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Allen R. Kamp
John Marshall Law School

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**BETWEEN-THE-WARS SOCIAL THOUGHT: KARL
LLEWELLYN, LEGAL REALISM, AND THE UNIFORM
COMMERCIAL CODE IN CONTEXT**

*Allen R. Kamp**

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* Professor of Law, John Marshall Law School. A.B., University of California, Berkeley, 1964; M.A., University of California, Irvine, 1967; J.D., University of Chicago, 1969. The author would like to thank Joel Cornwell, Mary Ann Glendon, Samuel Olken, John Henry Schlegel, Mark Tushnet, William Twining, Carol Ann Weisbrod, James Q. Whitman, and Peter Winship for their criticism and support.

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I. INTRODUCTION

My thesis is unsurprising. Karl Llewellyn, who believed that law should reflect the reality of society, was influenced by contemporary social science. Llewellyn and his contemporaries, collectively referred to as "Legal Realists," were a group of elite academics, from Yale, Harvard, and Columbia.¹ These Legal Realists were generally modernist, leftist, reform-oriented, and influenced by anthropology and institutional economics.

In retrospect, Llewellyn's statement that the Realists did not have a normative program is a questionable one,² since many of the Legal Realists accepted positions in Franklin D. Roosevelt's (F.D.R.) administration. For example, William O. Douglas served as Chair of the Securities Exchange Commission (SEC),³ Jerome Frank served as General Counsel to the Agriculture Adjustment Administration (AAA) and the Federal Surplus Relief Corporation, Special Counsel to the Reconstruction Finance Corporation, and Commissioner and Chair of the SEC,⁴ and Herman Oliphant, acted as an advisor to the Department of the Treasury and other agencies.⁵ Karl Llewellyn himself stridently supported President Roosevelt's plan to make certain reforms to the Supreme Court⁶ and

¹ These Legal Realists included: William O. Douglas, *see infra* note 3 and accompanying text; Herman Oliphant, *see infra* note 5 and accompanying text; Underhill Moore, *see infra* note 31; *see also infra* note 5 (discussing Legal Realists W.W. Cook, Samuel Klaus, T.R. Powell, and Wesley Sturges).

² "When the matter of *program in the normative aspect* is raised, the answer is: *there is none.*" Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931) [hereinafter *Realism*].

³ 4 THE NEW ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 197 (15th ed. 1994).

⁴ DICTIONARY OF AMERICAN BIOGRAPHY 215-17 (Supp. VI 1980).

⁵ DICTIONARY OF AMERICAN BIOGRAPHY 500-501 (Supp. II 1958); *see Dr. W. W. Cook Dies; Professor of Law*, N.Y. TIMES, Nov. 9, 1943, at 21 (identifying Cook as a member of the Committee on Practice of the U.S. Treasury from 1934-43); *Samuel Klaus, 58, U.S. Legal Advisor*, N.Y. TIMES, Aug. 3, 1963, at 17 (identifying Klaus as a legal adviser to F.D.R.); *Underhill Moore, Law Professor, 69*, N.Y. TIMES, Jan. 27, 1949, at 23 (identifying Moore as a special mediation representative of the public National War Labor Board); *T.R. Powell Dies; Law Professor*, N.Y. TIMES, Aug. 17, 1955, at 27 (identifying Powell as a former special assistant to the Attorney General of the United States and a member of F.D.R.'s five-man Emergency Fact-Finding Board); *Wesley Sturges, Educator, 69, Dies*, N.Y. TIMES, Nov. 11, 1962, at 88 (identifying Sturges as the chief representative of the Office of Economic Warfare for French North and West Africa during World War II).

⁶ Llewellyn wrote, "[w]hatever bill comes out of committee backed by the President needs fighting support." Karl N. Llewellyn, *A United Front on the Court*, 144 THE NATION, Mar. 1937, at 288, 289.

wanted a constitutional amendment “expressly and unequivocally enlarging the powers of Congress—preferably under the general-welfare clause.”⁷

Karl Llewellyn and his contemporaries were more reformist than is generally believed. These Legal Realists drew on a reservoir of contemporary social thought that supported reform intended to combat the conditions of the Depression.⁸ Seen in this light, the first versions of the Uniform Commercial Code (hereinafter UCC), in 1940 and 1941, may be viewed as part of the New Deal era’s struggle to restore prosperity.

This Article reconsiders Llewellyn’s ideas and the UCC in light of the thinkers that influenced Llewellyn.⁹ Two themes characterized the social science and society contemporary with the creation of the UCC in 1940 and 1941. First, many perceived a need for modernization in the face of the breakdown of the old order. Second, many conceived of the social order as being composed of groups or institutions, rather than individuals. This Article, which is organized around these themes, discusses how the first drafts of the UCC fit into the New Deal era of social and economic reform, specifically in the time between the invalidation of the National Industrial Recovery Act in 1935¹⁰ and Pearl Harbor. Examined in this context, the UCC was not merely a codification of forgotten

⁷ *Id.*

⁸ In 1937 Llewellyn suggested four “cures” to remove the common law from sales law: a despot, such as Napoleon; a “guildish organization, such as trade associations;” a “caring” code-drafter such as David Dudley Field; and “the creation of some agency which serves in private law as the cop serves in public law.” Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 380 (1936) [hereinafter *On Warranty II*]. “Such an agency not only can take initiative when otherwise none will, but can become a focus and target for experts’ discussion.” *Id.*

⁹ Llewellyn did not claim originality. In fact, Llewellyn credited many scholars for his ideas. Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 665 n.1 (1925) [hereinafter *Effect*]. Llewellyn admitted that “[t]he present paper makes little claim to originality in its details. Much of the synthesis, too, has been indicated by various writers from time to time. The author is particularly conscious of indebtedness to Sumner, Holmes, Veblen, Commons, and Pound; but the borrowings are legion and often unconscious.” *Id.* Llewellyn also credited “Sumner and Max Weber, . . . Corbin, Cook, U. Moore, Oliphant, L. Frank, John Dewey, . . . and the Boas School” as being influential. Karl N. Llewellyn, *Law and the Modern Mind*, 31 COLUM. L. REV. 82, 84 n.1 (1931) [hereinafter *Modern Mind*].

¹⁰ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); see also BERNARD BELLUSH, *THE FAILURE OF THE NRA 169-70* (1975) (discussing *Schechter* and the Supreme Court’s unanimous decision to void Title I of the National Industrial Recovery Act as an invalid delegation of legislative power to the President even though it only indirectly affected interstate commerce).

commercial law cases, but radical social and economic legislation that Llewellyn designed to cure the ills of the Depression. This Article concludes by explaining why the UCC's roots in the reformist movements of the New Deal era have not been addressed previously.

II. THE GOALS OF MODERNISM: EFFICIENCY, PRODUCTIVITY, ORDER

A. *Pragmatism and Optimism*

I have characterized the time under study as "between-the-wars." I do so advisedly. Llewellyn's Legal Realism represents the modernistic break with Progressivism, which began to wane with World War I. Although the relationship between the Progressives and the succeeding generation is complex, the difference can be summarized.

The Progressives were characterized by paternalism and belief in the expansion of the public sector; educated and efficient administrators were their ideal governors.¹¹ The experience of World War I damaged Progressivism, casting doubt on its optimism, its belief in progress, and its emphasis on moral values.¹² Earnestness was replaced by cynicism and social responsibility by alienation, while the Progressives' belief in virtuousness was seen as hypocrisy.¹³ The Realists and the New Dealers replaced morality with experimentation and empiricism and were skeptical about the moral revolution that the Progressives wanted.¹⁴

The Legal Realists were a part of the intellectuals' rejection of Victorian mores and ideas. As one scholar describes:

¹¹ See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, in PATTERNS OF AMERICAN LEGAL THOUGHT 99, 104 (1978).

¹² See *id.* at 116.

¹³ See *id.* at 117.

¹⁴ See *id.* Of course, as there was no absolute distinction between Progressive and New Deal thought, my division is overly general. Such a distinction, however, helps to highlight the unique aspects of the thought that influenced Llewellyn. See also RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* (1955) (discussing the period from 1890 to World War II as an age of reform with three main episodes, including the agrarian uprising and Populism of the 1890s, the Progressive movement which extended from 1900 to 1914, and the New Deal of the 1930s); OTIS L. GRAHAM, JR., *AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL* (1967) (discussing the origins of the New Deal and its continuity with American political history).

[d]uring the nineteenth century, a large majority of American academic and literary intellectuals served as protectors of Victorian mores and ideas. By the 1920's, however, most leading American intellectuals had announced their rebellion against virtually the same conventions and concepts. . . .

. . . Behind the shift lay an expansion of the parameters of late nineteenth-century literary realism and naturalism and of Victorian science and social science.¹⁵

Professor White characterizes "between-the-wars" intellectuals as being experimentalist, pragmatic and involved in the behavioral sciences.¹⁶ Furthermore, White claimed that these thinkers looked to "hardboiled" men of action as their fantasy heroes.¹⁷ Among such intelligensia, realism, the hardboiled hero (embodied by Humphery Bogart), and the New Deal all played a significant role.¹⁸

This world-view ended around the time of World War II. At that time, the Realists' moral relativism seemed too close to that of contemporary amoral totalitarian governments. The economic milieu of the Depression was being replaced by war-time prosperity and a new group of thinkers came to dominate the social sciences.¹⁹

Paradoxically, the mood of cynical resignation was accompanied by a pervasive excitement. The time was generally seen as a new age, full of new possibilities. A strong sentiment of optimism existed; if only certain specific things were changed, the United States would

¹⁵ STANLEY COBEN, *REBELLION AGAINST VICTORIANISM: THE IMPETUS FOR CULTURAL CHANGE IN 1920S AMERICA* 36 (1991).

¹⁶ G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, in *PATTERNS OF AMERICAN LEGAL THOUGHT* 136, 139 (1978).

¹⁷ *Id.*

¹⁸ *Id.* In discussing the characteristics of Realists, White writes:

In each of its major facets, Realism was a jurisprudence congenial to the America of the early 1930's. In the first years of the Great Depression, Americans found that one of the foundations of their society—the superiority of a loosely regulated capitalist system and its accompanying mythologies (the sanctity of private property, the virtue of self-help) had crumbled, and they had to find some way to rebuild in sounder form. In undertaking this task, their environment was one of economic deprivation; their mood, cynicism; their fantasy heroes, hardboiled men of action; their academic tools, the behavioral sciences; their philosophy of government, experimentalist and pragmatic. The demythologizing tendencies of the Realists, their commitment to decision-making by experiment, their preference for empiricism rather than abstraction, even their questioning of moral absolutes, were in harmony with the spirit of the first New Deal.

Id.

¹⁹ *Id.*

enter into a new era of power and prosperity. The economy was in shambles, and militarism, Fascism, and Nazism were growing stronger daily. Yet, there was an excitement, reflected in Llewellyn's writings, in modern architecture, in industrial design, and in the economic forecasts—an expectation that America was on the verge of a breakthrough. There was a sense that if only the dead hand of the past and its antiquated notions could be removed, then society would reach new heights. Nothing seemed beyond fixing; society could be understood, the economy could be put in order, and the law could be made subservient to human purposes. But first, outmoded ideas and practices had to be discarded.²⁰

This excitement about “the new” was pervasive. For example, in 1932, during the depths of the Depression, the Museum of Modern Art put on an exhibition of avant-garde architecture entitled “Modern Architecture—International Exhibition.”²¹ This rejection of the Beaux-Arts tradition signaled a turning point in American Architecture.²² The original memorandum proposing the exhibition spoke in terms parallel to Llewellyn's; it described the then current state of architecture to be “chaos.”²³ Interestingly, this exactly parallels the Legal Realist's ideology which found the state of the law to be in “chaos” as well.²⁴ In stripping away outmoded designs and practices and imposing order, Modernism was doing away with

²⁰ Llewellyn wrote of this Modernistic excitement:

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. . . .

The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words—placid, clearseeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble. So other fields of thought have spilled their waters in: the stress on behavior in the social sciences; their drive toward integration; the physicists' reexamination of final-seeming premises; the challenge of war and revolution. These stir. They stir the law. Interests of practice claim attention. Methods of work unfamiliar to lawyers make their way in, beside traditional techniques. Traditional techniques themselves are reexamined, checked against fact, stripped somewhat of confusion.

Realism, *supra* note 2, at 1222.

²¹ Brendan Gill, *The Sky Line: 1932*, THE NEW YORKER, Apr. 27, 1992, at 94.

²² *Id.*

²³ *Id.* at 96.

²⁴ Describing New York warranty law, Llewellyn stated: “What follows in New York is chaos.” *On Warranty II*, *supra* note 8, at 365. Other thinkers also saw the current scene as chaotic, for example, Hamilton's plan to reorganize the coal industry was to do away with the “chaos” of free competition. WALTER H. HAMILTON & HELEN R. WRIGHT, A WAY OF ORDER FOR BITUMINOUS COAL 24-29 (1928).

the chaos of a prior time. In architecture, as well as law, an integrated and rational mode of thought was needed.²⁵

Modernism was influential in the legal arena as well. For example, one of the Code's stated purposes was to "modernize the law governing commercial transactions."²⁶ Yet, what does it mean to "modernize?" Though it is difficult in retrospect to determine what the Modernistic program meant to those living in the thirties, it was a pervasive movement in law, architecture, art, and design. Modernism begins with the concept that the universe is unpredictable and that knowledge is evasive. From this concept follow two controlling beliefs: That "[t]o create [moral] values and garner whatever knowledge is available, individuals must repeatedly subject themselves . . . to the trials of experience,' and that '[a]bove all, [individuals] must not attempt to shield themselves behind illusions or gentility, as so many did during the nineteenth century."²⁷

Legal Realism "with its emphasis on empirical and functional methodologies and its thoroughgoing skepticism about moral or

²⁵ Phillip Johnson, who originally proposed the Museum of Modern Art's international exhibition of modern art, stated:

There exists today, both in America and abroad, a marked activity in architecture. Technical advances, new methods and fresh thoughts are solving contemporary building problems in a manner that can truly be called modern. A progressive group of architects, who have put aside traditional forms and are striking out along new and vigorous lines, are at work. In America Frank Lloyd Wright has for decades built modern houses. Raymond Hood is building the first really modern skyscrapers. Neutra's sanatorium in California, and Samuel Insull's great housing project in Chicago show the extent in the United States. . . . Modern architecture is most widely accepted in Germany. The city of Frankfurt has built tens of thousands of cheap houses. Mies van der Rohe, one of the leaders of the movement, has complete charge of the Berlin Building Exposition of 1931. The Bauhaus, a school founded by the architect Gropius, is identified with modern movements in the arts and crafts. . . . In Paris many mansions are modern, and Le Corbusier is now building a large Salvation Army base there. . . .

American architecture finds itself in a chaos of conflicting and very often unintelligent building. An introduction to an integrated and decidedly rational mode of building is sorely needed. The stimulation and direction which an exhibition of this type can give to contemporary architectural thought is incalculable.

Gill, *supra* note 21, at 96.

²⁶ U.C.C. § 1-102 (2)(a) (1994).

²⁷ G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489, 510 (1988) (reviewing JOSEPH P. LASH, *A NEW LOOK AT THE NEW DEAL* (1988) and BRUCE ALAN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988)) (quoting Daniel Singal, *Towards a Definition of American Modernism*, 39 AM. Q. 7, 15 (1987)).

epistemological absolutes, would seem to be a quintessentially modernist jurisprudence."²⁸

Modernism rejected tradition and stripped away excessive, outmoded, and unneeded practices and ideas. The Modernists' excitement was accompanied by hubris: law, anthropology, economics, and psychology could be used to understand and change the world. Llewellyn called for a realistic jurisprudence that would set goals, pass laws to reach these goals, and then monitor the success of the legislation.²⁹ This idealistic approach exemplifies the modernist belief that social sciences could be used to change society.³⁰ Works from this era are devoid of doubt, of any sense that society could not be totally understood, that the effects of human action could be unknown and hard to measure, or that there might have been intractable problems that were incurable.³¹

²⁸ *Id.* at 514. White concluded that

[T]he function of legal institutions, the composition of elite sectors of the legal profession, and ideas about law itself were being explained in new terms in the 1930's. Of course, that decade was also witnessing unprecedented economic and political instability, which not only helped create new roles for young lawyers associated with the New Deal but also contributed to the more general sense that the nation was encountering a revolutionary period in its history. There is little wonder that survivors recall their entry into the New Deal as "heady" and subsequent years as anticlimactic; little wonder that they perceived the cultural atmosphere as fresh, exciting, and transformative. They were entering a professional world whose meaning was being redefined to conform to the tenets of modernism, and were asked to put those tenets into practice. Having, in most cases, little previous professional experience, and not being identified with "outmoded" epistemological attitudes, they were "new" at a time when to be "old" was to be "demoralized."

Id. at 516-17 (quoting Milton Katz, *From Hoover to Roosevelt*, in *THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK* 121 (K. Louchheim ed., 1983)).

²⁹ Karl N. Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 *HARV. L. REV.* 431 (1930); see N.E.H. Hull, *Reconstructing The Origins of Realistic Jurisprudence: A Prequel to the Llewellyn - Pound Exchange Over Legal Realism*, 1989 *DUKE L.J.* 1302 (describing the origins of Llewellyn's theory of realistic jurisprudence).

Points One and Three of Llewellyn's "points of departure" for Realism were that law and society were in flux. He stated that, "[t]he conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve." *Realism*, *supra* note 2, at 1236.

³⁰ For example, Walton Hamilton prescribed a cure for the bituminous coal industry: a national corporation that would mine and sell all coal in the United States. In addition, both Jerome Frank's and Thurman Arnold's books explained that prosperity could be achieved just by abolishing outmoded practices. HAMILTON & WRIGHT, *supra* note 24. See JEROME FRANK, *SAVE AMERICA FIRST: HOW TO MAKE DEMOCRACY WORK* (2d ed. 1938); THURMOND W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

³¹ This hubris is exemplified by Underhill Moore, who, after being converted to Realism, renounced his studies of banking law and devoted the rest of his life to a study of how New

B. *Proposals for Reform*

Accompanying the excitement and hubris of Modernism was a program focused on the goals of efficiency, high-speed production, and the order and control necessary to achieve these goals. This program manifested itself in industrial design, the factory system of mass-production, industrial and commercial organization, and the economic prescriptions of such legal writers as Arnold, Frank, Hamilton, and Llewellyn. Its emblems were the streamlined trains, planes, and automobiles of the thirties.³² The cure for outmoded non-productive practices was mass-production. The goal was a smooth, efficient, and continuous regime that would flow without chaotic disruptions.

1. The Rejection of the Common Law

Modernism was to supplant the old and eliminate the disruptive, wasteful, and outmoded practices of earlier schools of thought. Existing common law rights and the common law system were seen as anachronistic and inconsistent with Modernism. Accordingly, the UCC was written largely to supplant the common law by clearing "statute and case law debris from the field so that commercial law could follow the natural flow of commerce."³³

Haven, Connecticut's parking regulations actually worked. Not having the statistical expertise necessary for his study, he spent the last part of his career observing illegal parking around Yale. Far from being able to observe the actual consequences of national legislation, it was impossible even to measure the impact of parking regulations in New Haven. John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195, 264-303 (1980).

³² Donald Bush recognized this emerging trend stating:

The desire to perform actions quickly, easily and without disruptions is a twentieth-century phenomenon evident in advanced-technology countries, especially the United States. It is manifest both in processes and in objects. One can cite such diverse examples as industrial time-motion studies, the superhighway system and the modern compact kitchen. "Streamlining," a term with its origins in science, has become commonplace in our language. It is synonymous with saving time and energy, and streamlined forms are emblematic of speed and efficiency.

DONALD J. BUSH, *THE STREAMLINED DECADE* 1 (1975).

³³ Richard Danzig, *A Comment on the Jurisprudence of The Uniform Commercial Code*, 27 *STAN. L. REV.* 621, 631 (1975). Such a new system was needed because:

Traditional rights of market ordering no longer captured the category of fundamental interests; they were both over- and under-inclusive. Rights to governmental assistance in the employment market, for example, were insufficiently protected by the common law, as were the interests of the poor, consumers of dangerous food and drugs, the elderly, traders on securities markets, and victims of unfair trade

The common law and the traditional constitutional system were not only inefficient, but were also incapable of protecting individuals.³⁴ Arguing for the extension of warranty protection to consumers of food and drink, Llewellyn described how the common law was inadequate to cure the problem of the sale of bad food: "It would seem obvious that if the risk of wholesomeness of canned or package foods is to be shifted from the consumer, it could most simply be spread, and even lessened, by throwing it on the house under whose brand the food is sold."³⁵ The common law has only negligence and warranty, with their problems of proof: "The judges have done what they could with concepts; but the concepts have no relation to a modern marketing system."³⁶ Thus, the "struggle to unhorse sales" arose in an attempt to get the "common" out of sales law.³⁷

Of course, Llewellyn did see some good in the common law tradition. He saw the common law as folk artifacts, working rules, that had proven their worth over time.³⁸ Llewellyn's characterization of the common law tradition as either part of the "grand" or "formal" style permitted him to rescue the good parts of that tradition and reject the bad as "formal." The legislator—social engineer's job was to take the good, practical folkways and reject the outmoded, whether they were the practices of merchants and

practices. At the same time, the common law system gave undue protection to rights of private property.

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 438 (1987).

³⁴ Many Modernists felt that

the original constitutional structure, like the common law, was closely associated with protection of the existing distribution of wealth and entitlements. In their view, the system of separated functions prevented the government from reacting flexibly and rapidly to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market.

Sunstein, *supra* note 33, at 424.

³⁵ *Effect*, *supra* note 9, at 667 n.8.

³⁶ *Id.*

³⁷ Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939) [hereinafter *Unhorse Sales*].

³⁸ Llewellyn described the common law as follows:

Pound has developed the idea of rules of law as "norms of conduct," as opposed to standards of judgment or rules of decision of disputes. Commons has married this concept with Sumner's "folkway," in his concept of *working rules*, which may be law-created, but more commonly are created by men's experiment, and only later taken over by the law. Such seems to have been the almost universal process in primitive law.

Effect, *supra* note 9, at 671 n.20 (citation omitted).

common law rules of sales (as in the UCC) or the tribal law of Native Americans.³⁹

2. Meeting the Challenge of Mass-Production

Sales law had to change to fit the new industrial-commercial regime of mass production. A stable, long-term relationship, based on selling quality mass-produced merchandise in volume with the observance of the group norms of decent merchants, was the way to prosperity. To achieve this, however, the Code had to shift the emphasis in sales law from the individual bargaining characteristic of the horse-and-buggy age, to standardized, flexible, group regulated, and "reasonable" contracts.

Long-range planning and the dealing necessary for a mass-production regime required a less rigid commercial law. In the Second Draft of the Proposed Sales Act, Llewellyn discussed a developing type of contract relationship "which deals with contract less as an arm's-length single deal than as a getting together on a type of joint-venture; an approach which greatly modifies the pattern of sharp, whole-hog risk-placing which underlies most of our legal doctrine of contract."⁴⁰ Long-term relationships were to be the norm. "Course of performance" was to be given legal effect to allow for binding adjustments to be made; otherwise, "a change of management, an extraneous personal friction, or even the resignation of a particular contact-man, can throw the machinery of adjustment completely out of gear."⁴¹ Consequently, UCC section 2-208 takes a more flexible approach to contracts between merchants.⁴²

In providing for flexibility, the UCC allowed merchants to cope with the rapidly changing, chaotic commercial conditions charac-

³⁹ See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

⁴⁰ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Report and Second Draft: The Revised Uniform Sales Act* (1941), reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS 269, 475 (Elizabeth S. Kelly ed., 1984) [hereinafter *R.U.S.A.*].

⁴¹ *Id.* at 476.

⁴² U.C.C. § 2-208 (1994). This section states:

Where the contract for sale 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.

Id. See U.C.C. §§ 2-209, 2-613, 2-614, 2-615 (1994) (illustrating the increased flexibility the U.C.C. brings to commercial law).

teristic of the Depression. This was necessary to preserve business relationships so that commerce would not totally break down.

To achieve the productivity possible with mass-production, the new age had to reject the old. For example, Walton Hamilton, who had a significant influence on Llewellyn,⁴³ saw the new coal-mining machines and the introduction of a factory system of industrial organization as creating a new, efficient system of coal production. The old craft-system was replaced with a single process which linked every operation, "from face to tipple, into a single continuous process."⁴⁴

The UCC's expanded warranty of merchantability was adopted to facilitate production and prosperity. Llewellyn saw warranties as "good business for the seller."⁴⁵ To him, not having a warranty is "primitive-mercantile," depending on individual bargaining which just slows down the stream of commerce.⁴⁶ Turnover produced profits, and warranties facilitated this turnover.⁴⁷

Llewellyn saw the purpose of contract law as achieving the efficacy and efficiency of high-productive capacity and mass-production. In *What Price Contract*, he identified the "most vital single aspect of contract law" as working against the contract dodger, who interferes with the free flow of commerce.⁴⁸

Llewellyn wanted to substitute a standard of "mercantile performance" for that of the "perfect tender rule" of commercial law, which gives the buyer the right to reject if the goods "fail in any respect to

⁴³ See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 93 (1973).

⁴⁴ HAMILTON & WRIGHT, *supra* note 24.

⁴⁵ In discussing warranties, Llewellyn stated:

The other pole is Utopia: value to the buyer. But, more or less approaching it, there exists another view of the market: repeat orders are what a seller needs; to stand behind words, and even behind wares-without-words, is good business *for the seller*—and is therefore good policy for a court to encourage. Transactions look to future delivery; even where they do not, they look to standard quality of goods produced in mass and grade, and sold by name, brand, or description. Distribution of goods is indirect, almost as of course; a buyer has only his dealer to trust to; it is a dealer's business to know the goods he sells. As between dealers (even as between retail-dealer and consumers), standing relations mean goodwill; and goodwill is what makes turnover; and turnover is what makes the balance-sheet wax fat. Confidence, not trickery, is the basis of prosperity.

Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 721 (1936) [hereinafter *On Warranty I*].

⁴⁶ *Id.* at 723.

⁴⁷ *Id.* at 721.

⁴⁸ Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704, 725 n.47 (1931) [hereinafter *Contract*].

conform to the contract.”⁴⁹ Llewellyn saw the perfect tender rule as producing “a series of cases which do plain mercantile injustice by permitting, on a falling market, or after buyer’s change of mind, rejection of a delivery which in all mercantile decency could be expected as of course to fill the buyer’s expectations.”⁵⁰ Thus, Llewellyn felt the perfect tender rule hindered the streamlined flow of commerce:

Until our economy shifts its entire base, deals between merchants will be first of all *deals*, looking toward movement of goods and toward accounts in due course to be taken care of. Adjustments of mercantile reasonableness will be proper to be made where needed, but rejection or rescission for non-troubling defects will be bad policy.

Into such a picture, on the mercantile side, the Sales Act requirement of exact compliance, coupled not only with rejection but with rescission, cuts like an Arctic blast. It is an invitation to throw back the risk of any dropping market upon a seller who has performed as a reasonable seller should perform.⁵¹

Llewellyn also saw the concept of title in sales law as a “wall” that inhibited progress.⁵² Llewellyn was able to remove the “wall” of title from commercial law.⁵³

⁴⁹ U.C.C. § 2-601 (1994).

⁵⁰ *R.U.S.A.*, *supra* note 40, at 382.

⁵¹ *On Warranty II*, *supra* note 8, at 389. Llewellyn did not get his way and the Code retains the perfect tender rule for non-installment contracts. See U.C.C. § 2-601 (1994). However, section 2-612 adopts a “substantial impairment” test and, as White and Summers point out, the Code restricts section 2-601’s perfect tender rule in many respects. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 357 (3d. ed. 1988). They concluded that “the law would be little changed if 2-601 gave the right to reject only upon ‘substantial’ non-conformity.” *Id.* Thus, the result Llewellyn desired was nonetheless achieved.

⁵² In an article addressing these barriers, Llewellyn stated: “The mercantile rules of law—and they are solid—which I have been describing make their way through this like ivy through a wall, live, growing, spreading, finding cranny after cranny. But the wall is still there, it is still in the way.” Karl N. Llewellyn, *Across Sales on Horseback*, 52 *HARV. L. REV.* 725, 736 (1939) [hereinafter *Horseback*]. See Karl N. Llewellyn, *Through Title to Contract and Beyond*, 15 *N.Y.U. L. REV.* 159 (1938) (questioning the use of title in the law of sales).

⁵³ In discussing Llewellyn’s effort, Ingrid Michelson Hillinger wrote:

Llewellyn had jettisoned title as a legal doctrine to allocate risk of loss. In its stead Llewellyn had stated several rules based on different methods of delivery. Llewellyn believed the pre-Code law regarding risk of loss had created uncertainty because everyone knew the person who held title assumed the risk but no one knew who had title. . . . Llewellyn believed that reliance on a monolithic concept to resolve disputes involving different considerations “works out, no less, either to obfuscate statement of results of rather reasonable decisions, or to misguide decision.”

As for bargaining itself, individual dickering had to be replaced with standardized contracts so that contracts could mass-produce agreements efficiently and cheaply.⁵⁴ Thus, the UCC is organized to facilitate the flow of commerce by removing the impediments to mass production and mass distribution through the use of flexible contracting rules.⁵⁵

III. PRAGMATISM, REALISM, AND VALUES

A. *Facts and Pragmatism*

Modernistic thought placed a great emphasis on facts. It was thought that focusing on "reality" would lead to clear thinking, prosperity, and even virility. Legal Realism, as its name implies, was (and is) concerned with facts and is characterized by pragmatism. Grant Gilmore described the turning of Realists to factual social science: "It appeared, however, that the social scientists, particularly the sociologists, had made great advances in techniques of empirical research. If the law professors adopted those techniques, they could marshal the facts on which enlightened decision depends."⁵⁶

The valuing of empiricism to the extent of fact-worship was pervasive in the twenties and thirties. The term realism, with its qualifier "legal," indicates that it is but a subspecies of "Realism" in literature (e.g., Zola, Drieser, Hemingway) and pragmatic social science, or even of a practical, non-idealistic, hard-boiled attitude

Ingrid M. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1165-66 (1985) (quoting Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159, 171 (1938)).

⁵⁴ In discussing standardized contracts, Llewellyn stated,

[s]tandardized contracts in and of themselves partake of the general nature of machine-production. They materially ease and cheapen selling and distribution. They are easy to make, file, check and fill. To a regime of fungible goods is added one of fungible transactions—fungible not merely by virtue of simplicity (the over-the-counter sale of a loaf of bread) but despite complexity. Dealings with fungible transactions are cheaper, easier. One interpretation of a doubtful point in court or out gives clear light on a thousand further transactions. Finally, from the angle of the individual enterprise, they make the experience and planning power of the high executive available to cheaper help; and available forthwith, without waiting through a painful training period.

Contract, *supra* note 48, at 731.

⁵⁵ See U.C.C. art. 2, pt. 2 (1994).

⁵⁶ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 89 (1977).

towards life. Only looking at facts closely could save us from chaos.⁵⁷ There was an assumption that "facts" somehow spoke for themselves; that facts unrelated to a system of values can give us the answer. This pragmatism produced the UCC with rules dependent on fact-specific determinations.

Llewellyn's first drafts of the Code provided for a jury composed of merchants to make these determinations.⁵⁸ Though the merchant jury was rejected, the fact finder must still make many factual determinations under the present Article 2. For example, UCC section 2-508(2) states: "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender."⁵⁹ The application of this section depends on five factual issues: (1) is the rejected tender "non-conforming;" (2) did the seller have reasonable grounds to believe it would be acceptable; (3) did the seller "reasonably notify" the buyer; (4) did the seller substitute a "conforming tender;" and (5) did he do so in "reasonable time?"⁶⁰ Along with the fact-based substantive law, the thirties saw the creation of modern discovery, which turned the litigation process into one that concentrated on factual investigation rather than formal pleading.⁶¹

Outside of the law, social thought in the thirties was characterized by a rejection of formalism and a concentration on empiricism.⁶² One commentator characterizes the thinking of Dewey, Veblen and

⁵⁷ Llewellyn stated that, "[o]verwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies." *Contract, supra* note 48, at 751.

⁵⁸ *R.U.S.A., supra* note 40, at 535.

⁵⁹ U.C.C. § 2-508(2) (1994).

⁶⁰ See WHITE & SUMMERS, *supra* note 51, at 425-33 (discussing U.C.C. § 2-508 and its implications); see also 1 THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE & LAW DIGEST §§ 2-413 to 2-416 (2d ed. 1991) (discussing the "Time" Problem and the Right to, Adequacy, and Refusal of Cure, presented by U.C.C. § 2-508(2)).

⁶¹ The introduction of extensive fact investigation has caused many problems and has become the subject of an entire literature. One commentator stated:

The broad and flexible provisions in Rules 26 through 37 for discovery were the most significant innovation in civil procedure when the rules were adopted in 1938. These rules rested on a philosophy that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.

CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 540 (4th ed. 1983) (citing 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (1st ed. 1971)).

⁶² MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 12 (1949).

Holmes, three major influences on Llewellyn, as the revolt against the formalistic and idealistic thinking of an earlier era.⁶³ Dewey and Veblen's empiricism, for example, contrasted with John Stuart Mill's *a priori* reasoning from first principles of human behavior.⁶⁴ The institutional economics of Veblen and Commons was based on an actual observation of how groups worked.⁶⁵ Likewise, Commons sought to identify the actual "working rules" that governed the behavior of organizations and based his theory of reasonable value on actual transactions.⁶⁶ Both Veblen and Commons rejected the classical economists' positing of *a priori* assumptions such as the wealth-maximizing individual.⁶⁷

New Deal agencies were necessary to perform the factual investigations required for effective empirical decisionmaking. Such investigations enabled fact-gathering agencies to base their decisions on reality, not opinion. Furthermore, their reality-based administration was practical, as opposed to an administration based on the presumptions of classical economics.⁶⁸

Other disciplines also reflected this empiricism. Professor Robinson, a psychology professor at Yale University, complained of

⁶³ *Id.* at 15-27.

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 7. One scholar explained:

Institutionalist economics, which flourished from the 1910s through the New Deal, drew heavily from both the British classical tradition and the German Historical School, as well as from the emerging theory of cultural evolution by natural selection. Institutionalism rejected the classical view that a few simple concepts could characterize all individual and institutional behavior. In particular, institutionalism flatly rejected the rationalistic psychology of self-interest that dominated both classical and neoclassical economic theory. The institutionalists believed that ideology, technology, history, habit, previous investment, and lack of information or difficulty in communication drive both individual human motivation and institutional structure.

Herbert Hovenkamp, *The First Great Law & Economic Movement*, 42 STAN. L. REV. 993, 1014 (1990) (citations omitted).

⁶⁶ See JOHN R. COMMONS, *THE ECONOMICS OF COLLECTIVE ACTION* 9-18 (1950).

⁶⁷ See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986) (describing the relation of the Institutionalists and the Legal Realists). Professor Kalman notes the close connection between "Institutionalism" and Legal Realism, stating that:

Veblen's institutionalism greatly influenced the realists: as one said, Veblen's indictment of classical economists' search for "higher or definitive syntheses and generalizations" and of classical economic theory's avoidance of "economic life processes" in its development of "a body of logically consistent propositions concerning the normal relations of things—a system of *economic taxonomy*" might be "applied word for word to classical jurisprudence, if we merely substitute for the terms 'economic' and 'economist' the terms 'legal' and 'jurist.'"

Id. at 19.

⁶⁸ COMMONS, *supra* note 66, at 226-27, 234-35.

the law's ignorance of fact in favor of out-moded ideals.⁶⁹ He believed only intellectual honesty would avoid the problems caused by the triumph of Modernism.⁷⁰ Felix Cohen wrote a philosophic counterpart to Robinson's manifesto.⁷¹ He used the philosophy of logical positivism to critique law, finding formalistic legal concepts to be "nonsense."⁷² As a Realist, he defined legal concepts on the basis of the actual behavior of the courts.⁷³ He believed the question, "is there a contract?," could be broken up into various factors which, in turn, referred to the actual behavior of the courts.⁷⁴ These factors included: what courts are likely to conclude about a given transaction; what elements will be viewed as relevant and important; how the courts have dealt with similar transactions; and what factors will argue for *stare decisis* and for change in the law.⁷⁵

This approach parallels that of the UCC. In general, UCC sections do not lay down formalistic rules;⁷⁶ instead, they identify the relevant and important elements that point the way to a solution. For example, UCC section 2-602, which governs rejections, states: "Rejection of goods must be within a reasonable time after

⁶⁹ See Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L.J. 235 (1934).

⁷⁰ *Id.* Robinson's article operates as a modernist manifesto, speaking of the social and natural control gained by science in contrast to outmoded philosophy.

Today men watch with apprehension their own increasing mastery over physical nature. They have the uneasy feeling that they are producing the machines that must sooner or later be used by themselves to destroy themselves. They grow morally earnest about the situation and write articles for the magazines. But too rarely do they bring to bear upon this great social problem that intellectual integrity, that frankness, that cool perspective of nature which has built the machines of war and which is man's only hope in the control of himself. Solemn men who go about the world preaching that there is something more to be relied upon than facts, that there is something more necessary to human life than intellectual honesty, are doing what they can to prevent the world from catching up with science.

Id. at 246-47.

⁷¹ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); see Joel Cornwell, *From Hedonism to Human Rights: Felix Cohen's Alternatives to Nihilism*, 68 TEMP. L. REV. 197 (1995).

⁷² Cohen, *supra* note 71, at 812 ("Valuable as is the language of transcendental nonsense for many practical legal purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena.")

⁷³ *Id.* at 839.

⁷⁴ *Id.*

⁷⁵ *Id.* Cf. KARL N. LEWELLYN, *THE BRAMBLE BUSH* 12 (1930) ("What these officials do about disputes is, to my mind, the law itself.")

⁷⁶ For exceptions to this general proposition see U.C.C. § 2-201 (1994) (the Statute of Frauds); U.C.C. § 2-321 (1994) (the definition of a C.I.F. contract).

their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."⁷⁷ The factors to be considered are the reasonableness of the time of rejection, measured from the delivery or tender, and the reasonableness of the notification.⁷⁸

B. Pragmatism and the Rejection of Idealism

Along with the emphasis on facts was a rejection of ideals, of the "ought." There was a pervasive desire to at least separate questions of value from questions of fact. One commentator stated that the Realists "were skeptical about the place of moral and ethical 'oughts' in the legal process . . . [or] . . . eschewed absolute moral values altogether."⁷⁹ An earlier generation's mixing of facts and values was thought to have produced confusion and chaos. To Llewellyn, law traditionally had ignored observation of facts:

[T]he first observation that one makes . . . is that the traditional approach to law has not been primarily concerned with a science of observation at all. Its center has been either an art (how to *get* disputes settled, how to *get* conduct channeled) or else a philosophy (what *ought* to be done with disputes, what *ought* to be done about channeling conduct)—or else an indiscriminate stew of both together. In this, law calls up memories of the beginnings of economics, political science, sociology.⁸⁰

Llewellyn's wish to separate facts and values and to base action on actual experience was part of a pervasive attitude in the twenties and thirties. One scholar characterized Thurman Arnold, one of the more radical Legal Realists, as displaying "ingrained anti-intellectualism."⁸¹ At the least, the Legal Realists argued for the "te-

⁷⁷ U.C.C. § 2-602 (1994).

⁷⁸ *Id.*

⁷⁹ WHITE, *supra* note 16, at 137.

⁸⁰ KARL N. LLEWELLYN, *Legal Tradition and Social Science Method—A Realists Critique*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 77, 81 (1962).

⁸¹ Neil Duxbury, *Some Radicalism about Realism? Thurman Arnold and The Politics of Modern Jurisprudence*, 10 OXFORD J. OF LEGAL STUD. 11, 30 (1990).

Arnold, throughout his work, makes a crude distinction between the philosopher and the technician. For him, the philosopher's pursuit is essentially contemplative in nature. It is not in any sense practical. Hence, the existence of philosophy is never considered to be anything more than futile. . . .

In contrast to the philosopher, the technician is the true agent of social construction, fully aware "that political government is necessarily a dramatic spectacle, that games are really important in the growth and development of institutions, and that these games can be controlled."

mporary divorce of Is and Ought".⁸² One needed values but had to keep objective legal science and a critical theory of values separate for clarity.

Perhaps some of this pragmatism comes from the scientific, realistic approach of anthropology which seeks to understand each culture on its own terms.⁸³ Franz Boas, who was the Chair of the Department of Anthropology while Llewellyn was at Columbia Law School, warned against the nationalistic attitude stating:

its social standards are considered as more fundamental than those that are general and human, or rather that the members of each nation like to assume that their ideals are or should be the true ideals of mankind. The late President Wilson once gave expression to this misconception when he said that, if we,—Americans,—hold ideals for ourselves, we should also hold them for others, referring in that case particularly to Mexico.⁸⁴

The era's pragmatic stance led to a hard-boiled rejection of woolly-headed intellectualism, particularly the type found in universities. One of Llewellyn's unpublished papers reveals his views.⁸⁵ Llewellyn believed "[i]ntellectualism and culture generally, as at present understood, are built on a foundation of: you work, you produce, you pay, while I loaf, study, cultivate myself."⁸⁶ This "leisure from production" was obtained through the private endowment and public support of institutions and students and private income from capital. However, Llewellyn believed that all three of these foundations were crumbling. Private income from capital was decreasing due to labor participation in profits and government taxation of income and inheritances.⁸⁷ The demand for practicality and democracy and the break-up of cultural tradition threatened public intellectual institutions. Privately endowed institutions faced competition from public universities, an increased unwillingness of donors to give (due

Id. at 31 (quoting THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 343-44 (1937)).

⁸² *Realism*, *supra* note 2, at 1236.

⁸³ FRANZ BOAS, *ANTHROPOLOGY AND MODERN LIFE* 15-16 (1928).

⁸⁴ *Id.* at 191.

⁸⁵ Karl Llewellyn, *Our Present Intellectualism* (unpublished manuscript, on file with the *Albany Law Review*) [hereinafter *Intellectualism*]. According to Llewellyn, "[o]ur present intellectualism is on the road to annihilation and will reach its goal. This fact is rather pleasant than otherwise." *Id.* at 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

to the decrease of private capital), and the social disfavor that accompanied the accumulation of funds.⁸⁸

However, Llewellyn felt the decline of intellectualism was “a happy thing.”⁸⁹ He found living and helping others to live to be two things in life which were worthwhile, while “intellectualism tends away from both doing and sympathy.”⁹⁰ Llewellyn castigated the intellectual, who he described as a pompous, conceited wimp and twit.⁹¹ Llewellyn’s Code, therefore, was fact-based, hard-boiled and did not rely on intellectual musings.⁹²

IV. THE INFLUENCE OF CONTEMPORARY SOCIAL SCIENCE

Llewellyn saw the social sciences as spilling into the stagnant canal of the law.⁹³ In fact, he stated that the greatest influences on his thought were social scientists, acknowledging his debt to “Corbin, Cook, U. Moore, Oliphant, L. Frank, John Dewey, J.R. Commons and the Boas School.”⁹⁴ Of these, Commons was an economist; Dewey, a psychologist; Weber, a sociologist; and Boas, an anthropologist. Moreover, Llewellyn practiced anthropology, writing with anthropologist Adamson Hoebel about the legal customs of the Cheyenne.⁹⁵ Llewellyn professed that law was a “means to social

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* Llewellyn divided thinking into “action directive” and “speculative or cultural.” He defined these terms as follows:

Action Directive thinking is an orderly projection of the imagination into the future, with strict adherence to the facts of experience. It is checked up constantly, and therefore useful. It makes action produce more results and more enjoyment for self and others.

But speculative or cultural thinking is bad clear thru. It cannot be checked up. There is no certainty about it. Each forward step in it is liable to geometrically progressive error. Hence it arrives nowhere. Nor does it matter if it did: life under one philosophy is essentially the same as that under another.

Id. at 7.

⁹¹ *Id.* at 8. Llewellyn pejoratively describes the effects of intellectualism. “Your physique and mentality turn soft & gooy [sic] like a spotted apple.” The intellectual becomes conceited, “loses moral backbone . . . his very existence depends on leisure,” and is “oppressive.” *Id.*

⁹² See U.C.C. § 2-101 cmt. (1994) (“The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.”).

⁹³ *Realism*, *supra* note 2, at 1222.

⁹⁴ *Modern Mind*, *supra* note 9, at 84 n.1 (1931). For a general description of the realistic-modernistic milieu in New York that influenced Llewellyn, who taught at Columbia, see ANN DOUGLAS, TERRIBLE HONESTY (1995).

⁹⁵ See LLEWELLYN & HOEBEL, *supra* note 39.

ends" needing "constantly to be examined for its purpose, and for its effect" to see "how far it fits the society it purports to serve."⁹⁶

Unlike the present day neo-classical economists, the "between-the-wars" social scientists used groups rather than individuals as their unit of social analysis. Institutional economists, such as Veblen and Commons, saw economics in terms of institutional, not individual interaction. The individual-based economics of Adam Smith was seen as appropriate only for the non-industrial age.⁹⁷ The question then became "how do groups work" which gave rise to the concept of "working rules," the rules by which institutions actually function. Llewellyn adopted this concept as the key to Legal Realism: a study of how the law *actually* functioned. Llewellyn's Code, which takes group practices and norms as its central principle, fits exactly within this ideology.

The following chart describes three ways of looking at society.

Unit	Theory of Political Economy	Era
The Nation State	Progressivism	The Progressive Era
Groups	Collectivism	New Deal, Between-the-Wars
Individuals	Neo-classical economics, the "Rights" society	The Present

⁹⁶ *Realism*, *supra* note 2, at 1236 (1931). Llewellyn also complained that social science ignored the law:

I have also been restless at the curious blankness with which men from other social disciplines face any legal matter or any talk of law. Of all the social disciplines it stands most isolated. My own guess is that is because the law-men mainly think doctrine and talk a language which runs in terms largely of correct doctrine—which is to exclude communication and contact with any premises except the premises of correct doctrine. But underneath all doctrines there lie problems, and those problems seem to me a proper study for all men of the social disciplines, and an illuminating one. They extend through all group-living, in any type of group. They are a meeting-ground on which *exchange* of ideas and knowledge is possible between the men of law and the men of the social disciplines.

Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1357 (1940).

⁹⁷ See WHITE, *supra* note 62, at 187 (noting that "Adam Smith, . . . according to Veblen, formulated the Eighteenth-Century credo just as the Industrial Revolution was making it obsolete").

Note that the “between-the-wars” era focused on the groups within a society, how they worked, and their rules.⁹⁸ This group focus contrasted with the Progressives who exalted state power over groups and individuals. Finally, the individualistic era sought to protect individuals’ social, political, and economic rights from state and group power. Article Two of the UCC embodies “institutionalism” by making the group behavior of merchants (trade usage) its central normative and interpretative concept.⁹⁹

A. *Institutionalism*

1. Working Groups as Institutions

To Llewellyn, “groups” were “working groups,” not interest groups. Groups are now defined by their social goals (environmentalists); their social, ethnic, or sexual characteristics (African-Americans, gays and lesbians); and even by their suffering from an affliction (Adult Children of Alcoholics, AIDS sufferers). Llewellyn, along with other “between-the-wars” thinkers, thought of groups more as those working together on a common task: farmers, labor unionists, and bankers. His thought paralleled the institutional economists, who looked at the producing groups in the economy, and the anthropologists, who studied tribes who were organized to get through life’s tasks.

Llewellyn saw the “working rules” as created by those inside the working groups: those outside were the audience, passively consuming the products. The idea of consumer/community groups was foreign to his thinking. The concept of the modern interest group was not an important factor in “between-the-wars” thought. Veblen, Commons, Boas, and Llewellyn were interested in groups of factory workers, craftsmen, tribes, and merchants. All can be characterized as groups working at something: either producing or, in the case of the Cheyenne, surviving and living. The consumer group is a product of our consumption-driven, individualistic society. It is hard to reconceptualize the Code to include it.

⁹⁸ It is difficult to find a label which characterizes this mind-set. “Groupism” is unsightly while “collectivism” conjures up visions of Soviet tractor factories. I have settled on “institutionalism,” a term that John Commons himself used to describe his own economics. See JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS: VEULEN, COMMONS AND MITCHELL RECONSIDERED* (1963) (explaining the theory of institutionalism).

⁹⁹ See U.C.C. § 1-205 (1994).

2. Rejection of Individualism

"Working rules"¹⁰⁰ was a term coined by the economist John Commons.¹⁰¹ His original use of the term came from his experience in the printing trade, where it was used to refer to the rules that actually governed the work and the workers on the shop floor.¹⁰² Commons gives the following definition of "working rules:"

Working rules are the way in which the management or administration of collective action guides the acts of subordinate individuals. There is a hierarchy of collective action, and history reveals how it came about. If economic science had started with corporations and unions instead of individuals, it might have started with the rules of action which apportion to each of the associated individuals the kind and amount of work which each should do, the kind and limits of transactions upon which each should enter, and the shares of the joint product to be apportioned to each. These apportionments are made by the working rules of the concern.¹⁰³

The day of the individual had passed; the Modern Age was the age of men acting in groups. It was the age of the "masses:" mass production, mass armies, mass demonstrations. In 1906, Pound contrasted the individualistic spirit of the common law with the group remedies of legislation¹⁰⁴ and argued that the common law could not cope with the problems of modern civilization.¹⁰⁵ According to Pound, the common law resisted the reforms of the legislation, using "common law guaranties of individual rights" that "stand continually between the people, or large classes of the people, and the legislation they desire."¹⁰⁶ Pound articulated what seemed

¹⁰⁰ Llewellyn contrasted the "working rules" of an organization, the actual rules that the organization followed, with the "paper rules," the rules that the organization purported to follow but that existed only on paper. "Paper rules' are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say 'the law' is." Karl N. Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 HARV. L. REV. 431, 448 (1930).

¹⁰¹ COMMONS, *supra* note 66, at 27.

¹⁰² *Id.* at 26-27.

¹⁰³ *Id.* at 125-26.

¹⁰⁴ THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337-53 (A. Leo Levin & Russell R. Wheeler eds., 1979).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 344.

to him to be an inversion of the “rights society”—it was the *society* that needed protection from the individual.¹⁰⁷

In his review of John Commons' *Legal Foundations of Capitalism*, Llewellyn considered the economic concept of “marginalism” and applied it to social and legal problems. The following excerpt illustrates the difficulty in appreciating his arguments which have implications that are so contrary to our society's individualistic, “rights” oriented way of thinking:

Finally, when one attacks the effect of the law in shaping conduct, in the profusion of cases where established morals or habits of self-discipline seem to make law unnecessary, one is led to hope that the marginal concepts may point the road to understanding. The rules of law against assault come into active play only at the individual margin when passion crosses the threshold of self-control, and come into play socially only with that marginal individual who falls below the standard of self-control commonly developed by early education. For it seems clear that, if the marginal individual were not restrained at least in the bulk of cases, either in self-defense or by imitation, laxity in the matter would spread through the group; such is the process of cut-throat competition. So, too, with the enforcement of contract obligation; and this regardless of delays, costs, and occasional acquiescence in the breach of contracts.¹⁰⁸

Llewellyn saw the individual as belonging at the margins, not as a member of a minority group or as a non-conformist whose rights deserve the protection of the law, but as a criminal. Thus, the merchant who did not conform to group standards was viewed as a cut-throat competitor, not as an entrepreneur. Llewellyn saw the group-norms as the “good”. Accordingly, the goal of both criminal and contract law was to enforce these norms, not to protect the right of the individual against their enforcement. The problem was perceived to be “laxity,” not conformism.

By the thirties, the common law and the prior age's emphasis on individualism were seen as exemplifying cultural lag, where the expressed ideals of the society lag behind a society's actual practices and problems. The Left, however, appreciated that the Modern Age belonged to the masses. Valentine Cunningham's description of the British literary scene applied to America, as well:

¹⁰⁷ *Id.* at 344.

¹⁰⁸ *Effect, supra* note 9, at 682.

Man had become Mass-man, *Massenmensch*, 'The Man' (to use Edgar Allan Poe's title) 'Of the Crowd'. Inescapably, the post-First-War sensibility had to grasp that it was in an age of mass-production, mass-demonstrations, mass-meetings, mass sporting occasions, mass-communications, mass-armies, a time when things would be done, in, and to, and for crowds.¹⁰⁹

In an unpublished manuscript, Llewellyn rejected individualism, and placed himself with the reforming Modernists:

If one had to select the major problem, outside of foreign relations, for our nation of to-day [sic], I do not readily see how one could avoid choosing the problem of how to reconcile *the ideology and practices* of the older *American individualism, and their values*, with the needs of an economy which has for a century been driving along into *industrial terms, corporate terms, national terms*—but driving and readjusting always primarily in terms primarily [sic] of *enterpriser's* interest, modified chiefly by occasional political revolts of larger voting classes who conceived themselves to have been squeezed.¹¹⁰

The rejection of individualism is apparent in the UCC's adoption of group norms as a principle of regulation and interpretation of contract terms. Group norms regulate contracts by setting the standard of "good faith;"¹¹¹ group practices define contract terms through the introduction of usage of trade "to explain or supplement" the terms of a contract,¹¹² and trade practices define the expected quality of the goods.¹¹³ Under the UCC, the individual merchant is always subject to the norms and usages of his trade group.¹¹⁴

¹⁰⁹ VALENTINE CUNNINGHAM, *BRITISH WRITERS OF THE THIRTIES* 266 (1988). The formalists, however, including Wyndham Lewis, D.H. Lawrence, T.S. Eliot, and F.R. Leavis disliked the masses; they "sustain[ed] a horrified rhetoric against mass-education, mass-production, mass-meetings, mass-identity, mass-civilization." *Id.* at 277 (describing T. S. Eliot's reaction to the collective). See F. R. LEAVIS, *MASS CIVILIZATION AND MINORITY CULTURE* (1930) (theorizing that in an era of mass-culture, the minority of people that appreciated culture must work harder to sustain it).

¹¹⁰ Karl N. Llewellyn, *Careers* 1 (unpublished manuscript, on file with the *Albany Law Review*).

¹¹¹ U.C.C. § 2-103(b) (1994).

¹¹² U.C.C. §§ 2-103(b), 1-205(3) (1994).

¹¹³ U.C.C. § 2-314 (1994).

¹¹⁴ *Id.*

3. The Necessity of Group Empowerment

New Deal thinkers sought to empower the groups within the society to control their own destiny. Louis Jaffe, like Pound, believed law's central problem was its ignorance of the groups actually in society.¹¹⁵ The law needed to deal with groups, controlling them through social engineering: "We require to study the behavior of the subject-matter of control, men in groups; and to invent such machinery as, with least waste, least cost, and least unwanted by-product, will give most nearly the result desired."¹¹⁶ Llewellyn believed the legal system should just lay out the field within which smaller units could operate.¹¹⁷

In *The Cheyenne Way*, Llewellyn focused on a "'contrast' between primitive law and modern: that of 'group responsibility.'"¹¹⁸ He stated that the individual does loom large in modern law. Yet, he viewed the modern law as having "been moving uninterruptedly into

¹¹⁵ See Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 201 (1937) ("We are increasingly aware of the fact that the most significant and powerful components of the social structure are economic groups, competing and complementary in varying degrees. In the official political philosophies and in the explicit provisions of our constitutions, these groups receive no recognition as political entities.").

¹¹⁶ *Effect*, *supra* note 9, at 666.

¹¹⁷ *Id.* at 669 ("But the legal feature of this age remains, not the persistence among all men of an interest in general security, but the emergence of diverse and specialized groups with a need for specialized control."). Llewellyn was surprised at the diverse range of interests that recognized this need:

It is curious to observe the most divergent groups in harmony on this point. Corporate interests, cooperatives, soviets, guild socialists, and men in feudal conditions, differ on whether to base the lesser unit on territory or other industrial function, or capital contribution; on whether control should be according to birth, ownership, membership, or service; on whether the rewards should be divided according to military power, ownership, extent of member's use of the service, the needs of the workers, or their day-to-day service contribution. They differ as to whether the state or national supervising control should be apportioned by territory or function, etc. But they all concur in the common platform that the central supervising body should, outside of one central field common to all men as men and to the particular system as a whole, do no more than lay out the field within which each smaller unit operates and state the rules of interaction among units; and, especially, that to the local or industrial or other functional unit should be left autonomous control of its own activity within those limits. The problem of achieving adequate small-unit rule-making is therefore neither new nor American, but only peculiarly acute in view of the character of the legal institutions which the present generation in this country happen to have inherited. In Europe, for instance, the existence of specialized commercial courts lightens the burden materially.

Id. at 669 n.13.

¹¹⁸ LLEWELLYN & HOEBEL, *supra* note 39, at 50.

expansion of group relations and of group responsibility: the party, the corporation, the union, the cooperative, workmen's compensation, and *respondeat superior*.¹¹⁹ Llewellyn expressed this as follows: "the dominant picture is coming more and more to stress groups, other-than-kin groups, as the legal units."¹²⁰

Under this theory, groups had to be empowered to police their non-conforming members, whose deviant behavior would prevent the arrival of order, efficiency, and productivity. Businessmen, through the trade association movement, also sought to exert group control on the non-conforming individual entrepreneur. The trade associations and cartels served as the primary private mechanisms to do this, yet lacked the power to police individual members.¹²¹ As such, non-conforming entrepreneurs could undercut the association's established prices. Thus, the trend both among academics and business people was to see society as a collection of groups, not of individuals.¹²² Groups had to police the individuals and Llewellyn's empowerment of groups to determine "good faith" and "usages of trade," as a part of Article 2's coverage of the sale of goods, was part of this movement.

B. *Anthropology and Realism*

Of all fields of contemporary social thought, anthropology dominated Llewellyn's thinking. A review of his writings from *Effect of Legal Institutions Upon Economics* of 1925¹²³ to the *Common Law Tradition* of 1960¹²⁴ reveals his anthropological approach, using the tribe or the group as his unit of analysis. His Legal

¹¹⁹ *Id.*

¹²⁰ *Id.* at 51.

¹²¹ Note that although the Commerce Department, in the twenties, dispersed information on competitors and promulgated codes of competition, "industry enjoyed to all intents and purposes a moratorium from the Sherman Act." PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969* 50 (1972) (quoting Charles A. Stevenson, Address (June 1934), in MARSHAL E. DIMOCK, *BUSINESS AND GOVERNMENT: ISSUES IN PUBLIC POLICY* 110 (1961)).

¹²² Valentine Cunningham made it clear that this rejection of individualism was international:

The Left was committed, more or less, to the communal idea as a good. As we've seen, Socialists believed in plural pronouns, the social 'we', especially the Party 'we' in solidarity with the working-classes. Leftist fiction is full of the Folk: of groups, crowds, multitudes, of large throngs purposefully united in dances, singing, strikes, demonstrations, marches, meetings

CUNNINGHAM, *supra* note 109, at 267.

¹²³ *Effect*, *supra* note 9.

¹²⁴ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

Realism followed the approach of Franz Boas, who wrote: "To the anthropologist, on the contrary, the individual appears important only as a member of a racial or a social group. . . . The group, not the individual, is always the primary concern of the anthropologist."¹²⁵ Boas described the anthropological quest in terms that could as well apply to Legal Realism:

[W]e cannot treat the individual as an isolated unit. He must be studied in his social setting, and the question is relevant whether generalizations are possible by which a functional relation between generalized social data and the forms and expression of individual life can be discovered; in other words, whether any generally valid laws exist that govern the life of society.¹²⁶

1. Folkways, Folk Art, and Folk Music

Llewellyn emphasized anthropology in all his works.¹²⁷ Professor Danzig showed that the messages of sociology and anthropology figure substantially in Llewellyn's thought.¹²⁸ William Graham Sumner and Boas, the anthropologists cited by Llewellyn, focused on the behavior of particular groups rather than on individual behavior and styles of art. Their manner of investigating folkways and folk art parallels the Realists' treatment of the law. Sumner's *Folkways* described social practices from around the world, such as "slavery,"¹²⁹ "sex mores,"¹³⁰ and "popular sports."¹³¹ Sumner

¹²⁵ BOAS, *supra* note 83, at 12-13.

¹²⁶ *Id.* at 15-16.

¹²⁷ See, e.g., LLEWELLYN, *supra* note 124 (analyzing group behavior of appellate judges); LLEWELLYN & HOEBEL, *supra* note 39 (describing the law of the Cheyenne Indians).

¹²⁸ Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-27 (1975). Professor Danzig noted how Llewellyn's view of the lawyer's role in society corresponded to the methods of anthropology:

For Llewellyn the flow of the attorney-client relationship is in the opposite direction. Since the correct result is immanent in a situation, the client is better placed to perceive it than the lawyer. The lawyer's function is to learn from the client: to become informed about the situation, to cull the information he has gathered, to organize it, and to translate it into terms that will inform the court. Note again how analogous this position is to that of the anthropologist.

Id. at 626 n.16.

¹²⁹ WILLIAM G. SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 261-307 (1940).

¹³⁰ *Id.* at 342-94.

¹³¹ *Id.* at 560-604. Not coincidentally, Llewellyn had studied under one of Sumner's students at Yale. Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 757 n.199 (1992).

described how "habit, routine and skill were developed" by early man: "All at last adopted the same way for the same purpose; hence the ways turned into customs and became mass phenomena. Instincts were developed in connection with them. In this way folkways arise."¹³² Folkways that contain doctrines of truth and right, including philosophical and ethical generalizations as to societal welfare, are termed "mores."¹³³ Laws arise from such mores, and must be consistent with them to work effectively.¹³⁴ However, there is conflict inherent in the relationship between laws and mores. While laws are rational and practical, mores "cover the great field of common life where there are no laws or police regulations."¹³⁵

Franz Boas' investigation of tribal artifacts, such as his article on Alaskan needle-cases,¹³⁶ where page after page pictures and analyzes needle-case after needle-case, can be seen as a model of Legal Realist scholarship¹³⁷ in which item after item is studied and compared. Just as anthropologists do not treat artistic style mechanically, but rather, as a set of principles, Legal Realists viewed laws simply as general principles governing behavior and not a set of formal rules.

C. *Anthropology and Commercial Law*

The Legal Realists were fascinated by anthropology and sought to apply its teachings to the study of law. They based this application on the highly questionable assumption that modern western society works in the same way traditional societies do. To Llewellyn, the tribes studied by Sumner and Boas became groups of merchants and judges, and styles, folkways, and mores became usages of trade and ways of judging.

Legal Realism can be characterized as an anthropological approach to the law. The Realists studied the law objectively, in the

¹³² SUMNER, *supra* note 129, at 2.

¹³³ *Id.* at 36-38.

¹³⁴ See Karl N. Llewellyn, *What Law Cannot Do For Inter-Racial Peace*, 3 VILL. L. REV. 30 (1957) (explaining the problems with racial integration in the 1950s) [hereinafter *Racial Peace*]. See also James E. Herget & Stephen Wallace, *The German Free Law Movement As the Source of American Legal Realism*, 73 VA. L. REV. 399, 404-405 (1987) (explaining that law arose from folkways).

¹³⁵ SUMNER, *supra* note 129, at 56.

¹³⁶ FRANZ BOAS, *RACE LANGUAGE AND CULTURE* 564-92 (1940).

¹³⁷ Cf. KARL N. LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) (summarizing sales case after sales case—801 in all).

same manner an anthropologist would view the practices of a tribe. Thus, the study of law is a study of what “judges do” rather than what the law should be. Llewellyn repeatedly and explicitly adopted an “anthropological” approach. For example, in his work explaining the common law method to Germans, Llewellyn collected American legal cases just as Boas had selected his Eskimo needle-cases.¹³⁸

The Legal Realists adopted techniques used to study autonomous, non-industrial, non-Western societies in order to study groups within Western industrial society, such as coal miners, sellers of goods, and judges. Both had “folkways,” “styles,” and “language” characteristic of and determined by the group’s traditions. Tribes became groups of merchants and judges, folk art styles became styles of judges (the “Grand” and “the Formal”), and folkways became trade usages.¹³⁹

Llewellyn felt that current trades were equivalent to the local cultures of yesteryear. To him, groups of merchants (and lawyers and judges) followed a cohesive body of folkways, traditions, and practices that can be determined by anthropological technique.¹⁴⁰

In the old days men’s cultures—I use the term here in its broadest sense: the whole body of men’s attitudes and ways and thoughts—in the old days these cultures grew apart locally, grew into regional character, valley to valley, city to city, land to land. Occupations, means of livelihood, were reasonably alike for all. Rye in Germany, wheat in England, corn in our South, but agriculture everywhere. Around this central unity the cultures varied, under the dim-seen

¹³⁸ After “collecting” these cases, Llewellyn discussed them and described his analytical technique. He noted the need for lawyers, like anthropologists to use “modern anthropological techniques.”

Anthropologists have long been prey to the easy and regrettable misconception that things happen in a society the way the natives *claim* they happen. Lately, anthropologists have indeed been describing this prevailing native ideology but have at the same time compared it with the way things are actually observed to happen (which in general may be more or less at variance with the way the natives say they happen). . . . It is time that lawyers, both in their own law and above all in comparative legal studies, learned this skepticism of anthropologists. The existence of a statutory provision, or of a generally acknowledged rule, is certainly interesting, but in and of itself really says nothing.

KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 47 n.2 (Paul Gerwitz ed. & Michael Ansaldi trans., 1989) (1933).

¹³⁹ See generally KALMAN, *supra* note 67, at 1-44 (describing the characteristics of Legal Realism).

¹⁴⁰ See Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495, 1507 (1984) (reviewing LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983)).

influence of language, faith, a focussing on cotton or on corn; on flax, the vine or the olive; under that other much neglected influence, the ways of food. The difference between johnny cake and pie, black bread and muffins, cuts vastly deeper than most have imagined. Travel was then the broadening, the stirring influence—travel from one narrow close knit culture to the next. And men learned to think that stimulating cultural differences displayed themselves in little surface ways; learned to look to such differences in surface ways as the only index to cultural stimulus. When one who has learned to think thus looks about him in America, he must despair. Americans at the ball games or the poles are alarmingly alike. In the smoking car, at bridge, or in the street—alarmingly alike. These are the surface ways, spreading their likeness throughout our Western civilization more and more.

But the cultures of today grow apart less by places than by occupations. As voters or as theater goers we are one tribe, alike. As bricklayers, plumbers, coal miners, corn belt farmers, hardware men, we are as different as are Czechs and Spaniards.¹⁴¹

There were policy reasons to try to locate and enforce the practices of merchants. Sumner adopted a Darwinistic view which saw good folkways as surviving over lesser ones in a long unconscious process.¹⁴² The Realists also felt that one could locate true value

¹⁴¹ Karl N. Llewellyn, *This Cut-Rate American Culture* 7-8 (unpublished manuscript, on file with the *Albany Law Review*). One can doubt the equation of the tribe and the trade. Professor Chris Williams has criticized Llewellyn's idealistic assumption "that merchants are in general agreement about trade practices and that decision makers are capable of recognizing those areas of agreement and employing them as bases of decision in disputed cases." Williams, *supra* note 140, at 1507. Professor Williams argued that when a buyer and seller go to court, one can infer that the trade custom was too vague to resolve the dispute. *Id.* at 1508. To Williams, Llewellyn did not offer "any convincing empirical evidence" that agreement on "reasonable commercial behavior" exists. *Id.* Professor Williams denied Llewellyn's central premise: that the usages of particular trades should control commercial law. *Id.*

¹⁴² In discussing folkways, Sumner stated:

They are like products of natural forces which men unconsciously set in operation, or they are like the instinctive ways of animals, which are developed out of experience, which reach a final form of maximum adaptation to an interest, which are handed down by tradition and admit of no exception or variation, yet change to meet new conditions, still within the same limited methods, and without rational reflection or purpose.

SUMNER, *supra* note 129, at 4.

and authenticity in traditional group practices. As stated by Llewellyn, "when I listen to my friend discuss tar paving I sit in the presence of a devotee, I hear the ritual of a faith, I bow before the art and glory of a craftsman."¹⁴³ Llewellyn turned to group crafts to escape what today we would call "pop" culture.¹⁴⁴

Such disdain for popular, mass-culture was pervasive. Valentine Cunningham points out that thinkers from the Marxists to T.S. Eliot condemned pop culture, with its vulgarity, jazz, and "sex-appeal."¹⁴⁵ Realism was seen as being in competition with popular soap-operas.¹⁴⁶ Thus, folk art based on tradition, such as the folk song, had value and authenticity.¹⁴⁷ Like the folk songs, merchant practices have evolved.

There is an anthropological connection between the merchant rules and aesthetics. Llewellyn saw merchants as forming discrete groups, each with its own customs and practices. Such a group, produced its own artifacts, which time would evolve into something functional and beautiful.¹⁴⁸ There is a parallel between merchant practices and the Alaskan needle-cases studied by Boas.¹⁴⁹ They are functional (they hold needles) and beautiful. They are traditional: they can only be understood as the products of a tribe.¹⁵⁰

As the native Alaskans created beautiful objects of folk art, merchants have created beautiful and functional mercantile practices, such as the C.I.F. contract used in international marine

¹⁴³ Llewellyn, *supra* note 141, at 8.

¹⁴⁴ In discussing the then-present state of affairs of American culture, Llewellyn wrote, look a minute at this tawdry spreading culture—the sentimental drool or he-man stuff that sells as fiction; the leaded testimony at the murder trial; the intimate venomous details of an off-color sex dispute; the blat of poorer jazz; the riot of cliché of thought and phrase; the empty prettiness of poster girls.

Id. at 2.

¹⁴⁵ See CUNNINGHAM, *supra* note 109, at 284 (noting the formalists' disapproval of society's "addiction" to popular culture).

¹⁴⁶ See *id.*

¹⁴⁷ Karl N. Llewellyn, *Folksong 1-2* (unpublished manuscript, on file with the *Albany Law Review*). Llewellyn wrote: "[t]he essence of a folk song: that it shall, over some period, have been sung, and have been transmitted by tradition. . . . Folk song that seems most lasting, sweet to recur, has simplicity, depth, straightness, and deals with vital emotions." *Id.* For a discussion of the thirties' interest in folk-music, see CHARLES WOLFE & KIP LORNELL, *THE LIFE AND LEGEND OF LEADBELLY* (1992).

¹⁴⁸ See Llewellyn, *supra* note 141, at 8 (rhapsodizing on the art of skilled labor).

¹⁴⁹ See BOAS, *supra* note 136.

¹⁵⁰ See BOAS, *supra* note 83, at 211 (discussing how a society's mores affect the inventions that it produces).

shipping.¹⁵¹ The merchant rules, then, are similar to the law codes Llewellyn proposed for the Native Americans;¹⁵² they are functional and beautiful rules proposed for a discrete group. Specialized groups need specialized rules; rather than create rules of general application, rules should be tailored to the particular characteristics and needs of the group. So the folk song, the C.I.F. contract, and the Grand Style of the Common Law Tradition, are all practices that have stood the test of time and have evolved in good and beautiful ways. Group practices are good and should be practiced and enforced against dissidents.¹⁵³

Judges can be seen as tribes practicing folk art.¹⁵⁴ For example, in shaping the law of the letter of credit, the commercial law judges, as a group, evolved the applicable law “[n]ot in isolated instances, but repeatedly, they showed a group wisdom often exceeding that of the business community whose institutions they were called on to sanction or reject.”¹⁵⁵ The judge’s work displays a “style” typical of the group.¹⁵⁶ Llewellyn explicitly discusses the problems of the use of “style” to analyze legal behavior. “Style,” as a tool of analysis, works best for tangible monuments, music, literature, and architecture, but also works for appellate judging, the drafting of documents,

¹⁵¹ Karl N. Llewellyn, *On the Good, The True, The Beautiful, In Law*, 9 U. CHI. L. REV. 224, 228-29 (1942) [hereinafter *Good*].

¹⁵² See LLEWELLYN & HOEBEL, *supra* note 39.

¹⁵³ As written by Llewellyn in 1928:

I propose to ring changes, perhaps *ad nauseam*, on three simple facts: first, that law observance is a question not of legal rules, but of the formation of folkways that can be and will be learned chiefly without direct reference to particular rules; second, that law and folkways alike are not general and common to our society, but are different and specific according to groups, occupational and other; and third, that for mass, as contrasted with individual, attempts at control, the problem of lawmaking and of law enforcement centers on informed, sustained effort to find the particular persons whose conduct is concerned, and to devise means for affecting the conduct patterns of those particular persons.

Karl N. Llewellyn, *Law Observance Versus Law Enforcement*, reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 399, 399 (1928).

¹⁵⁴ Llewellyn treated appellate judges as a corporate body: “Moreover, the study is directed at courts *and not* at individuals, and the ‘average’ appellate judge displays himself better in the blurred but real corporate person of the court and in the corporate behavior than he can by any analysis of individuals and averaging of their attributes.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 515-16 (1960).

¹⁵⁵ Karl N. Llewellyn, *Some Advantages of Letters of Credit*, 2 U. CHI. L. REV. 1, 2 (1929).

¹⁵⁶ Llewellyn contends that “[i]nside craft-work, style *does* tend to unify . . . What our opinions do show is a drive to fit the style of reason in judging into a type of opinion which is appropriate, and which has structure, form, and life.” LLEWELLYN, *supra* note 154, at 468.

and the writing of briefs, which leave monuments in their own right.¹⁵⁷

Llewellyn valued trade practices (including the trade practices of law) as embodying a spirit of craftsmanship.¹⁵⁸ His concept that man has an innate drive towards craftsmanship and quality comes from another thinker, Thorstein Veblen, who conceived of an “instinct of workmanship” that was “chief among those instinctive dispositions that conduce directly to the material well-being of the race.”¹⁵⁹ Veblen considered workmanship and parenting as man’s two primal instincts.¹⁶⁰ To him, instincts were neither blind nor unaffected by thought.¹⁶¹ Veblen concluded that “all instinctive action is teleological . . . involves holding to a purpose . . . aims to achieve some end and involves some degree of intelligent faculty to compass the instinctively given purpose.”¹⁶² The characteristics of Veblen’s “instinct of workmanship” can be used to characterize the UCC and the jurisprudence of Realism as it “occupies the interest with practical expedients, ways and means, devices and contrivances

¹⁵⁷ Professor Hillinger points out that Llewellyn was creating an archeological object—a set of principles that could be used by businessmen as the Native Americans used their traditional design principles:

Llewellyn planned to create beautiful law for businessmen. Such law would be beautiful because it was functional. For Llewellyn, legal esthetics were in essence functional esthetics. Article 2 would create law businessmen could use, law which would guide them in their affairs: ‘A structure of legal rules, howsoever fair of face, must function well or be an active Evil to the men and work it houses.’ Legal rules could be functional only if they were clear, certain and predictable. Predictability, in turn, would be insured only if the rules protected good faith and did not require misconstruction to produce good results. In drafting Article 2, Llewellyn sought to create ‘a body of sales law which is clear, guidesome, which it is almost impossible to misconstrue.’ Llewellyn wanted his rules to protect good faith and provide predictable and satisfactory results, both in court and out. That aim, determined by Llewellyn’s theory of what legal rules should accomplish, explains why he stated separate merchant rules in Article 2.

Hillinger, *supra* note 53, at 1163 (citations omitted).

¹⁵⁸ Llewellyn, *supra* note 141. Llewellyn wrote:

When I listen to my friend discuss tar paving and sit in the presence of a devotee, I hear the ritual of a faith, I bow before the act and glory of a craftsman. All new to me, all fresh, all stirring. . . . But man remains man . . . it is a strange human animal that can sell rustless screens, aluminum ware, or champion bed springs long without enthusiasm for flylessness or looking at the sleep that passeth understanding.

Id. at 8-9.

¹⁵⁹ THE PORTABLE VEULEN 312-13 (Max Lerner ed., 1948) [hereinafter VEULEN].

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 312.

¹⁶² *Id.* at 318.

of efficiency and economy, proficiency, creative work and technological mastery of facts."¹⁶³

Using contemporary social and economic thought, it is possible to understand why usage of trade is the controlling concept of the Sales Article. Society was seen as a composite of organized groups, each different, each operating under its own set of folkways and working rules. Thus, law had to be particularized and customized on the group level. Businessmen, as well as social scientists, sought group control of individual business through mechanisms, such as the trade association, and legislation, such as the National Industrial Recovery Act. Social scientists, businessmen, and legal scholars all sought to empower groups to control their marginal members. In fact, such control of the marginal member, the "chiseler," was seen as the key to regaining prosperity.¹⁶⁴

Anthropologists, ethnologists, and institutional economists, viewed group practices as good. Group practices were viewed by them as products of an evolutionary process that produced such artifacts as Native American art, the C.I.F. contract, and the folk song.¹⁶⁵ Trade practices had evolved in a non-intellectual, natural way to be functional and to meet the group's needs. The UCC's use of "usage of trade" and "standards of fair dealing in the trade" sought to achieve the virtues of the "folkway" in commercial law.¹⁶⁶

D. *Between-the-Wars Economics*

1. Institutional Economics

In economics, it was the institutional economists Veblen and Commons who influenced Llewellyn the most.¹⁶⁷ The institutional economist school of thought focused on the collective, not the individual.¹⁶⁸ The institutional economists also shared a view of

¹⁶³ *Id.* at 320.

¹⁶⁴ For a discussion of the "chiseler," see *infra* text accompanying note 170.

¹⁶⁵ This explains why museums of natural history consist of exhibits about dinosaurs and tribal life. Both are seen as products of the natural process of evolution, rather than artifice.

¹⁶⁶ See U.C.C. §§ 1-205, 2-103(1)(b) (1994).

¹⁶⁷ Hovenkamp, *supra* note 65, at 1014.

¹⁶⁸ COMMONS, *supra* note 98, at 902. In the words of Commons:

This is the problem of modern economics, which is coming to be known as Institutional Economics. An institution is merely collective action in control, liberation, and expansion of individual action. It may be Communism, Fascism, or Capitalism. The economic philosophy of the French Revolution would have abolished

the history of law and economics, a skepticism of *laissez-faire*, and a preference for government coordination that fit with their collectivist views.¹⁶⁹ Additionally, the institutional economists subscribed to an economic paradigm that explained the causes and prescribed a cure for the Depression, that I term “pre-Keynesian macro-economics.” In the thirties, before Keynesianism triumphed, the cause of the Depression was seen to be the “chiseler.” This term referred to the seller who was producing shoddy goods at low prices and paying his workers less and less, thus sending commerce into an ever-descending spiral.¹⁷⁰ To cure this problem, several statutes were proposed or enacted, including the NRA, the NLRA, the AAA, and the UCC.

Llewellyn credited Veblen and Commons as being the two major intellectual influences on his work.¹⁷¹ In fact, Veblen and Commons appear to be the only economists Llewellyn credits. For Veblen and Commons, the history and dynamics of groups, and not the assumed principles of individual wealth maximization comprise the foundation of economics.¹⁷² Like Karl Llewellyn, they believed that each economic group had its own rules and had to be studied on its own terms.¹⁷³

To Commons, the *transaction* was the fundamental unit of society. The transaction, however, did not take place in a vacuum between two wealth-maximizing individuals. Rather, it developed under the working rules of the group. Commons wrote:

Collective action proceeds, indeed, not from the intellectual logic of philosophers and economists, but from the arguments, debates, conferences, compromises, mass meetings, agreements, disagreements, negotiations, propagan-da—among ordinary people themselves, like business men, laboring men, farmers, or professional classes, when forced or persuaded to consider their common interests. The psychology of this give-and-take process of conciliation and agreement may be named negotiational psychology, to

collective action. The economic philosophy now, the world over, is the philosophy of collective action.

Id.

¹⁶⁹ See generally *id.* (discussing the prevalent economic philosophy).

¹⁷⁰ LOUIS GALAMBOS, *COMPETITION AND COOPERATION: THE REEMERGENCE OF A NATIONAL TRADE ASSOCIATION* 198 (1966).

¹⁷¹ See *supra* note 9 and accompanying text.

¹⁷² See *infra* notes 207-212 and accompanying text.

¹⁷³ See note 168 and accompanying text.

distinguish it from the pleasure-pain psychology of the individualistic economists since the eighteenth century.¹⁷⁴

Institutionalism concerned itself with "collective action." The individual was viewed, not as an independent entity, but as part of a working group. This view contrasted with that of the classical economists who saw society as a chance collection of individuals. Commons used Bentham's sovereign as one example of this contrast:

Bentham's "sovereign," also, was not an outcome of the customs or other collective action of the mass of individuals who constituted his "community." His individuals were a population, not a society; they were "chance" individuals, not a going concern; and his sovereign was an outsider, not a part of the society.¹⁷⁵

Collective action, however, was also liberating and empowering:

Collective Action is more than *control* of individual action—it is, by the very act of control, as indicated by the auxiliary verbs, a *liberation* of individual action from coercion, duress, discrimination, or unfair competition, by means of restraints placed on other individuals.

And Collective Action is more than restraint and liberation of individual action—it is *expansion* of the will of the individual far beyond what he can do by his own puny acts.¹⁷⁶

Thus, the two fundamental concepts of Commons' institutionalism are collective action and the transaction.¹⁷⁷ These are also the fundamental concepts of Article 2. The sales transaction has to be seen in the context of the particular trade, in measuring good faith, determining the meaning of contract language, and evaluating the quality of goods.¹⁷⁸

¹⁷⁴ COMMONS, *supra* note 66, at 28-29 (1970). For a discussion of Commons and the use of his collectivism in modern Denmark, see Yngve Ramstad, *Reasonable Value and Denmark's Negotiated Economy*, 25 J. OF ECON. ISSUES 431 (1991). The anthropologist Boas, another of the influences on Llewellyn, is considered by some to be an institutional economist. Joseph Dorfman, *The Background of Institutional Economics*, in INSTITUTIONAL ECONOMICS: VELEN, COMMONS, AND MITCHELL RECONSIDERED 1, 19 (1964) ("Franz Boas offered an approach that was closely related to institutionalism, if indeed it might not be characterized as institutionalist anthropology.").

¹⁷⁵ COMMONS, *supra* note 98, at 234.

¹⁷⁶ *Id.* at 73.

¹⁷⁷ Neil W. Chamberlain, *Institutional Economics of Commons*, in INSTITUTIONAL ECONOMICS: VELEN, COMMONS, AND MITCHELL RECONSIDERED 63, 74-75 (1964).

¹⁷⁸ See U.C.C. § 1-205 (1994).

2. Economic History

Institutional economists and other social thinkers such as Arnold,¹⁷⁹ Commons,¹⁸⁰ Frank,¹⁸¹ Hamilton,¹⁸² Isaacs,¹⁸³ Llewellyn,¹⁸⁴ and Veblen¹⁸⁵ shared a view of economic history and of the developmental changes in commerce, technology, and economic organization. This theory of history fits the era's modernistic program in explaining the differences between the prior age and the present one and why the prior era's economic theories and law had to be rejected.¹⁸⁶ The first stage was pre-industrial, characterized by artisan producers who sold directly to the buyer.¹⁸⁷ Isaacs' description of the old Sales Act is typical. He saw it as approximately

dating the business picture back two or three generations ago, and in emphasizing the type of sale as one by the dealer who is likely to be the maker, to a lay consumer. The picture is satisfied by the horseman who stops at the saddler's door to buy a new saddle.¹⁸⁸

Adam Smith's *laissez-faire* was appropriate only to that prior era. The Industrial Revolution had made Smith obsolete. However, this revolution, which was characterized by individual production led to the problems of cut-throat competition, over production, and cyclical economic fluctuations.¹⁸⁹ Government institutions, trade associations, and unions grew since more collective control was needed to solve the problems created by industrial production.¹⁹⁰

¹⁷⁹ See ARNOLD, *supra* note 30, at 2.

¹⁸⁰ See COMMONS, *supra* note 98, at 1-9.

¹⁸¹ See FRANK, *supra* note 30, at 3.

¹⁸² See HAMILTON & WRIGHT, *supra* note 24, at 54.

¹⁸³ See Nathan Isaacs, *The Industrial Purchaser and the Sales Act*, 34 COLUM. L. REV. 263 (1934).

¹⁸⁴ See *Effect*, *supra* note 9, at 668.

¹⁸⁵ See VEBLEN, *supra* note 159, at 54.

¹⁸⁶ Compare this historical approach with that of neo-classical economics: since man always has been a wealth maximizer, the same economic theory can analyze the problems of 1776 and today.

¹⁸⁷ Isaacs, *supra* note 183, at 263.

¹⁸⁸ *Id.*

¹⁸⁹ See generally FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 85-86 (1990) (discussing FDR's belief that the key to economic recovery was to get individual producers, like farmers, to decrease production which would increase prices and thereby stabilize the economy and stimulate industrial recovery).

¹⁹⁰ See, e.g., HAMILTON & WRIGHT, *supra* note 24, at 3-6. Hamilton and Wright examined the coal industry which was initially a petty industry, characterized by free entry of individual

Llewellyn examined the evolution from a mercantile economy to an industrial economy, and finally to financial capitalism.¹⁹¹ He recognized that laws needed to reflect the modern markets and not the older face-to-face markets.¹⁹² One change that Llewellyn believed was necessary to modernize the law of sales was an expanded warranty of quality.¹⁹³ Although a warranty of quality was unnecessary when goods were exchanged face-to-face and when buyers knew their sellers, such a warranty was needed when goods were mass-produced and distributed over long distances.¹⁹⁴ Therefore, the law of *caveat emptor* became a relic.¹⁹⁵

Like *caveat emptor*, individual contracting was also considered obsolete.¹⁹⁶ Moreover, many scholars were growing skeptical of *laissez-faire* economics.¹⁹⁷ Instead of individual self-determination, institutions and groups became important in the contracting process.¹⁹⁸

One can view the UCC as embodying the collectivist mentality of the institutionalists. The UCC's "standardized contract" applies to an agreement unless the parties contract out of it.¹⁹⁹ For example, the warranty of merchantability applies unless the parties exclude it from the contract.²⁰⁰ Furthermore, the language of the contract will be interpreted based on the parties' group membership.²⁰¹ In

miners. *Id.* These miners could set their own terms of employment and bargain individually with the buyers. *Id.* However, after the industrial revolution, larger enterprises engaged in mass-production took over. *Id.*

¹⁹¹ See *Horseback*, *supra* note 52, at 726.

¹⁹² See *Unhorse Sales*, *supra* note 37, at 883 (viewing the legal history of his subject as a "struggle to unhorse Sales law, and to make conscious a proper merchants' law of wares moving to and through a merchants' market"); see also *id.* at 903 (raising doubts as to the proliferation of protective devices such as warehouse receipts and bill of lading acts).

¹⁹³ *On Warranty I*, *supra* note 45, at 712.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 713 (explaining the idea of holding sellers accountable through various obligations based on good faith and contract law).

¹⁹⁶ Nathan Isaacs, *The Standardizing of Contracts*, 27 *YALE L.J.* 34, 46-47 (1917).

¹⁹⁷ *Id.* at 47.

¹⁹⁸ *Id.* at 45 (analogizing the movement away from individual contracts to medieval status since an individual's rights and duties depended more on his economic status or institutional affiliation than on individual bargains).

¹⁹⁹ U.C.C. §§ 2-201 to 2-210, 2-301 to 2-328 (1994).

²⁰⁰ *Id.* at § 2-314.

²⁰¹ *Id.* at § 1-205(3) (providing that "[a] course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement").

any event, the parties are bound by good faith, which is defined as the practices of honest and fair merchants.²⁰²

3. Between-the-Wars Macro-Economics

The economists in the interwar years occupied a peculiar position because they had rejected Adam Smith but had not yet discovered Keynes.²⁰³ The concept of the multiplier, that government spending multiplies throughout the economy creating demand, was not widely accepted when proposed in 1933.²⁰⁴ It was not until 1938 that FDR accepted Keynesian theory and adopted a spending policy.²⁰⁵

If the cause of the Great Depression was not a maladjustment of the price-allocation system or a mistaken fiscal policy, what was it? Today, many scholars see the debate as being between the neoclassicists and the Keynesians. However, these scholars have overlooked that there was another view, which can be termed "Pre-Keynesian Macro-Economics," which most intellectuals, businessmen, and even President Roosevelt accepted.

a. Prevention of Chiseling

The pre-Keynesian macro-economists believed that business was caught in a vicious cycle. They thought that overproduction led to lower prices and "chiseling," the lessening of the quality of goods and cheating, which further caused lower wages, decreased demand, overproduction, and, finally, lower prices and chiseling again.²⁰⁶

²⁰² *Id.* at § 2-103(1)(b).

²⁰³ See HERBERT STEIN, *THE FISCAL REVOLUTION IN AMERICA* 149, 474 n.28 (1990) (explaining that before 1936, economists were not influenced by Keynesian theories and policies since Keynes did not develop his theories until later during the New Deal).

²⁰⁴ See *id.* at 153 (indicating that Keynes proposed the idea of multipliers in 1933 to increase government spending which would increase total spending and incomes by a multiple thereof); see also *id.* at 50 (indicating that FDR disregarded the effects of government spending on the economy since he thought that there were only a few areas where the government could usefully spend money).

²⁰⁵ FREIDEL, *supra* note 189, at 255.

²⁰⁶ See GALAMBOS, *supra* note 170, at 198. FDR described the chiseler problem in one of his fireside chats. He advocated an "orderly industrial system" in which the majority within an industry would, with government backing, bring 'minorities to understand that their unfair practices [were] contrary to the sound public policy of the nation.'" *Id.* (quoting Minutes of Twenty-First Annual Meeting of U.S. Chamber of Commerce (May 4, 1933)). FDR explained why industry and government should work together:

Take the cotton goods industry. It is probably true that ninety per cent of the cotton manufacturers would agree to eliminate starvation wages, would agree to stop long

This process was further characterized by chaotic fluctuations in production, poor quality goods, ruinous cut-throat competition,²⁰⁷ and wages too low to allow workers and their families to maintain minimum standards of health and welfare.²⁰⁸

President Roosevelt hoped that the National Industrial Recovery Act (NIRA) would redistribute income and thereby assure greater buying power.²⁰⁹ The NIRA created the National Recovery Administration (NRA) which, along with business, was responsible for enacting fair competition codes.²¹⁰ These codes, which were drafted by business and which were supposed to be exempt from Antitrust laws, set wages, hours and working conditions.²¹¹ FDR intended for these fair practice standards to create higher prices and restore profits, in return for which businesses would accept wage

hours of employment, would agree to stop child labor, would agree to prevent an overproduction that would result in unsalable surpluses. But, what good is such an agreement if the other ten per cent of cotton manufacturers pay starvation wages, require long hours, employ children in their mills and turn out burdensome surpluses? The unfair ten per cent could produce goods so cheaply that the fair ninety would be compelled to meet the unfair conditions. Here is where government comes in. Government ought to have the right and will have the right, after surveying and planning for an industry to prevent, with the assistance of the overwhelming majority of that industry, unfair practice and to enforce this agreement by the authority of government.

Id. (quoting Franklin D. Roosevelt, Remarks at President's Fireside Chat (May 7, 1933)). This meant that the policing of quality and fair practices was necessary for prosperity. *See infra* notes 267-69 and accompanying text. The President's description resembles Llewellyn's explanation of the "marginal businessman" who caused the problems. *See Effect, supra* note 9, at 682 (pointing out that legal rules were necessary to contain "marginal individuals" and prevent the proliferation of lax morals and cut-throat competition).

²⁰⁷ Cut throat competition is exemplified by the board game *Monopoly*, which was a product of that era. The point of *Monopoly* is that if one player obtains all the resources and eliminates all other players from the game, he destroys competition. Similar to the game-player, a business or individual who, through superior bargaining power, could continually negotiate better deals, would eventually eliminate other trading partners, and ruin the entire system.

²⁰⁸ *See FRANK, supra* note 30, at 235. Frank indicated that "the total national income is bound to shrink alarmingly unless a large enough number of citizens receive some fair share of it. The fate of those Americans who receive relatively high incomes is therefore inextricably bound up with that of those who receive low incomes. The former cannot prosper unless the latter do." *Id.*

²⁰⁹ *See FREIDEL, supra* note 189, at 126-27. Roosevelt spoke of the "deeper purposes of the NRA in building up wages that were at the starvation level and in slashing hours that were too long, resulting in 'a greater distribution of income and wages' and consequently an increase in employment and in 'the purchasing power of the average American citizen and, therefore, of the Nation as a whole.'" *Id.* (footnotes omitted).

²¹⁰ STEPHEN R. PRESSER & JAMIL S. ZANALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 737 (2d ed. 1980).

²¹¹ *Id.*

and hour guarantees.²¹² FDR hoped this increased demand would then prompt businesses to invest in new enterprises.²¹³

Like the NRA, the first drafts of the UCC sought to combat chiseling. The standard of mercantile performance and the mercantile jury that would determine that standard were intended to work together to prevent chiseling on both sides.²¹⁴ Moreover, Llewellyn proposed that there should be a "survey to determine the condition of the goods"²¹⁵ in order to prevent chiseling.²¹⁶ The UCC's enforcement of group norms by employment of trade usage, good faith, and quality standards had the macro-economic purpose of preventing chiseling and thereby restoring prosperity.

²¹² FREIDEL, *supra* note 189, at 127.

²¹³ *Id.*

²¹⁴ See *R.U.S.A.*, *supra* note 40, § 11-A cmt. 2, at 383-84. The comment to section 11-A of the 1941 draft indicates:

(2) *The question of fact about substantial defect.* Despite recognized understanding of the commercial obligation in mercantile sales as extending only to mercantile performance, as between decent merchants, there remains the fear of chiseling by the indecent seller, if "the bars are let down." This is a legitimate fear. The price of indulging it, is of course to leave the bars down for the indecent buyer; but one evil should not be incurred to cure another of like kind and extent. And a court is rarely, and a jury almost never, equipped to pass with sound mercantile judgment on such a question as substantiality of a defect in performance in a particular trade.

By the same token, neither a court nor a jury is equipped in the ordinary course to pass upon a question of compliance with description in, say, the textile field, or upon those questions of "usage of trade" whose incidence runs throughout the Draft, as it did throughout the Original Act.

Thus the machinery provided in Section 59 for quick determination of mercantile questions of fact, by experts largely chosen by the parties, puts the whole of Sales law upon a new foundation of reckonability and certainty which it has lacked—save in the hands of a few great commercial judges—since the time of Mansfield's famous jury.

As applied to the question of fact in mercantile performance questions in particular, Section 59 would seem to remove danger of either uncertainty or of successful chiseling, and make it possible to assure to both decent buyers and decent sellers proper protection by law of their mercantile expectations.

Id.

²¹⁵ *Id.* § 56(3)(a) at 509.

²¹⁶ See *id.* § 56 cmt. 2, at 511-12. This comment indicates that such a survey seeks also to guard against chiseling under a lien by use of such lien (buyer's or seller's) to withhold the goods from examination by the other party. The essential sanction of the last sentence lies in the probable effect on a trier of fact of seeing evidence of the demand for inspection and of the refusal. There is no reasonable possibility of such evidence being cooked in bad faith, since the party in possession can prevent that by offering a joint inspection or a survey.

Id.

b. *Achieving Equal Bargaining Power*

Another goal of the reformers was to achieve equal bargaining power. The reformists were skeptical of the free market.²¹⁷ They doubted the free market's freedom and thought that the chiseler would, in the absence of regulation, depress, demoralize, and disorganize the markets by driving down wages and purchasing power.²¹⁸ However, these reformists, who believed that the true value of a commodity was determined in transactions between equals,²¹⁹ felt that transactions among equals, with standards being strictly policed, would break the vicious cycle of lower prices, wages, and consumption.²²⁰ Many thought that sales was a field in which such equality could be achieved since merchants were both buyers and sellers.²²¹ Representative trade associations and the

²¹⁷ See OTIS L. GRAHAM, JR., AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL 6 (1967) (explaining that Progressives and New Dealers viewed unrestricted economic power as the enemy).

²¹⁸ See *supra* notes 206-208 and accompanying text.

²¹⁹ COMMONS, *supra* note 98, at 344.

²²⁰ See *id.* at 345. Reasonableness of bargaining power is crucial as it is the only fair way to share limited resources and works against "cut throat" competition:

Extended to the business community, under such names as business ethics, it is the purpose, by means of this newly permitted bargaining power, to prevent that individual bargaining of competitors which steals customers by cutting prices, or steals labor by raising wages. It is now coming to be believed—a belief not contemplated by the early economists—that both the purchasing power of the public and the supply of labor-power are limited. Therefore, the new ethical doctrine of "live-and-let-live" indicates that the proper procedure—instead of the practice of competing by individual bargainers in order to pull customers or laborers away from competitors by lower prices or higher wages—is to get only a reasonable share of that limited purchasing power or limited labor-power.

Id.

Commons saw the concern with "reasonable bargaining power" as *supplanting* the concerns of classical economics:

Hence the practical theories of today, in the United States, are not the older theories of individual competition, individual property, the liberty of individual bargaining, the mechanism of free competition, nor even the communist theories of prohibition of bargaining. They are the theories of reasonable bargaining power. These come before economists and courts under the four groupings of discrimination, or unequal opportunity for individual bargaining; fair competition instead of free competition; reasonable price instead of normal or natural competitive price; and equal or unequal treatment of the different kinds of bargaining power, such as that of laborers and employers, farmers and capitalists, etc.

Id.

²²¹ See *Effect*, *supra* note 9, at 674 (discussing the promise of a system of collective bargaining to resolve disputes and create equality).

type of bargaining used by the NRA to promulgate trade standards could also achieve equality.²²²

This view of equal bargaining was closely aligned with the current of thought which advocated the redistribution of income to increase purchasing power. Although Llewellyn did not address redistribution of income, he was concerned with equal bargaining power.²²³ This concern re-emerged years later when Llewellyn indicated, in the first drafts of the UCC, that trade standards should be fixed by equal bargaining.²²⁴ Llewellyn was concerned about one-sided standardized contracts.²²⁵

²²² See GALAMBOS, *supra* note 170, at 206-207.

²²³ See *Effect*, *supra* note 9, at 674 (citing Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 452-54 (1920)); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). See also MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, 195 (1992). Horowitz explained that Robert Lee Hale was the most influential heir of the institutional economists. He wrote that

Hale's pathbreaking "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) is the model for several Realist critiques of the premises of legal and economic orthodoxy. First, it is one of the earliest rigorous criticisms of the orthodox ideal of voluntariness in market exchange. Since all market transactions are affected by the prior distribution of property and entitlements, Hale argued, the market was in fact an organized form of coercion of the weak by the strong. The decision to "withhold"—not to buy in the market or not to employ labor—was simply another form of assertion of economic power.

Id. (footnotes omitted). Hale portrayed the market "as an interlocking system of power relations, not as some abstract voluntary meeting of the minds or convergence of wills." *Id.* at 196.

²²⁴ See TWINING, *supra* note 43, at 307.

²²⁵ See *Effect*, *supra* note 9, at 673 (explaining how lopsided contracts emerge when one party has a stronger bargaining position); see also KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES*, 51 (1930). Llewellyn's Casebook states the following:

The principal case presents a court dealing with what the court apparently considers such a contract. Note that if the contract form has become really standardized among competitors, or if the other bargaining party is at a bargaining disadvantage (the small apartment renter, the factory laborer, the shipper of goods by railroad, the purchaser of steel or of insurance), we have something approaching legislation by one group on its relations with another group. In this aspect the work of the I.C.C. and the regulation of insurance policies become exceedingly interesting. The unwillingness of courts to declare a clause void merely because it works unfairness leads to their merely knocking out one clause after another because it does not clearly express the position contended for; which, in turn, means a fresh chance for the counsel of the one party to accomplish the desired result in his new form.

Id. at 51. Llewellyn, citing to Isaacs' discussion of a balanced standardized contract, which he tried to incorporate in the UCC, further indicated:

Isaacs has pointed out that the whole law of partnership or sales is a sort of standardized contract-frame into which the parties' expressed intention is fitted, and out of which their "contract" as to any unforeseen emergency, is drawn. But this law-made standard differs from the ordinary standardized contract of the present

Since a *laissez-faire* system did not yield fair results, the state or someone had to regulate the coercion present in the markets. The National Labor Relations Act (NLRA), NIRA, and the UCC were all intended to achieve equal bargaining. Under the NIRA, standards of fair competition were to be set by representative groups of businessmen.²²⁶ The NLRA was an attempt to set wages and working conditions by fair collective bargaining between unions and employers.²²⁷ Moreover, in the first drafts of the UCC, usages of trade were to be set by equal bargaining.²²⁸

4. "Reasonableness"—Does it Mean Anything?

One wonders if "reasonable" meant the same thing to Llewellyn and Commons. Did Llewellyn, like Commons, believe that reasonable meant the result of bargaining among equals? Such a reasonableness standard *objectively* focuses on what the parties would have agreed on given equal bargaining power. This standard also answers the objections of critics who find meaningless the use of "reasonable," "reasonably," "commercially reasonable," and "seasonable" in Article 2 of the UCC.²²⁹

day in having grown up out of the balance of contentions on both sides.

Id. (citing Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917)).

²²⁶ National Industrial Recovery Act, 15 U.S.C. § 703 (1988), ruled unconstitutional by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (indicating that "[u]pon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants . . .").

²²⁷ National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1988). This purpose is clear from the policy behind the NLRA. Congress stated:

Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and restoring equality of bargaining power between employers and employees.

Id.

²²⁸ See, e.g., NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Proposed Final Draft No. 1: Uniform Revised Sales Act* (1944), reprinted in 2 UNIFORM COMMERCIAL CODE DRAFTS 1, 110 (Elizabeth S. Kelly ed., 1984) (indicating that "[n]othing could be stronger evidence of a time for any action being in fact reasonable than the fixing of a time by a fair agreement"). See TWINING, *supra* note 43, at 303 (explaining that the UCC's official purpose was to preserve flexibility in commercial transactions through customs, usages and agreements of parties).

²²⁹ David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 212 (1967).

Academics and politicians had been concerned with reallocation of bargaining power prior to the 1950s. However, the idea of imposing standards based on equal bargaining power, died in the drafting process. The UCC rejected an objective standard of reasonableness based on what two equal parties would have agreed to and, instead, favored the vague, undefined term of unconscionability.²³⁰

V. PRACTICAL ISSUES BETWEEN PRACTICAL MEN—INTERWAR ECONOMICS IN PRACTICE

A. *Rejection of Laissez-Faire*

Although this Article has described the intellectual history of the interwar era, these ideas were not only theoretical, but also formed the basis for the political action of those attempting to reform and re-organize society. Many scholars previously mentioned in this Article participated in government and legislation.²³¹ The New Deal era represented a rare period in American history where an

²³⁰ The Second Draft included a section on form contracts that was eventually withdrawn. See *R.U.S.A.*, *supra* note 40, § 1-C, at 331-32 (providing for written, agreed upon rules of trade to be incorporated into particular trade contracts and for means of distinguishing bargained and unilaterally imposed terms in printed forms). The form contract problem is now handled by an unconscionability section which allows a court to refuse to enforce unconscionable clauses or whole contracts. U.C.C. § 2-302(1) (1994). This section provides:

[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id. However, the principle of unconscionability "is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." *Id.* cmt. 1 (citations omitted); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Proposed Final Draft: Uniform Commercial Code* (1950), reprinted in 10 UNIFORM COMMERCIAL CODE DRAFTS 1, 117 (Elizabeth S. Kelly ed., 1984). See also NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Uniform Commercial Code* (1948), reprinted in 6 UNIFORM COMMERCIAL CODE DRAFTS 1, 83-84 (Elizabeth S. Kelly ed., 1984) (indicating that unconscionability in the 1949 Code was to compensate for unequal bargaining power).

²³¹ For example, John Commons was active in Wisconsin government and instituted the first workman's compensation system. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 5, at 176-80 (Supp. III 1973). Jerome Frank worked in the Agricultural Adjustment Administration, Federal Surplus Relief Corporation and the Securities and Exchange Commission. *Id.* at 215-16 (Supp. VI 1980). Thurman Arnold led FDR administration's efforts to stop anti-competitive business practices. *Id.* at 16-17 (Supp. VIII 1988). See also *supra* notes 3-6 and accompanying text.

elite group of intellectuals ascended to positions of power.²³² Moreover, these intellectuals felt that FDR's predecessors had failed and therefore they viewed FDR's election as a mandate for significant economic changes and a new economic order.²³³

Some economists have divided these New Dealers into the following groups: (1) advocates of more competition; and (2) advocates of systematic organization and planning as well as conscious and sensible administrative control of economic processes which would "restore economic balance and prevent future breakdowns" (economic planners).²³⁴

The economic planners have been further divided according to where they fell in the political spectrum.²³⁵ Economic planners on the left were characterized as those "who would deprive businessmen of their power and transfer much of it to the state or to organized non-business groups."²³⁶ The economic planners on the right were considered "industrialists and pro-business planners . . . who felt that an enlightened business leadership, operating through self-governing trade associations, should make most of the decisions."²³⁷ Hamilton and Frank were members of the first group of planners which advocated giving power to the state or non-business groups.²³⁸ Llewellyn was a member of the second group

²³² See DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* 81-82 (1988) (explaining that FDR sought out a group of intellectuals, referred to as the "Brain Trust," to channel "people and ideas from the university into his administration").

²³³ *Id.* at 81. Brand indicated that FDR's election "ushered into power a new political elite," who would attempt to institute a new economic order. *Id.* "The business elites and their political allies who had run the nation in the 1920s had failed, and the 1932 election had provided a mandate for radical changes." *Id.* This "new order that Roosevelt envisioned would rely primarily on cooperation rather than competition and on nonlegal modes of conflict resolution rather than on the rule of law. Disciplined cooperation for the sake of the common good would have to replace undisciplined individualism and the narrow focus on maximizing profits." *Id.*

²³⁴ ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 13, 36 (1966) (warning that this division is useful but not precise and that "[i]t was much more complex" since individuals "refused to accept ideological systems intact and then stick to a given position").

²³⁵ *Id.* at 12-13.

²³⁶ *Id.* at 13.

²³⁷ *Id.* (indicating that these "pro-business planners" thought that the Depression was caused by "chiseling" and "cutthroat competition").

²³⁸ See HAMILTON & WRIGHT, *supra* note 24, at 6 (noting the problems associated with business groups regulating the industry); see also FRANK, *supra* note 30, at 406-407 (explaining that without government involvement businesses would not operate efficiently or productively).

which wanted business or trade associations to make the decisions.²³⁹

The economic system of self-governing business groups, advocated by Llewellyn and other economic planners on the right and in which governmental powers could be exercised by economic or vocational groups, has been called the "business commonwealth."²⁴⁰ Examined in this light, Article 2 was intended to establish a business commonwealth.

The attempts to organize business and save it from the chaos of *laissez-faire* fell into the following four stages: (1) the trade association movement of the twenties; (2) the NRA's attempt to institute a measure of corporatism and collectivism;²⁴¹ (3) the NRA's failure, demonstrated by the Supreme Court's ruling that the NIRA was unconstitutional,²⁴² and the creation and strengthening of agencies like the National Labor Relations Board,²⁴³ the Agricultural Adjustment Administration,²⁴⁴ and the Federal Trade Commission;²⁴⁵ and (4) the emergence of Keynesians and World War II. The UCC, which was Llewellyn's attempt to continue the program of the NIRA and the business commonwealth ideal by other means, was part of the third stage.

B. Trade Associations

Although businessmen, as opposed to academics, created the trade association movement, that movement is consistent with the anthropologists' and institutional economists' emphasis on group,

²³⁹ See *Good*, *supra* note 151, at 263 (stating that "[a] man's rights must be accessible, but to be right rights, they must call also for some share on his part in initiating or in working out their procurement, their fulfillment. Else law remains remote, the government becomes an enemy or a dairy-cow . . .").

²⁴⁰ See HAWLEY, *supra* note 234, at 36-37.

²⁴¹ See BRAND, *supra* note 232, at 92 (discussing societal corporatism and the cooperative relationship between business and labor based on collective bargaining).

²⁴² See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding NIRA codes unconstitutional as an attempted delegation of legislative power to the executive branch).

²⁴³ See BELLUSH, *supra* note 10, at 179 (discussing the passage of the National Labor Relations Act (NLRA) as an attempt to create a more friendly environment for labor relations after the invalidation of the NRA).

²⁴⁴ See Theda Skocpol & Kenneth Feingold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 258 (explaining that the AAA was more successful in organizing farmers than the NRA was in organizing industrial capitalists).

²⁴⁵ See BRAND, *supra* note 232, at 221 (stating that "the FTC was the foremost institutional guardian of the antitrust legacy, and it had historically objected to many forms of industrial stabilization").

and not individual or state, control. The trade association movement was an important means of regulating commerce and it laid a foundation for the NRA.²⁴⁶ Trade associations set quality standards and trade practices in the area of sales. The movement's pervasiveness is illustrated by the fact that both Herbert Hoover and FDR were involved in the American Construction Council.²⁴⁷ Moreover, the Merchants' Association of New York, a trade association, drafted the proposed Federal Sales Act that was the impetus for the UCC.²⁴⁸

The trade associations were trying to achieve stabilization, cooperation, and control.²⁴⁹ Starting with the "dinner-club" associations in the nineteenth century, trade associations and government bureaucrats began working together to promote industrial stability and economic rationalization.²⁵⁰ By the twenties, trade associations began taking on identities separate from their members.²⁵¹ They tried to regulate industries and impose standards on both members and nonmembers.²⁵² In addition, the Department of Commerce, headed by Herbert Hoover, promulgated ethical codes and assisted the growth of trade associations.²⁵³

The trade association movement was, in part, a response by small businesses to the increasing size and power of large corporations.²⁵⁴ The associations lobbied for a revision of the antitrust laws so that they could effectively organize competition.²⁵⁵ These associations, supported by their members, began to advocate

²⁴⁶ See *id.* at 150.

²⁴⁷ *Id.* at 4. In fact, FDR and Herbert Hoover, then Secretary of Commerce, founded the Council in 1922 "to prevent 'unfair competition' within the construction industry, to stabilize and cartelize the industry, and to develop planning through the imposition of codes of 'ethic's.' *Id.*

²⁴⁸ Hiram Thomas, *The Federal Sales Bill As Viewed by the Merchant and the Practitioner*, 26 VA. L. REV. 537, 543-44 (1940).

²⁴⁹ See GALAMBOS, *supra* note 170, at 10.

²⁵⁰ See *id.* at 33-36, 44. At first, "dinner-club" associations worked out price and production controls through committees or informal contacts. *Id.* However, since the associations were self-regulated, some industries experienced cutthroat competition and excess capacity problems. *Id.* Therefore, in an effort to stabilize the industry, it was important for the government and manufacturers to work together. *Id.*

²⁵¹ See BRAND, *supra* note 232, at 92 (explaining how trade associations were not merely representing members' interests but "were incorporated into the administrative apparatus of the NRA (administrative corporation) with the expectation that they would subordinate their economic self-interest to broader national goals").

²⁵² *Id.* at 93.

²⁵³ *Id.* at 150.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 151.

an increased government role in order to create cooperation and bring chiselers into line.²⁵⁶ This vision of a “business commonwealth” would be achieved with the assistance of government agencies which would promulgate rules and codes of practice to promote cooperation and prosperity.²⁵⁷

C. *The NRA*

Trade associations could not control prices and production without government authority. In establishing industry standards, associations could not set production quotas or prices for fear of violating the Sherman Antitrust Act.²⁵⁸ The government, therefore, while enabling “self-government in industry,” had to play a supervisory role by “advising and supporting business leaders, enforcing business decisions, assisting in the organization of the more backward trades, and rounding up any stray chiselers that were not as yet convinced that what was good for their industry was also good for them.”²⁵⁹

Therefore, associations needed some government support, involvement, and control to combat the chaos of the Depression.²⁶⁰ The NIRA was such a support mechanism. Like most political

²⁵⁶ BRAND, *supra* note 232, at 151-52 (indicating that “[t]he possibility of using the coercive powers of the state to bring uncooperative ‘price chiselers’ into line appealed greatly to the organizationally disadvantaged, who had no other means to effect market stabilization”).

²⁵⁷ See HAWLEY, *supra* note 234, at 11. Hawley suggests that there was a vision of a business commonwealth, which sought to set up a benevolent capitalism under which everyone would be happy and prosperous:

The result was a rapid burgeoning of trade associations, a rationale that justified their anticompetitive activities, and a public policy under which such agencies as the Department of Commerce and the Federal Trade Commission helped these associations to standardize their products, expand their functions, and formulate codes of proper practices, codes that generally regarded a price cutter as a “chiseler” and price competition as immoral. If the official propaganda of these business organizations could be believed, the nation had entered a new era of cooperative activities, an era in which poverty and class conflict would disappear, business would discipline itself, and everyone would benefit from the joint action of enlightened business leaders.

Id.

²⁵⁸ See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (holding that a selling agency composed of several coal producers did not violate the Sherman Antitrust Act because it did not have “monopoly control of any market nor the power to fix monopoly prices”).

²⁵⁹ HAWLEY, *supra* note 234, at 38-39.

²⁶⁰ See generally BELLUSH, *supra* note 10, at 5 (indicating that a partnership between government and trade associations was necessary to combat unethical businessmen who decreased wages and the quality of production).

programs, the NIRA was a political compromise.²⁶¹ The NIRA attempted to chart a middle course between an aggressive policy of competition with strict enforcement of antitrust laws and a policy of vigorous government control of the economy. The NIRA allowed business groups to regulate themselves without violating the antitrust laws.²⁶² The philosophy behind the NIRA was an outgrowth of the "business commonwealth" vision.²⁶³

A more left wing "second vision" of the NIRA existed along side this vision of an enlightened, scientific, and cooperative business community running American industry. This vision viewed the NIRA as a step to "a collectivist democracy engaged in purposeful national planning."²⁶⁴ Business would be put under the discipline of scientific management in a regime inspired, in part, by institutional economist Thorstein Veblen.²⁶⁵

The trade groups' greatest obstacle to achieving a business commonwealth by regulating their members' trade practices was the groups' lack of coercive authority.²⁶⁶ To police their members, the groups had to share in the sovereign power of the state.²⁶⁷ As indicated previously, the prevalent view, which was shared by Roosevelt, Llewellyn, Bernard Baruch, and leaders of trade as-

²⁶¹ See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 57 (1963) (indicating that FDR ordered the committee drafting the NIRA to be locked in a room until they drafted a bill which reflected compromise on all sides).

²⁶² *Id.* at 57-58 (pointing out that government allowed business to draft code agreements which were exempt from antitrust laws). See BELLUSH, *supra* note 10, at 5 (discussing FDR's goal of having trade standards that would be exempt from antitrust laws but monitored by the government). *But see id.* at 29 (pointing out the inconsistency in the NIRA since one part exempted the codes from antitrust laws and another provided that no code shall allow monopolies or antitrust violations).

²⁶³ HAWLEY, *supra* note 234, at 42 (stating that "the prophets of the business commonwealth were able to write some of their ideas into the National Industrial Recovery Act"). See *id.* at 8-9 (stating that competition would be rationalized through a program that would "repeal the Sherman Act, encourage business organization, and allow self-governing trade associations, loosely supervised by federal authorities, to rationalize competition, improve business ethics, and handle the nation's social problems").

²⁶⁴ *Id.* at 43.

²⁶⁵ *Id.*

²⁶⁶ See Jaffe, *supra* note 115, at 202.

²⁶⁷ *Id.* Jaffe explains the associations' problem when he indicates that "the most significant and powerful components of the social structure are economic groups." *Id.* at 201. However, in theory, the only legitimate entity is the "organization of citizens territorially. . . . This community is the state. This activity is the law!" *Id.* at 201. The economic groups, however, demand power. This is "in part a demand for groups privileges over against the rest of society; in part a demand by the more explicit elements in a group that the group as a corporate body be given power to coerce under the sanction of law dissentient members of the group." *Id.* at 202.

sociations and labor unions, was that the only way to cure the nation's economic ills was to control the "scabs" and "chiselers."²⁶⁸ The NIRA put such police power in the groups' hands.²⁶⁹

There were other social and philosophic bases for the NIRA. Many theorists believed that industry solutions had to be industry specific.²⁷⁰ The NIRA, which was based on the belief that group empowerment would lead to individual empowerment,²⁷¹ provided an opportunity for groups to develop group-specific solutions.²⁷² Moreover, the administrative regulation of the NRA would make law less remote to individuals.²⁷³

Thus, localized and trade-specific self-regulation would likely be both more efficient and more empowering than remote public administration.²⁷⁴ The NRA, therefore, sought to regulate the economy by empowering trade groups to regulate themselves.²⁷⁵ The trade group was to establish codes of fair competition that would stamp out chiseling.²⁷⁶ Violations of these codes would lead to criminal prosecutions.²⁷⁷ In return, labor would obtain guaran-

²⁶⁸ See *supra* notes 206-13 and accompanying text.

²⁶⁹ See LEUCHTENBURG, *supra* note 261, at 65 (indicating that the fair practice code would "eliminate eye-gouging and knee-graining and ear-chewing in business").

²⁷⁰ See *Effect*, *supra* note 9, at 667 (indicating that a major legal problem was fitting the law to the specific problems of the group in question and that "the outstanding legal problem of the day [was] . . . how common, general rules, judge-made or statutory, are to control transactions under high specialization").

²⁷¹ See *Good*, *supra* note 151, at 263 (describing how the Tennessee Valley Authority was a government agency that was working to empower the average citizen); see also COMMONS, *supra* note 66, at 27-30 (alluding to this empowerment by explaining the power of collective action and that the individual is puny by himself or herself but powerful when acting in concert with others).

²⁷² See BELLUSH, *supra* note 10, at 25 (indicating that FDR intended to use trade and industrial associations to create codes).

²⁷³ See *Good*, *supra* note 151, at 261 (describing how administrative regulation had the potential to make law clear and meaningful to individuals, and indicating that "this is best bodied forth in legislation, when well drawn, with lines of policy that any interested man can understand, made clear, with technical detail left then to be handled flexibly by administrative regulation").

²⁷⁴ See Jaffe, *supra*, note 115, at 212 (indicating that "[p]articipation in management satisfies the craving for self-expression, for power"); see also *Good*, *supra* note 151, at 263 (discussing the remoteness of traditional government and the virtues of citizen involvement which may be an unstated reference to Jaffe).

²⁷⁵ See BELLUSH, *supra* note 10, at 37-38 (indicating that members of trade groups were appointed to advisory boards and helped create the codes).

²⁷⁶ See *id.* at 36-38 (discussing the fair practice codes).

²⁷⁷ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (involving an individual charged with criminal violation of the Live Poultry Code).

tees of minimum wages and maximum hours and the right to engage in collective bargaining.²⁷⁸

The specific industry codes were usually proposed by trade associations.²⁷⁹ The proposing group conferred with NRA officials and the NRA's three advisory boards representing labor, businesses, and consumers.²⁸⁰ After this group reached a consensus on a code, a public hearing was held.²⁸¹ Following consideration of any new proposals, the code was sent to the NRA administrator, who then forwarded it to the President for final approval.²⁸² The process of code adoption was similar to that proposed by Llewellyn to fix trade usage under the Proposed Sales Act.²⁸³ The NRA codes of fair competition were to become a "*law merchant*" for the relevant industry.²⁸⁴

The NIRA "was the most ambitious attempt to institute societal corporatism in American political history."²⁸⁵ It attempted to transform *laissez-faire* competition into one of cooperation.²⁸⁶ Fortunately or unfortunately, the NIRA failed. Therefore, the UCC was an attempt to salvage the ideals of cooperation and group power out of the wreckage of the NIRA.

D. *The Failure of the NRA*

The NRA's code-making process turned out to be more complex, protracted, and difficult than expected. The more powerful companies dominated code-making, making it burdensome on small businesses.²⁸⁷ Businessmen objected to the wage, hour, and collective bargaining provisions as the precursors to strikes and labor unrest.²⁸⁸ The problem of enforcing detailed codes of fair competition became insurmountable. Policing service industries with many small establishments was similarly difficult. The growing alienation of businessmen from the New Deal made the program, which depended upon business cooperation, impossible to

²⁷⁸ FREIDEL, *supra* note 189, at 104.

²⁷⁹ BELLUSH, *supra* note 10, at 37.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *R.U.S.A.*, *supra* note 40, at 332.

²⁸⁴ BRAND, *supra* note 232, at 11 (emphasis added).

²⁸⁵ *Id.* at 92.

²⁸⁶ *Id.*

²⁸⁷ See FREIDEL, *supra* note 189, at 136.

²⁸⁸ See *id.* at 137-38.

operate.²⁸⁹ Ultimately, the NRA's futile attempt to establish fair competition undermined the program.²⁹⁰

Thus, the NIRA was already discredited when *A.L.A. Schechter Poultry Corp. v. United States*²⁹¹ (*Schechter Poultry*) reached the Supreme Court. However, when the Court declared the NIRA's delegation of sovereign power to private groups unconstitutional, the NIRA's crucial feature of permitting group empowerment and control was eliminated.²⁹²

Modern administrative treatises do not view *Schechter Poultry* in these terms. These texts treat this case as a "delegation" problem without differentiating delegations to provide groups from delegations to administrative agencies.²⁹³ The delegation under the NIRA was not to an agency, but to trade associations, industrial associations or groups upon the President's approval.²⁹⁴

In *Schechter Poultry*, the United States charged the defendants, wholesale slaughterers of poultry, with selling diseased and uninspected poultry in violation of labor standards.²⁹⁵ The government argued that the regulations were justified because diseased poultry "is necessarily disposed of through misrepresentations as to its condition, and causes distrust and a reluctance to purchase on the part of consumers."²⁹⁶ The presence of inexpensive diseased poultry forced the sellers of good poultry to decrease their own prices to remain competitive.²⁹⁷ In addition, low wages paid to laborers also caused price cutting.²⁹⁸ The Court of Appeals noted that all "these conditions brought about an industrial demoralization which, with all its adverse national consequences, needed correction and betterment."²⁹⁹

²⁸⁹ See BRAND, *supra* note 232, at 105 (concluding that, by the end of 1934, "the social consensus necessary for the NRA simply did not exist").

²⁹⁰ See *id.* at 119.

²⁹¹ 295 U.S. 495 (1935).

²⁹² *Id.* at 537.

²⁹³ See, e.g., KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 2.6 (3d ed. 1994).

²⁹⁴ National Industrial Recovery Act, 15 U.S.C. § 703 (1988) (original version at ch. 90, § 3, 48 Stat. 195 (1933), ruled unconstitutional by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

²⁹⁵ *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 618 (2d Cir.), *rev'd*, 295 U.S. 495 (1935).

²⁹⁶ *Id.* at 619.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

The Supreme Court, however, held that the NIRA was an impermissible delegation.³⁰⁰ The court concluded that the “codes of fair competition” promulgated under the NIRA were not limited to “unfair competitive practices” under existing law, but authorized “wise and beneficent [sic] measures for the government of trades and industries.”³⁰¹ Such a delegation, the Court held, was illegitimate since it lacked standards for any trade, industry or activity.³⁰²

The Supreme Court’s invalidation of the NIRA in *Schechter Poultry* spurred the New Deal into action.³⁰³ After reading telegrams from small businessmen complaining of cutthroat

³⁰⁰ A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

³⁰¹ *Id.* at 535.

³⁰² *Id.* at 541. Compare U.C.C. § 1-205 (1994) (delegating to trades and industries the power to set standards of usage and fair dealing). Additionally, the UCC allows the banking industry to set the standard of ordinary care through “clearing-house rules and the like or with a general banking usage.” *Id.* at § 4-103(c).

Llewellyn disagreed with the Supreme Court’s decision in *Schechter Poultry*. See *On Warranty I*, *supra* note 45, at 713, 721. Llewellyn believed that group or state requirements of good faith and fair dealing were a prerequisite for economic prosperity. In support of this view, Llewellyn stated:

Let government (guild or general) step out (as it did), and you have a void. Voids are uncomfortable. That is, they are uncomfortable under some conditions. If your notion of commerce is the wandering peddler, the horse-trader, the side-show at the fair, then you think well of arm’s-length bargaining, single-occasion deals, and devil take the fool. If, on the other hand, you think of trade in terms of goodwill and future business, you will find no hardship in imposing on a seller various obligations resting in first essence on good faith, and then on contract: what did he *agree* to deliver? The progression is from “any man in selling will affirm that his wares are good” (arm’s-length), through “one must not conceal what he knows, or ought to know” (tort), into “This is what he has agreed to deliver” (contract); then, into: this is what he must answer, generally, for putting on the market (*res ipsa loquitur*, and third party warranty); and finally, into central regulation: he must, on pain of exclusion or fine (guild or association) or confiscation, fine, or imprisonment (state), show publicly the content of his ware; or even: wares of less than a given standard he *shall not put out*. . . . [R]epeat orders are what a seller needs; to stand behind words, and even behind wares-without-words, is good business *for the seller*—and is therefore good policy for a court to encourage. Transactions look to future delivery; even where they do not, they look to standard quality of goods produced in mass and grade, and sold by name, brand, or description. Distribution of goods is indirect, almost as of course; a buyer has only his dealer to trust to; it is a dealer’s business to know the goods he sells. As between dealers (even as between retail-dealer and consumers), standing relations mean goodwill; and goodwill is what makes turnover; and turnover is what makes the balance-sheet wax fat. Confidence, not trickery, is the basis of prosperity.

Id.

³⁰³ See FREIDEL, *supra* note 189, at 160.

competition,³⁰⁴ FDR attacked the Supreme Court for *Schechter Poultry*.³⁰⁵ FDR intensified this attack with his ill-fated court-packing plan.³⁰⁶ In the aftermath of the NIRA's collapse, the New Dealers sought new ways to modernize the economy, end the Depression, and restore prosperity.

VI. THE POST-SCHECHTER ERA

After *Schechter Poultry*, the debate over economic policy re-emerged. Some New Dealers proposed cartelization, with the setting of minimum prices, production quotas, product standards, and labor practices.³⁰⁷ The economic planners argued for managed systems of production and pricing.³⁰⁸ The UCC emerged in the period between *Schechter Poultry* and Pearl Harbor.³⁰⁹

After *Schechter Poultry*, proponents of the business commonwealth "were still proposing ways to get around the court decision and re-establish a policy 'of cooperative self-regulation,'" and a program that would "defend industry from the chiseler."³¹⁰ A trade association official proposed that the federal government grant each national organized trade association the right to draft and legally enforce its own ethical codes.³¹¹

The increasing alienation between business and the Roosevelt Administration made such a plan impossible for the federal government. While business increasingly viewed the New Deal as being anti-property and against the ideological foundations of business, Roosevelt also grew disillusioned with the failure of business to cooperate.³¹² A set of specific laws designed to solve

³⁰⁴ *Id.* at 162 (one telegram sent to Roosevelt from a small businessman read: "Chiselers already at our throats and have begun choking us. Need immediate action").

³⁰⁵ *Id.* at 163. In protest, Roosevelt stated: "We are the only nation in the world that has not solved that problem. We thought we were solving it, and now it has been thrown right straight in our faces and we have been relegated to the horse-and-buggy definition of interstate commerce." *Id.*

³⁰⁶ *Id.* at 194.

³⁰⁷ See HAWLEY, *supra* note 234, at 150.

³⁰⁸ See *id.* at 172. The economic planners' stronghold was the Agricultural Adjustment Administration, where Jerome Frank was serving, and which still administers such management over the agricultural economy today.

³⁰⁹ The first drafts of the UCC were completed in 1940 and 1941.

³¹⁰ See HAWLEY, *supra* note 234, at 149.

³¹¹ *Id.* The UCC's definition of "good faith" allows a trade association to do just that. See U.C.C. § 2-103 (1994) (allowing a trade association to set its own ethical standards since good faith, in the case of merchants, "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

³¹² See HAWLEY, *supra* note 234, at 152-55.

particular problems or regulate specific industries followed the failure of the NIRA.

The work of the NRA was subdivided and parceled out to various agencies.³¹³ The National Labor Relations Board took over the labor sections from the NRA.³¹⁴ Production codes and regulations were passed for the coal, transportation, and communication industries.³¹⁵ Oil also became subject to state production controls.³¹⁶ Production codes were proposed, but not enacted for, the cotton, textile, lumber, apparel, and anthracite coal industries.³¹⁷ Note that the "capture" theory of regulation of industries understates the case. In the New Deal, the agency was *supposed* to be captured from the beginning. The agency's purpose was to enforce the desires of the industry *legally*.

Finally, at the end of the thirties, the New Deal gave up on the ideal of the business commonwealth which was characterized by business-government cooperation. Business had been unable to cooperate under the NIRA and became increasingly alienated from the New Deal.³¹⁸ Roosevelt changed course again and flirted with Keynesianism and a vigorous antitrust program.³¹⁹ Shortly thereafter, the nation was preparing for war and the Depression era was over.³²⁰ Llewellyn, however, still sought to control "chiseling"

³¹³ *Id.* at 159-62.

³¹⁴ See BRAND, *supra* note 232, at 251.

³¹⁵ See HAWLEY, *supra* note 234, at 207, 233-34.

³¹⁶ *Id.* at 214.

³¹⁷ *Id.* at 220, 223-24. For examples of the New Deal era's legislation which replaced unregulated competition with sharing markets by cartels, planning, and enforcement of group norms see: Fair Trade (Miller-Tyding) Act, ch. 690, Title VIII, 50 Stat. 693 (1937) (current version at 15 U.S.C. § 1 (1994)) (originating and succeeding in protecting small retail business from chain-stores, mail-order firms, and supermarkets by prohibiting price discrimination between retailers, calling for equal advertising allowances, banning predatory price cutting, and limiting quantity discounts); Bituminous Coal (Guffey-Vinson) Act of 1937, ch. 127 §§ 1-22, 50 Stat. 72 (1937) (formerly codified at 15 U.S.C. §§ 828-52 (1988), *repealed by* Pub. L. No. 89-554, § 8(a), 80 Stat. 649, 651 (1966)) (regulating the bituminous coal industry); Merchant Marine Act of 1936, ch. 858, § 201, 49 Stat. 1985 (1936) (codified as amended at 46 U.S.C. §§ 1104-1294 (1988)); Motor Carrier Act, ch. 498, pt. II, § 201, 49 Stat. 543 (1935) (originally codified in 49 U.S.C. §§ 301-327 (1976), recodified as amended in scattered sections of 49 U.S.C. (1988)); Civil Aeronautics Act of 1938, ch. 601, § 201, 52 Stat. 973 (1938) (originally codified in 49 U.S.C. §§ 1301-1542 (1976), *repealed in part and recodified in part in scattered sections of 49 U.S.C. by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994)). The original drafts of the UCC are also an example of this type of legislation.

³¹⁸ See FREIDEL, *supra* note 189, at 256.

³¹⁹ See *id.* at 255-57. FDR appointed Thurman Arnold as head of the Antitrust Division, and increased the Division's lawyers from 18 to 300. *Id.*

³²⁰ See *id.*

and establish standards of good faith and quality in his Revised Sales Act.

A. Trade Self-Regulation

The UCC keeps the dream of the business commonwealth, with each trade regulating its own affairs, alive. Although the UCC does not provide for resale price, maintenance, or restrictions on output, the UCC allows the trade group to regulate commerce through its key device of "usage of trade" which defines the terms of the contract, good faith, and product quality.³²¹ The UCC permits the type of trade self-governance that the Supreme Court in *Schechter Poultry* held patently unconstitutional.³²²

Llewellyn sought to realize the goals of the NIRA and to modernize sales by moving away from individual bargaining toward trade group regulation.³²³ The UCC's insistence on "reasonableness" also limits the freedom of contract by allowing courts to police commercial agreements.³²⁴ Moreover, the UCC's use of "usage of trade" constituted a radical change in contract law.³²⁵ A trade usage governs a contract even if the parties were unaware of it or intended not to be bound by it.³²⁶

³²¹ U.C.C. § 1-205(2) (1994).

³²² See *id.* at § 1-205 (1994).

³²³ See *On Warranty I*, *supra* note 45, at 713. In the UCC, Llewellyn made contracts subject to "usage of trade" and the observance of reasonable commercial standards of fair dealing in the trade. See U.C.C. § 1-205 (1994) (usage of trade and standards of fair dealing). Moreover, the UCC sets up a standardized contract of sale in Part 3 of Article Two that governs unless the parties contract otherwise. *Id.* at §§ 2-201 to 2-210, 2-314. See also Austin T. Wright, *Opposition of the Law to Business Usages*, 26 COLUM. L. REV. 917, 938 (1926) (pointing out that allowing business usages to control obligations between merchants conflicts with the consensual theory of contracts).

³²⁴ See U.C.C. §§ 2-205, 2-206, 2-207, 2-305, 2-309, 2-513, 2-602, 2-607, 2-608, 2-610 (1994) (employing reasonableness standards).

³²⁵ See *id.* at § 1-205 cmt. 1.

³²⁶ See *R.U.S.A.*, *supra* note 40, at 332. The draft encouraged trade groups to promulgate their own standards:

(1) *The balanced "Association" type of "Rules"*. General provisions in an Act cannot do particular justice to the particular conditions of the wholesale trade in grain, or furs, or dried fruit, or fresh produce. What general provisions can do, is to leave usage of trade free to modify or displace the general provisions. But *proof* of usage of trade, especially before a jury, is expensive and uncertain. Even before a merchant-tribunal the results of proof of such usage of trade must abide the event, and some upsets are inevitable. Moreover, usage may be unclear, or in process of change, or different as between the market the seller knows and the market familiar to the buyer. It is, therefore, wisdom for those engaged in a particular trade to get together on a clear and specialized articulate statement in advance of such usages

B. Standardized Rules

The UCC also establishes a standardized contract.³²⁷ By employing "standardized contracts," the UCC sets forth a group of rules that exemplify Isaac's observation that such rules will supplant individual bargaining unless the parties take the trouble to contract out of them. These rules provide "a whole background of solutions for *any* matter which as a whole is sufficiently reasonable and fair not to *need* to be bargained about."³²⁸

The UCC's use of "reasonable" also moves away from individual bargaining and towards regulation. Although reasonableness may be vague, the UCC's use of that standard gives courts the power to regulate the bargain and behavior of parties to sales contracts.³²⁹ The use in the proposed Federal Sales Act of "reasonableness" is also inconsistent with *laissez-faire*.³³⁰

C. Regulatory Ideals

In order to decrease disputes over quality standards, Llewellyn advocated a shift from sole reliance on private litigation to regulate sales law to a system encompassing such mechanisms as vertical

or changes in usage as they wish incorporated into their transactions. This the section should recognize and seek to encourage.

Id.

³²⁷ See U.C.C. §§ 2-201 to 2-210, 2-301 to 2-328 (1994). See also *R.U.S.A.*, *supra* note 40, at 303. The introduction to the second draft discusses standardized contracts and indicates: The second kind of framework is a sort of standardized contract, serving wherever the parties have not particularized their bargain. It fills in and it fills out. Its office is to provide not only reasonable and fair solutions for particular matters, but, no less, a whole background of solutions for *any* matter, which as a whole is sufficiently reasonable and fair not to *need* to be bargained about. This has always been the effort of the courts; but the courts have had to work at the problem case by case and rule by rule, piece by piece. When the law of a whole field comes to be stated, the net balance of fifty or five hundred of these particular rules comes up for examination and review.

Id.

³²⁸ *R.U.S.A.*, *supra* note 40, at 303.

³²⁹ See DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 539 (1992) (stating that "Reasonable has no precise legal meaning. It is flexible. That is its virtue and only utility for the law").

³³⁰ See Nathan Isaacs, *The Sale in Legal Theory and In Practice*, 26 VA. L. REV. 651, 652 (1940) ("This fondness for the 'reasonable price', as distinguished from the ideal of insisting that the parties and not the courts shall make the contract, may look back to the middle ages or forward to some New Deal, but obviously it excludes the Nineteenth Century from our calculations.").

integration, scientific purchasing, trade association standards, and legislative regulations.³³¹ For example, vertically integrated businesses do not have to be concerned with intra-firm "sales".³³² Technical purchasing staffs, that specify what they want, do not need implied warranties.³³³ Business associations could be encouraged to promulgate standards.³³⁴ Moreover, legislative regulation, along with a system of civil liability, was necessary.³³⁵ Therefore, Llewellyn viewed litigation as a last resort which would clean up any leftover problems.³³⁶

Although it is still private law, and thus the desired government regulation is not present, Llewellyn's Code goes a long way toward realizing the purposes of the NIRA. In addition to incorporating

³³¹ See *On Warranty II*, *supra* note 8, at 395 & n.137.

³³² See *id.*

³³³ See *id.*

³³⁴ *Id.* at 395-96. Llewellyn stated:

"What will pass in the market" is sub-defined into distinguishable degrees or ratings of "Be." or "H.P." or octane or acid content; or into "fancy," "choice," "table," and "plain"—with rules for grading, as for instance that any one lowest or worst apple in a box will govern, or that five percent of culls are permissible.

Id.

³³⁵ *Id.* at 408. Llewellyn stated:

Legislative regulation can be three-fold at least, and can *cumulate* in action with civil liability. This *cumulation*, instead of *substitution*, is one lesson that the 18th and 19th centuries, in their alternation of inadequate attacks, suggest to the 20th.

Legislation, taking the major lines of regulation, can: (a) *define* standards of quality, and provide official inspectors, to make contract language test up to what it says; (b) lay down *minimum* standards, either *in toto* or for named grades, and provide ways of dealing with would-be chisellers. This is Tudor regulation to keep the exploited from having to use his own unpracticed judgment. It is colonial. It lapses a little, in the 19th century. It is federal meat inspection as distinguished from saying on the label to buyers who do not understand, that this product contains blank percent of blank; (c) If the goal is clear, legislation can, between merchants and in favor of consumers, knock out contrary contract, or can even penalize attempts to make contrary contract.

All of which, wherever employed, seems to have led not only to better enforcement of civil obligation, but toward the major end for which civil obligation itself exists: to wit, the *avoidance* of injury and dispute. It hardly needs saying, in addition, that to keep the civil-obligation-side alive means presence of a useful social pressure to keep the official inspectors on their social job. The 19th century does not show failure of the civil obligation. It shows instead that civil obligation is magnificent, when rightly handled—but *not enough*, however rightly handled.

Id.

³³⁶ See *id.* at 395-96. Llewellyn believed that warranty litigation would wither away. He did not contemplate the present system of sales law in which warranty litigation is pervasive. See generally U.C.C. Rep. Serv. (Callaghan) ¶ 2313-18 (citing a multitude of cases dealing with express and implied warranties, exclusion and conflict of warranties which illustrate the prevalence of such litigation).

trade corporation standards, the Code provides for group self-management, the policing of chiselers, and the imposition of group-determined quality standards.³³⁷

The UCC, which is the result of the imposition of regulatory ideas on a system of private law, is a peculiar statute which displays an ambivalence between *laissez-faire* and regulation. For example, under the UCC's treatment of warranty, merchants who sell goods give a "warranty of merchantability" which is fixed by the group norms of the trade.³³⁸ Goods must "pass without objection in the trade under the contract description"³³⁹ unless the implied warranty is excluded or modified.³⁴⁰ The UCC requires that the excluding language "must mention merchantability and in case of a writing must be conspicuous" and give methods to disclaim a warranty.³⁴¹

However, a party's power to exclude warranties is limited by the UCC's unconscionability section.³⁴² In any case, the agreement can provide for modifications and limitations of remedy, unless "circumstances cause an exclusive or limited remedy to fail of its essential purpose."³⁴³ Moreover, "at least minimum adequate remedies [must] be available."³⁴⁴ And, in any case, minimum express warranties cannot be completely disclaimed.³⁴⁵ The UCC thus displays an ambivalence between *laissez-faire* and state imposition of standards of warranty and remedy.

D. Meeting the Challenges of Depression Conditions

The Depression, which preceded the initial drafts of the UCC, was a period of great price fluctuations, chaotic business conditions, and low levels of production and consumption.³⁴⁶ It is not surprising

³³⁷ *On Warranty II*, *supra* note 8, at 395-96.

³³⁸ U.C.C. § 2-314(2)(a) (1994).

³³⁹ *Id.*

³⁴⁰ *Id.* at §§ 2-314(1), 2-316.

³⁴¹ *Id.* at § 2-316(2)-(3) (identifying methods to disclaim a warranty).

³⁴² *Id.* at § 2-302 (giving courts options where agreement is found to be unconscionable).

³⁴³ *Id.* at § 2-719(1)(a)-(2) (1994).

³⁴⁴ *Id.* at § 2-719 cmt. 1.

³⁴⁵ *Id.* at § 2-313 cmt. 4 (indicating that "the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation").

³⁴⁶ See generally FREIDEL, *supra* note 189, at 248 (discussing the economic conditions of the depression). For example, the wholesale price index for all commodities declined from 50 in 1928 to 33.6 in 1932. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE U.S., COLONIAL TIMES TO 1970, BICENTENNIAL EDITION, 199 (Part I 1975). Subsequently, the wholesale price index rose to 44.5 by 1937 and fell to 39.8 in 1939. *Id.* It then started rising, and did not fall by more than 4.1 points again. *Id.*

that buyers sought to get out of contracts and that sales law needed to be changed to keep parties bound by an agreement. Many sections of the Sales Article were drafted to meet this problem.³⁴⁷ UCC section 2-605 is a good illustration of this.³⁴⁸ Since section 2-605 can be traced back to a proposal specifically concerned with price fluctuations, this section's purpose was to protect sellers from buyers who reject because of falling markets.³⁴⁹

In proposing the language of section 2-605, Lawrence Eno acknowledged Llewellyn's assistance.³⁵⁰ Therefore, Llewellyn was

³⁴⁷ Specifically, the following UCC sections were intended to make it easier for parties to form contracts: § 2-305 (a party can make a contract without agreeing on a price); § 2-306 (a specific quantity does not have to be included); § 2-308 (the parties do not have to agree on the place of delivery); § 2-309 (time of performance does not have to be ascertained); § 2-311 (parties do not have to agree the details of performance); § 2-207 (a contract can come into being despite an acceptance which adds new or different terms); § 2-204 (requiring no formal offer or acceptance); § 2-201 (indicating that formal requirements are kept to a minimum). Additionally, the following sections seek to preserve the contract once it is made: § 2-508 (the seller may cure defects of tender); § 2-602 (the buyer must reject in a timely fashion). See Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 208 (1938); U.C.C. §§ 2-607 (1994) (indicating that revocation has a higher standard and is generally unavailable except where goods are accepted with knowledge of nonconformity and a belief the nonconformity will be cured). *But see* § 2-609 (stating that failure to provide the requesting party with adequate assurances is anticipatory repudiation of the contract).

³⁴⁸ U.C.C. § 2-605 (1994). This section reads:

WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO PARTICULARIZE.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

Id.

³⁴⁹ See *id.* at § 2-605 cmt. 2. See also NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Draft for a Uniform Sales Act (1940) reprinted in* 1 UNIFORM COMMERCIAL CODE DRAFTS 171, 237 (Elizabeth S. Kelly ed., 1984). This states:

In a contract or sale between merchants, the seller may demand a full statement of all objections on which the buyer is relying to justify any rejection, rescission or cancellation. On such demand, the buyer must give notice within a reasonable time of any objections which are reasonably ascertainable, or be barred from setting up such objections in later litigation. Objections made by the buyer in the absence of such demand do not bar the setting up of omitted objections unless the omission has actually, reasonably, and materially misled the seller. The burden of proving such reliance is on the seller. The burden of proving that an objection was not readily ascertainable at the time of responding to a demand for full statement is on the buyer.

Id. Similar language was contained in section 56 of the Second Draft. *R.U.S.A., supra* note 40, at 510.

³⁵⁰ Lawrence R. Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782, 816 (1935).

aware of Eno's proposals. After considering economic conditions from the early 1900s to the mid-1930s, Eno concluded that the factor of depression was present in two-thirds of the cases decided in favor of the seller.³⁵¹ Eno believed that knowledge of the changes in price levels was crucial for understanding the motivation behind rejections.³⁵² Therefore, Eno proposed a statute to "put the burden on the seller of demanding a formal statement of defects from the buyer."³⁵³ The modern version of section 2-605 thus stems from thirties scholarly thought about how to deal with Depression conditions.³⁵⁴

Likewise, other UCC sections were also responses to the Depression. For example, Llewellyn recommended that the proposed Federal Sales Act should include a provision allowing for easy resale or cover in rapidly changing market conditions, with a neutral appraiser to determine the state of the goods on delivery.³⁵⁵ These simplified resale and cover provisions became part of the UCC.³⁵⁶ The right of the seller to cure improper tender or delivery was also included in the UCC to prevent a buyer from rejecting on account of falling markets.³⁵⁷

Commercial law had to be flexible in order to keep pace with the rapidly changing Depression conditions. To achieve this flexibility, the Second Draft of the proposed Sales Act solicited "advice and information, especially from business men" on a "possible Section . . . on Division of Risks by Contract and by Law."³⁵⁸ This proposed section was to cover an emerging type of contractual relationship "which deals with contract less as an arm's-length single deal than as a getting together on a type of joint-venture; an approach which

³⁵¹ *Id.* at 817.

³⁵² *Id.* at 811 ("There are other cases where the drop in the market is so pronounced that the failure of the court to stress this in words as probably the real reason for rejection is almost unforgivable.").

³⁵³ *Id.* at 817.

³⁵⁴ *See id.* at 817; *see also* U.C.C. § 2-605 (1994).

³⁵⁵ *See* Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 569-70 (1940).

³⁵⁶ U.C.C. §§ 2-706 to 2-716 (1994).

³⁵⁷ *Id.* at § 2-508. *See also* R.U.S.A., *supra* note 40, at 465. This states that The situations involved are of two quite diverse types. The first involves a contract which has become most unwelcome to the obligee (commonly because of a severe change in the market), and involves an obligee who sits back waiting and hoping for an error in tender. In such a case, errors should be curable, if they can be cured in time; it is both uncommercial and unjust to "freeze a breach" unnecessarily.

Id.

³⁵⁸ R.U.S.A., *supra* note 40, at 475.

greatly modifies the pattern of sharp, whole-hog risk-placing which underlies most of our legal doctrine of contract."³⁵⁹

The concepts described in the "Possible Section" are embodied in the present UCC, which allows for a free readjustment of sales contracts.³⁶⁰ The concept that "course of performance" determines the parties' contractual rights³⁶¹ deals with problems expressed in a comment to the "Possible Section."³⁶² UCC section 2-209, entitled "Modification, Recession and Waiver," also gives legal effect to informal practices of adjustment to price changes that existed during the Depression.³⁶³

Long-range planning and dealing required a less rigid law.³⁶⁴ Therefore, the UCC permits open price terms,³⁶⁵ output and requirements contracts, and exclusive dealings contracts.³⁶⁶ Moreover, under the UCC a sales contract can be indefinite in duration and can leave particulars of performance to be specified by one of the parties.³⁶⁷ In permitting this, the UCC allowed the merchant to cope with the rapidly changing, chaotic commercial conditions characteristic of the Depression.

³⁵⁹ *Id.* The comment indicates that even among honest merchants, fluctuating market prices or changing conditions would cause price, time, amount or quality adjustments. *Id.* at 476.

³⁶⁰ *See id.* at 475-76 (discussing potential for eliminating risks inherent in arm's length contracting); *see also* U.C.C. § 2-209 (1994) (allowing for modification without consideration); U.C.C. §§ 2-613 to 2-615 (allowing substituted performance and excuse).

³⁶¹ U.C.C. § 2-208 (1994).

³⁶² *See R.U.S.A.*, *supra* note 40, at 476 (stating that "a change in management, an extraneous personal friction, or even the resignation of a particular contact-man, can throw the machinery of adjustment completely out of gear").

³⁶³ U.C.C. § 2-209 cmt. 1 (1994).

³⁶⁴ 4 ENCYCLOPEDIA OF SOCIAL SCIENCE *Contract* 333-34 (1931).

Indeed, such flexibility is a marked trend in marketing of goods as well, wherever long range buyer-seller relations come to seem more important than exact definition of the risks to be shifted by the particular dicker in terms of quantity, quality or price: output and requirement contracts, maximum and minimum contracts, contracts with quality - quantity and kinds to be specified from month to month and sliding scale price arrangements are symptomatic of an economy stabilizing itself along new lines.

Id. *See generally* *R.U.S.A.*, *supra* note 40, at 476 (discussing long term arrangements in which the price is adjusted on a monthly basis to fit the market).

³⁶⁵ *See* U.C.C. § 2-305 cmt. 1 (1994).

³⁶⁶ *Id.* at § 2-306 cmts. 2 & 5; *see also* *R.U.S.A.*, *supra* note 40, at 374-75 (stating "[f]or in the past decades a growing practice has been noticeable, to close long range or seasonal supply contracts with an eye more on *assuring the movement of goods and the certainty of supply* than on shifting the risk of rise and fall in the market").

³⁶⁷ *See* U.C.C. §§ 2-309 cmt. 7, 2-311 cmt. 1 (1994) (rejecting the older view that such open terms invalidated the contract because of indefiniteness).

Thus, the entire contractual framework of Article 2, including its rejection of formal doctrines which made contracting difficult, and provisions such as cover that keep contracts alive, were responses to the problems created by the Depression.

VII. THE LOST LEARNING—HOW WE LOST IT

My argument is simple. I have examined the works of scholars such as Commons, Boas, Hale, Isaacs, Frank, and Sumner, whom Llewellyn cites and credits in his writings, to answer the question: "was there anything in the social and economic milieu that influenced Llewellyn's thought?" I have also examined prevalent social and economic concepts of the time, such as the chiseler and collectivism, and have determined that these concepts affected Llewellyn.³⁶⁸ This influence is evidenced by the initial drafts of the UCC which explicitly refer to these concepts. In addition, these concepts and Llewellyn's works, especially the UCC, seem to agree.³⁶⁹

It is unsurprising that Llewellyn, who argued long and forcefully that law should apply the teachings of contemporary social science, actually did so when he drafted a proposed statute. That Llewellyn's proposal was the basis of the present commercial law does not change this but makes it more historically interesting. Why then, are Commons, Veblen, Boas, the NIRA, Sumner, Isaacs, Hamilton, Modernism, FDR, and the NLRA, not discussed by present commercial law scholars? How or why was all this learning lost?

Unquestionably, this learning has been lost because the early writings leading up to the UCC have been ignored by commercial law scholars and commentators.³⁷⁰ Social thought from 1925 to 1940 has been generally ignored by commercial law scholars. For example, most books discussing regulation fail to mention the thirties.³⁷¹ Legal thinkers, in fact, seem to replot the same

³⁶⁸ See *supra* notes 168-70 and accompanying text.

³⁶⁹ For example, the collectivism of Commons and the group anthropology of Boas and Sumner fits with the UCC's employment of trade usage in the Sales Article. See COMMONS, *supra* note 98, at 5-6; BOAS, *supra* note 83, at 11-16; SUMNER, *supra* note 129, at 12-13.

³⁷⁰ UCC commentators ignore works prior to the fifties. For example, White and Summers do not mention these scholars. See *generally* White, *supra* note 11; WHITE & SUMMERS, *supra* note 51.

³⁷¹ See STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982) (failing to list Keynes, Commons, Veblen, Roosevelt, Arnold, or Frank in its index); PHILLIP AREEDA, ANTITRUST ANALYSIS (3d ed. 1981) (failing to mention the NRA); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 56 (1978) (containing little discussion of the thirties)

ground as the between-the-wars academics, without realizing it. There are four possible explanations for this neglect.

A. *The Change in Academic Fashion*

One possible explanation why these ideas have been overlooked is that academic thought changed in the forties, when new topics, approaches, and thinkers, like Keynes, came into vogue. A symbol of this change is the fact that Ronald Coase, a present-day Libertarian and Nobel Prize-winning Chicago economist, was a socialist in the thirties.³⁷² In the fifties, scholarship became narrowly focused, formal, morally-neutral, and ahistorical. In economics, the collectivism of the institutionalists was replaced by Keynesian and neo-classical thought.³⁷³ Moreover, FDR adopted Keynesian economics.³⁷⁴ A new macro-economic paradigm replaced that of the NIRA.³⁷⁵

Jurisprudential thought also changed. The "Process" and the "Reasoned Elaboration" schools emerged to replace Legal Realism.³⁷⁶ With the Supreme Court's civil rights decisions, the attention shifted to the Bill of Rights, the courts, the civil rights lawyers and constitutional law scholars.³⁷⁷ Thus, starting in the late thirties there was a change in both theoretical and applied economics, sociology, and jurisprudence.

antitrust policy). Bork viewed *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), which upheld the trade association activities of coal producers and which contains much of the era's theory of demoralization of industry, as a routine cartel case. See also FOUNDATIONS OF ADMINISTRATIVE LAW (Peter H. Schuck ed., 1994) (failing to include one article discussing the New Deal, even though it is a collection of writings on administrative law).

³⁷² Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1211 n.1 (1991).

³⁷³ See COMMONS, *supra* note 98, at 52; WHITE, *supra* note 62, at 3-4.

³⁷⁴ See FREIDEL, *supra* note 189, at 64.

³⁷⁵ See Hovenkamp, *supra* note 65, at 1038. Professor Hovenkamp described how in academic economics, Coase and Pareto come in vogue: "Under ordinalism, the ideology of neoclassical welfare economics moved very far to the right. For the ordinalist, voluntary transactions could be scientifically shown to enhance welfare. Forced wealth transfers generally could not be, and came to be perceived as reflecting nothing more than politics." *Id.* See also Herbert Hovenkamp, *Evolutionary Models In Jurisprudence*, 64 TEX. L. REV. 645, 682 n.206 (1985). Hovenkamp described how sociology changed after the heroic age of sociology of the twenties and thirties which was concerned with the creation of the best society. Afterwards, sociologists tended to practice micro-sociology, studying discrete social phenomena, such as the "socialization in infants." *Id.*

³⁷⁶ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4-7 (1991) (describing the shift in academic emphasis from economic regulation to rights).

³⁷⁷ *Id.*

Llewellyn, however, did not make this change. Instead, Llewellyn continued to view the world in terms of the business commonwealth and the older anthropology and sociology.³⁷⁸ Llewellyn's response to the "rights revolution" and *Brown v. Board of Education*³⁷⁹ is instructive. Faced with integration, Llewellyn embarrassingly applied Sumner's concepts of "folkways" to the civil rights movement.³⁸⁰

Just as Llewellyn did not understand the rights activists, the activists did not, and still do not, understand Llewellyn. For example, consumer rights advocates do not understand why Llewellyn did not put more consumer protections into the UCC.³⁸¹

Llewellyn's vision was different from today's "rights talk." Whereas rights advocates view society in terms of powerless individuals who are oppressed and exploited by powerful institutions, Llewellyn, Commons, and the believers in the business

³⁷⁸ See LLEWELLYN, *supra* note 154, at 515-16 (studying appellate decision making as "small group behavior" and as a type of anthropological style).

³⁷⁹ 349 U.S. 294 (1955).

³⁸⁰ See *Racial Peace*, *supra* note 134, at 31. Llewellyn indicated:

In any event, three things seem very clear. The first is that the machinery of law-government has no need to lag behind or to lag with or to uncreatively just fit into the existing ways of people in their race relations, whether inside a nation or between nations. On the contrary the machinery of law-government can be built (as has been done in part by our Constitution and by our Supreme Court and by our system of armed services and of elections) to set up ideals still far from full attainment, to set up tension, steady or sudden, in the direction of those ideals, and in some degree to block off or to beat down obstruction. But the second thing is no less clear: put tension on too suddenly, too sharply, too hard, and your wire can snap, can even snap back into that devastation called destruction and reaction. It is a fine trite truth that the art of statesmanship lies in finding workable measures, in introducing them with patient skill, in following them through with firmness, and with courage, *and also with tact*.

Id. at 31. Llewellyn goes on to balance racial justice with the probable resistances offered by local folkways when he stated:

Hospitals: (which I think could be made today into regulated public utilities, at least for purposes of anti-discrimination.) As to patients, admissions to private rooms raise problems no more serious than the "outrage" felt years back by people with "real cars" and "real" status when Ford began to pay "mere" workmen five dollars a day and to let us ordinary folk climb into Model-T's; while emergency work and wards entail an element of common suffering that goes some distance toward an even deeper common feeling than that of "team."

Much more troubling is the matter of professional staff, where the limited facilities and opportunities produce a bottle-neck not unlike that envisaged above in regard to industry in a depression.

Id. at 34.

³⁸¹ See Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 519 (1987) (criticizing Llewellyn for failing to protect consumers more).

commonwealth saw society as working groups engaged in commerce. Moreover, in as much as consumer groups want to empower consumers individually, Llewellyn wanted to empower merchants collectively. Thus, part of the explanation for the forgetfulness of the past is that academic trends have changed.³⁸²

B. *Complexity of Academic Works*

Another possible explanation for the forgetfulness is that Llewellyn and his contemporaries were, and still are, difficult to understand. Llewellyn and Commons wrote in an extremely complex, elusive, and convoluted style. Compounding this problem was Llewellyn's distaste for citation, especially in the Code comments. Although contemporary literature of the twenties and thirties indicates that few, if any, of Llewellyn's ideas were unique, Llewellyn never credited such sources which makes it extremely difficult to pinpoint the sources he relied on.

One wonders if Llewellyn adopted his style as camouflage. Even though Llewellyn was a modernist, collectivist and a reformer who supported FDR and the New Deal, he still had to relate to and sell his ideas to the conservative commercial bar, The American Law Institute, and The Commissioners on Uniform State Laws. Therefore, it is probable that Llewellyn intentionally wrote his articles in a manner that concealed his radicalism.³⁸³

Moreover, in Llewellyn's discussions of the UCC, he did not refer to institutionalism, anthropology, or collectivism, but took on the style of the commercial lawyer. Therefore, the UCC was presented as merely an improvement on the Sales Act and not a radical change. By pretending that the UCC was only a codification of the prior better commercial decisions, Llewellyn has misled many.

C. *Schechter Poultry's Effect on Institutionalism*

A third possible explanation for this neglect is that institutionalism never entered main-stream legal case analysis, in

³⁸² See Schlegel, *supra* note 31, at 195 (suggesting that "American Legal Realism simply ran itself into the sand" and thereby got lost in the general legal milieu).

³⁸³ See, e.g., *Contract*, *supra* note 48, at 751. Llewellyn stated that "[o]lverwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships." *Id.* A leftist could interpret this passage as viewing *laissez-faire* economics as *passee*. A conservative might interpret it as stating that the principles of freedom of contract were being built into modern law.

part, because *Schechter Poultry*, for reasons peculiar to legal scholarship, diverted attention away from institutionalism. In addition to invalidating the NIRA, *Schechter Poultry* also rejected any direct granting of sovereign power to groups. Thus, legal devices after *Schechter Poultry* had to indirectly delegate this power, like the UCC, through captive administrative agencies or by making group norms part of individual bargaining.

This bar on direct group empowerment had a peculiar effect because of how legal scholarship works. To a large extent, both legal scholarship and teaching are case intensive. As *Schechter Poultry* prevented legislation directly empowering groups from being passed, there were also no cases interpreting such legislation to teach or write about. Moreover, no one reads law review articles from the thirties anymore. Thus, an entire theme in prior legal thought is passed over.

D. Traumatic Injury

Finally, traumatic events during the forties and fifties created a collective amnesia about the ideas of the thirties. World War II and McCarthyism were two such traumatic events. World War II forced a moral choice and compelled an end to the Legal Realists' skepticism and their scientific detachment from moral issues.³⁸⁴ The amoral style of Realism became, at best, a mistake.³⁸⁵ As a result,

³⁸⁴ See FRANK, *supra* note 30, at 3-7. Pearl Harbor made obsolete Frank's argument that America should concentrate on economic issues and ignore foreign wars; see also COMMONS, *supra* note 98, at 903 (stating amorally: "Yet it is doubtful whether, under modern conditions, a decision can be reached as to which is the better public policy—the Communism of Russia, the Fascism of Italy, or the Banker Capitalism of the United States").

Llewellyn statements in the thirties also showed a moral neutrality. See LLEWELLYN, *supra* note 154, at 468-75. Similar to Commons and Frank, Llewellyn stated that

An authoritarian system can and does handle a moderately effective shaping of its children by the million. Whatever troubles Russia has today, the generation of young Russians have lost Tsarist Russia forever. Whatever troubles Germany has or will have, the young Germans are, as a people, being effectively made into a different people from that of pre-Hitler days.

Id. at 468.

³⁸⁵ See White, *supra* note 11, at 140. White opined that the rapid decline of the Realist's influence

was a perceived relationship between their moral relativism and the rise of amoral totalitarian governments. Frightened by the spectre of Nazi Germany and Fascist Italy, American intellectuals sought a means of distinguishing their culture from that of those regimes. One apparently clear distinction, they found, was the presence in America of pervasive moral ideals, such as liberty and democracy. These ideals were absolutes in that they served to define the nature of American

many philosophical bases of the UCC were rejected or at least forgotten.³⁸⁶

After World War II, the collectivist, anti-*laissez-faire* ideals of the thirties faced the new challenge of McCarthyism. Any admission or hint that the new proposed commercial code was even remotely based on collectivist theories or that it worked against individual bargaining would have been disastrous.³⁸⁷

As we have seen, freedom of contract, or at least an individual's freedom of contract, is not a principle of the UCC.³⁸⁸ A merchant's freedom to bargain is hemmed in by "reasonableness," the standard of good faith, the use of standard terms and meanings³⁸⁹ and non-disclaimable usage of trade. The UCC, however, could not explicitly recognize these. The UCC was proposed for adoption in the fifties, which was the worst time to mention the Code's bias against individual bargaining. Therefore, the UCC's explicit references to freedom of contract were added in the fifties for political reasons.³⁹⁰

Not only would it be impolitic to mention the UCC's intellectual roots, it would also be irrelevant. After the war, American society and commerce were different. The pre-war era was characterized by shifting price levels, widespread commercial collapse, bankruptcy, and an accompanying conclusion that traditional law was inadequate.

civilization; yet the Realists were asserting the relativistic nature of morals and ethics and championing pragmatism. It was not difficult, pursuing this line of reasoning; to see Realism as an intellectual precursor to totalitarianism.

Id.

³⁸⁶ See CASABLANCA (Metro-Goldwyn-Mayer 1942). The cultural icon exemplifying America's rejection of the thirties' hard-boiled realism is Rick in *Casablanca*. One could no longer practice a trade and be concerned solely with issues of money-making. "The problems of the world are not in my department. I'm a saloon-keeper." One had to make a moral choice. "[I]t all adds up to one thing. You're getting on that plane with Victor where you belong." *Id.*

³⁸⁷ See COMMONS, *supra* note 66, at 131.

³⁸⁸ See White, *supra* note 11, at 40-41 (noting that after 1937 freedom of contract was seen to be a thing of the past).

³⁸⁹ Examples of standard terms are F.O.B., which means "free on board," and C.I.F., which means "cost, insurance and freight." DICTIONARY OF LEGAL ABBREVIATIONS (1993).

³⁹⁰ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Uniform Commercial Code: Proposed Final Draft No. 2* (1951), reprinted in 12 UNIFORM COMMERCIAL CODE DRAFTS 1, 26 (Elizabeth S. Kelly ed., 1984). Section 1-102(2)(b)'s "continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties" was added in 1951. *Id.* That section's comment, proposed in 1955, reads: "subsection (3) states affirmatively, and at the outset, that freedom of contract is a principle of the Code." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Supplement No. 1 to the 1952 official Draft of Text and Comments of the Uniform Commercial Code* (1955), reprinted in 17 UNIFORM COMMERCIAL CODE DRAFTS 307, 321 (Elizabeth S. Kelly ed., 1984).

quate. However, since the United States economy was the most successful in the world after World War II, there was no reason to change the way things were being done. Although the UCC still bore the traces of pre-war social philosophy, that philosophy was outmoded.

VIII. THE UCC AS A PARADIGM

The UCC may also be viewed as a paradigm. The UCC's rise is similar to the scientific revolutions described by Thomas Kuhn.³⁹¹ Kuhn theorized that the received wisdom, the paradigm, breaks down with the growth of perceived anomalies. The experimental results do not fit the accepted theories of the time. A time of stress, conflict, debate, and creativity, follows until a new structure or paradigmatic theory emerges. This then becomes the accepted wisdom and scientists again practice normal science which involves proving and working out minor conflicts in the dominant theory.³⁹²

Paradigm theory fits the UCC's creation and later explication. The Depression was the time of anomaly. The traditional legal framework was obviously incapable of working, achieving prosperity, or structuring viable commerce. As indicated, the Depression was a period of new ideas, debates on fundamental principles, radical rejection of old concepts, and proposals for new order. Once the new order was set in place, however, lawyers and professors set about practicing, teaching, and analyzing normal law. Commercial law was no longer a debate on the fundamentals, but about the micro-conflicts and problems generated by the new paradigm—the UCC. The leading commercial law scholars were therefore those who could micro-analyze the UCC. Thus, the new age belonged to a managerial rather than a creative elite.

Today we practice normal science in commercial law scholarship and work out the minor problems in the UCC. However, a typical twenties or thirties law review would discuss philosophy,³⁹³ institutionalism,³⁹⁴ current sales law,³⁹⁵ proposals for granting

³⁹¹ See generally THOMAS S. KUHN, *THE STRUCTURE OF THE SCIENTIFIC REVOLUTIONS* (1970).

³⁹² Examples of this are the replacement of Newtonian physics with Einstein's theory of relativity and the replacement of the geo-syncline geology by plate-tectonics.

³⁹³ See generally Cohen, *supra* note 71.

³⁹⁴ See John R. Commons, *Law and Economics*, 34 *YALE L.J.* 371, 372-75 (1925).

³⁹⁵ See generally Isaacs, *supra* note 183 (criticizing the Uniform Sales Act).

sovereign power to economic groups,³⁹⁶ and even social revolution.³⁹⁷

Like his contemporaries, Llewellyn's language was metaphorical, poetic, and concerned with basic issues. The language of the interpreters of the Code is precise, dry, and analytical.³⁹⁸

The commercial law scholars and experts we consult today, such as White, Summers, and Nordstrom, are the heirs of the between-the-war thinkers who created the system. As successors, their job was to perfect the UCC and explain its internal workings. However, they were and still are not concerned about the UCC's basic premises. We have taken the UCC's structure for granted for too long.

³⁹⁶ See Jaffe, *supra* note 115.

³⁹⁷ See generally Robinson, *supra* note 69.

³⁹⁸ See *Contract*, *supra* note 48, at 751. Compare Llewellyn's following conclusion with any page of White and Summers:

One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—"pity and terror—" Law means so pitifully little to life. Life is so terrifyingly dependent on the law.

Marginal cases, hospital cases, most of our cases well may be. Much doctrine, however sweetly spun, serves chiefly to grow grey with dust against the rafters. Overwhelming is the certainty that any synthesis which is to match with the meaning of the law in life must expand beyond the futile limits set by present legal theory to include great blocks of what we know as property, and equity, and remedies, to cover as well the most significant parts of business associations, and who knows what besides. Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.

Against these conclusions stand others. The *ad hoc* approach of case-law courts is sane, it cuts close to need, it lives, it grows. And the work of law and lawyers in the contract field, however little of the whole it constitutes, has vital meaning. It is both hinge and key of readjustment. And how, without it, shall the great gate swing open?

Id.

