently assert its individual self-

120. Id. at 9.
121. Id. (footnotes omitted).
122. See supra note 86.
123. See Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-01 (1941).
125. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 806 (9th Cir. 1981) (Kennedy, J., concurring).
interest under the contract.\textsuperscript{126}

Our ideas about contract and contracting parties are changing. As ideas change so eventually does the law. Beliefs do control actions. There is growing acceptance of the idea that a broad factual inquiry is necessary to determine what constitutes the contract. In the process, however, the original idea of Llewellyn, that we are searching for the \textit{bargain} in fact is not always kept at the forefront. Contracting parties are increasingly seen as “partners” with a common interest, rather than individuals with separate interests. As this relational view of the contract and the parties becomes more generally accepted new legal obligations are sure to follow. Changes in employment law over the last twenty-five years give a glimpse of what can happen when fundamental beliefs change.

Caring and kindness are virtues. It is hard to argue against them. Nevertheless, one should remember that they can be part of society without being forced by law and when forced they are no longer virtues.\textsuperscript{127}


\textsuperscript{127} \textit{Cf.} CHARLES FRIED, \textit{CONTRACT AS PROMISE} 91 (1981).

Nothing in the liberal concept of contract, nothing in the liberal concept of humanity and law makes such altruism improbable or meaningless. The disposition to view one another with kindness and forbearance is an affirmative good, which liberalism is in no way committed to deny. But, just as in the family, the enforcement of such a posture itself tends to tyranny.

\textit{Id.}