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UPTOWN ACT: A HISTORY OF THE UNIFORM COMMERCIAL CODE: 1940-49

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I. UPTOWN/DOWNTOWN

MY title is inspired by a footnote in Professor John Henry Schlegel's *The Ten Thousand Dollar Question*, where he notes that there are intellectual as well as geographical neighborhoods. "[T]he world is divided into many little neighborhoods. Woe is it to anyone who tries to talk 85th Street to the dudes on 107th."[1]

One can conceptualize the history of the drafting of the Uniform Commercial Code (U.C.C.) as the story of what happened when the proposed statute left Morningside Heights, the neighborhood of Columbia University, and the legal realists, anthropologists, and institutional economists working there, and went downtown to mid-town Manhattan and Wall Street to meet with private commercial attorneys, businessmen, and bankers. One can imagine Karl Llewellyn, professor of law at Columbia, putting his proposals for a Revised Sales Act in his briefcase and taking the Number One IRT downtown to hammer out the Code provisions.[2]

This visualization differs from the generally accepted history of the U.C.C. That history reads as follows: The Code was a product of the work of two institutions, the National Conference of Commissioners on Uniform State Laws (NCC) and the American Law Institute (ALI). The NCC had promulgated about seven uniform commercial acts, while the ALI's main product was the Restatements of the Law.[3]

"The creation of the Uniform Commercial Code represents one phase in the history of the struggles of various national organizations with the intractable problems of unification, simplification and modernization of law in the United States."[4]

The NCC proposed to prepare "a great uniform commercial code," and in response, Llewellyn proposed to an NCC conference a First Draft and

1. John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 453 n.50 (1989) (book review) (quoting Arthur Jacobson in a personal conversation).

2. *See* REPORT AND SECOND DRAFT THE REVISED UNIFORM SALES ACT (1941), *reprinted in* 1 UNIFORM COMMERCIAL CODE DRAFTS 269 (Elizabeth S. Kelly ed. 1984) [hereinafter R.U.S.A., 1941 Draft].

3. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-76 (1973). John Henry Schlegel describes the ALI: "That organization provided now tax deductible opportunities for slightly left of center, upper-caste lawyers to socialize in an atmosphere that reinforced the notion that theirs was a learned profession and thus further separated them from the stench of the *Untermenschen* of the profession." JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 212 (1995) [hereinafter SCHLEGEL, AMERICAN LEGAL REALISM]. For a different view of the ALI, which describes it as a force for positive change in the law, see N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 J.L. HIST. REV. 55 (1990).

4. TWINING, *supra* note 3, at 276-77.

Report on a Revised Uniform Sales Act. He then prepared another report containing a critique of the Uniform Sales Act and a complete new draft. At a 1941 meeting, the NCC and ALI entered into negotiations over drafting a uniform commercial code and the ALI chose Llewellyn as the chief reporter with Soia Mentschikoff as the Assistant Chief. A "treaty" between the ALI and the NCC was concluded in 1944, and the drafting process, with many stages of revision and consultation, began.[5] "After the publication of the first complete draft in May 1949 . . . memoranda and reports were received from Bar Associations, law firms, official committees set up in various states, and commercial and business concerns . . . ."[6] The Code was adopted in 1953 in Pennsylvania, but its passage was postponed in New York until after a monumental study by the New York Law Revision Commission. The Code's drafters made various changes in response to the New York Commission's criticism, which resulted in the 1957 Official Draft. Between that draft's publication and 1966, forty-eight jurisdictions enacted the Code.[7]

The rest, as they say, is history. Recently, however, even that history is being ignored. A recent article in the *ABA Journal* speaks of Article 2 being "drafted in the 1950s."[8] The Code, however, was first proposed in the 1940s, and it resembles many other statutes that date back to the New Deal era. "It was the curious fate of the Code, a 1940s statute, not to have been widely enacted until the 1960s."[9] The latest edition of the standard commercial law treatise, White and Sumners's *Uniform Commercial Code*,[10] has dropped the sections that discussed the Code's history. The treatise presents the reader with a statute that just exists.

By looking at the record somewhat differently, the story changes from a long drafting process conducted by two remote, august, and expert institutions into one characterized by a collision between the two cultures of Uptown and Downtown. It is an epic in which a radical professor—a fan of folk music, a poet, a supporter of the New Deal, a devotee of anthropologists and Veblen and Commons, the radical institutional economists, a despiser of pallid intellectuals who instead preferred "action-direction thinking," and a decorated veteran of the German Army of World War I who was about to divorce his second wife and marry one of his former students[11]—sought to realize his radical, reformist programs for sales law. He, his third wife, and his hand-picked group of young professors[12] pro-

5. *See id.* at 279-86.

6. *Id.* at 286-87.

7. *See id.* at 287-98.

8. *See* Henry J. Reske, *Software Publishers Take Interest in U.C.C.*, A.B.A. J., July 1995, at 22.

9. GRANT GILMORE, THE AGES OF AMERICAN LAW 86 (1977) [hereinafter GILMORE, AGES OF AMERICAN LAW].

10. *See* 1-4 JAMES J. WHITE & ROBERT S. SUMNERS, UNIFORM COMMERCIAL CODE (4th ed. 1995).

11. *See* TWINING, *supra* note 3, at 87-127.

12. Llewellyn handpicked a number of young academics, "promising young men near the start of their careers," to work on the Code. *Id.* at 284.

posed such radical changes in commercial law as strict liability in tort, fact-finding by a merchants jury, pervasive regulation of the formation and performance of contracts, truth-in-lending disclosures, abolishment of holder-in-due course in secured consumer lending, and notice before self-help repossession. Although Llewellyn presented his ideas as traditional, they were revolutionary in practice.[13]

These ideas were proposed years before they were finally enacted into law. Some of them never have been. These radical reforms, however, were gradually limited or discarded in the drafting process. Choosing between having their proposed code being a purely academic exercise or having it adopted by state legislators, the drafters chose the latter and deradicalized the U.C.C.[14]

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13. "Llewellyn was willing to characterize his work as nonradical in introduction, and yet to be radical in proposal." Richard L. Barnes, *Toward a Normative Framework for the Uniform Commercial Code*, 62 TEMP. L. REV. 117, 125 n.24 (1989).

14. N.E.H. Hull describes Llewellyn's romanticism in *The Romantic Realist: Art, Literature and the Enduring Legacy of Karl Llewellyn's Jurisprudence*, 40 AM. J.L. HIST. 115 (1996). For Llewellyn's radical manifesto of legal realism, see Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); for his interest in folk music, see Karl N. Llewellyn, unpublished and untitled manuscript on Folksong (on file with *SMU Law Review*) [hereinafter Llewellyn, unpublished manuscript]. He supported FDR's court-packing plan, see Karl N. Llewellyn, *A United Front on the Court*, 144 THE NATION 288, 289 (1937) [hereinafter Llewellyn, *United Front*]; his relations with anthropology and anthropologists is described by the co-author of THE CHEYENNE WAY, see KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941) [hereinafter THE CHEYENNE WAY], and E. Adamson Hoebel, *Karl Llewellyn: Anthropological Jurisprude*, 18 RUTGERS L. REV. 735 (1964) [hereinafter Hoebel, *Anthropoligical Jurisprude*]. Llewellyn commented on Commons's work in Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 665 n.1 (1925) [hereinafter Llewellyn, *Effect*], and there acknowledged his indebtedness to Veblen and Commons, *see id.*; for Llewellyn's despising of intellectualism "Your physique and mentality turn soft and gooy [sic]" and his preference for "*Action directive* thinking is an orderly projection of the imagination into the future, with strict adherence to the facts of experience," see Karl N. Llewellyn, *Our Present Intellectualism, microformed on* Karl N. Llewellyn Papers B.V.3.u. (on file with *SMU Law Review*); for his service in the German army, see TWINING, *supra* note 3, at 479-81; for his divorce and remarriage, see *id.* at 109-10. Grant Gilmore expressed doubts on the validity of laissez-faire. *See* Grant Gilmore, *On The Difficulties of Codifying Commercial Law*, 57 YALE L. REV. 1341, 1358 (1948) [hereinafter Gilmore, *Difficulties*]. Llewellyn had a free hand in picking the Reporters of the Code articles. *See* TWINING, *supra* note 3, at 284. The proposed drafts of the U.C.C. at one time or another contained provisions for strict liability for manufactured goods. *See* The Code of Commercial Law (1948), *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 213 (Elizabeth S. Kelly ed., 1984) [hereinafter Code of Commercial Law]; merchant juries, *see* R.U.S.A., 1941 Draft, *supra* note 2, § 59-59D, at 531-37; regulation of form contracts, *see id.* at 331-32; a proto truth-in-lending disclosure, *see* Uniform Commercial Code § 9-205 (Proposed Final Draft 1950), *reprinted in* 11 UNIFORM COMMERCIAL CODE DRAFTS 234-36 (Elizabeth S. Kelly ed., 1984); holder-in-due course in consumer secured lending prohibitions, *see* Uniform Commercial Code § 8-207 (October 1949 Revisions of § 1-105, Bank Collections Part of Art. 3 § 6-303, and Articles on Secured Transactions and Bulk Transfers), *reprinted in* 8 UNIFORM COMMERCIAL CODE DRAFTS 403, 496-97 (Elizabeth S. Kelly ed., 1984); notice before self-help repossession was required, *see* Uniform Commercial Code § 8-608 (September 1949 Revisions of § 1-105, § 6-603 and Articles on Secured Transactions), *reprinted in* 8 UNIFORM COMMERCIAL CODE DRAFTS 265, 378 (Elizabeth S. Kelly ed., 1984); and an objective good faith requirement for holders-in-due course. *See* Commercial Code §§ 43, 45 (Tentative Draft No. 3, 1947), *reprinted in* 3 UNIFORM COMMERCIAL CODE DRAFTS 45, 78 (Elizabeth S. Kelly ed., 1984).

This Article discusses the history of the Code, from the 1940 drafting of the Revised Uniform Sales Act to the 1949 drafts of the Uniform Commercial Code. The year 1949 is a logical stopping point because the drafts of that year represented the drafters' best efforts before the commercial world woke up, took it seriously, and started the lobbying and other political processes in earnest to protect and to improve their interests.

Another reason for drawing the line around 1949 is that it was near that time when the cast of characters who were drafting the Code changed. Karl Llewellyn withdrew, at least partially, from the drafting process.[15] Hiram Thomas, a spokesman and lawyer for the New York Merchant's Association who served as the voice of the practical commercial lawyer, became too ill to participate in the drafting process.[16] The original drafters of the early 1940s were supplemented by such persons as Grant Gilmore and Allison Dunham, who as of 1946 worked on the secured transactions article, and Charles Bunn, a professor at Wisconsin who edited the Code from 1951-52.[17] Another type of drafter emerged, acting as a liaison with particular interests. Walter Malcolm worked with the banking industry,[18] Homer Kripke with the financing industry,[19] and F.T. Dierson with the food, drug, and cosmetics industry.[20] A new group came in and took the Code from its proposed version of 1949 to the one that was enacted.

Thus, the U.C.C. as it exists today, is a product of compromise between the original reformist program and the political reality of the forties and fifties. It still bears the impact of the collision between Morningside Heights and Wall Street.[21] This Article provides a broad-brush descrip-

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15. *See* TWINING, *supra* note 3, at 286.

16. *See* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 520 (1987); Letter from Hiram Thomas to Herbert F. Goodrich, ALI Archives (Apr. 29, 1948) (on file with *SMU Law Review*). Hiram Thomas's contribution to the U.C.C. was significant, but it is now ignored. It was he who introduced unconscionability into Article 2. *See* discussion, *infra* notes 180-219 and accompanying text.

17. *See* TWINING, *supra* note 3, at 271.

18. *See* Walter D. Malcolm, *Article 4—A Battle with Complexity*, 1952 WIS. L. REV. 265 n.* (a biographical sketch of Mr. Malcolm).

19. *See* 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY at xi (1965) [hereinafter GILMORE, SECURITY INTERESTS].

20. *See* Letter from F.T. Dierson to John W. MacDonald, ALI Archives (June 21, 1954) (on file with *SMU Law Review*).

21. Grant Gilmore describes the Code in these terms, as an unsatisfactory compromise:

> The Code in its final form can best be described as a compromise solution which satisfied no one. Llewellyn had recruited a drafting staff which was composed mostly of younger law professors whose own ideas about law had been greatly influenced by Llewellyn and the other Realists. Sharing Llewellyn's views, they produced drafts which reflected his own pluralism and anti-conceptualism. Those drafts were largely rewritten by practitioners whose instinctive approach to law was more conventional. Even so, the Code, as rewritten, retained more than mere traces of the earlier approach, both in substance and in style. It testifies to the fundamental cleavage which, by the 1940s, had overtaken the legal profession in this country.

GILMORE, AGES OF AMERICAN LAW, *supra* note 9, at 85-86.

tion of this process of compromise, rather than the typical micro-analysis of the history of one section.

Writing or reading a history of the U.C.C. may seem to be one of the most boring exercises in which one could indulge. But there are reasons for studying the Code's history. Perhaps the most important reason is that its history reveals that the U.C.C. is not a sacred text, not a distillation by experts of the wisdom of commercial law. It is just a statute, and like all other legislation, it is a product of the problems of its time, the social and economic presuppositions of its era, and the relative power of the political forces involved. The drafters took various positions on several commercial issues and, so can we today. For example, Article 9's allowance of self-help repossession without notice did not come directly from the common law, but was debated in the drafting process. In its first drafts, the secured transactions article required notice before repossession. The issue is debatable, and we can reconsider the issue today.

Moreover, studying the history of the Code helps our understanding of various problems of interpreting the Code. Many anomalies in the Code can only be explained by its history. For example, in Article 2, good faith is objective, but in Article 1, it is subjective.[22] Even though the effect on the rights of the buyer is practically the same, there are different standards of performance for single delivery and installment contracts. Such anomalies are products of the Code's historical development and the compromises made. For example, the standard of performance of a contract is the result of a compromise between Llewellyn's proposals for a standard of mercantile performance and the desire of others to retain the strict performance standard of commercial law.

Some U.C.C. rules are neither anomalous nor unresolved but are just vague in meaning. Examples are unconscionability and the many "reasonable" and "commercially reasonable" standards scattered throughout Article 2. However, these vague concepts originally had an objective meaning and were to be applied by merchants themselves. Much of the present Code's ambiguity is the result of the rejection of Llewellyn's procedures to determine reasonableness (the merchant tribunals) and the deletion of his Comments that explained what "reasonable" meant.

Political compromise also produced many of the U.C.C.'s more complicated sections. For example, the sections on varying statutory provisions by agreement, sections 1-102(3) and (4), are the result of a long fight on whether the Code's dictates should be mandatory or not. The complex relation between course of dealing, usage of trade, course of performance, and express terms of an agreement is again the result of a compromise between Llewellyn's program to have commercial law based on trade norms and others' desire to base it on individual contracting.

Looking beyond the Code, we can see that the interaction between other laws and the Code is problematic. Examples are the relationship of

22. *See* U.C.C. § 2-103 (1989) ("observance of reasonable commercial standards . . . in the trade"); U.C.C. § 1-201(19) ("honesty in fact").

402A liability in tort with warranty liability under Article 2 and that between federal consumer protection legislation and the Code. Originally, however, the Code itself contained products liability and consumer protection sections. The Code originally provided a more integrated approach than it does in its current version. As a result, a study of the Code's history is essential in understanding what commercial law is today.

But perhaps the best reason for researching, writing, and studying the Code's history is that it is actually an interesting story, containing a hanging judge, an aristocratic wastrel who was an ancestor of Princess Diana, The Duchess of Marlborough, depression-era dreams of a business commonwealth, and the difficulty of finding a place to eat lunch in mid-town Manhattan. It is an epic; perhaps a tragedy.

II. THE FOUR PARAMETERS AND LLEWELLYN'S GOALS FOR COMMERCIAL LAW

Especially helpful in studying and describing the history of the U.C.C. is an examination of what factors control, construct, and regulate the dealings between the parties to a commercial contract. There are four parameters I wish to consider: positive statutory requirements, court or administrative regulation, trade norms, and the contract arrived at by the parties. By positive statutory requirements, I mean such legislation that dictates the terms of a deal. Present examples of commercial regulation include Truth-in-Lending regulation[23] and the Magnuson-Moss Warranty Act.[24] Article 2 of the U.C.C. has a few such sections that are not variable by agreement, such as the right to reclaim goods sold to an insolvent[25] and the one-year minimum statute of limitations.[26] One must remember, however, that the sections that can be varied by agreement will apply *unless* the parties agree otherwise. Thus, the provisions create a standardized contract that controls unless the parties opt out of it.[27] Generally, Parts 3 and 5 of the present Sales Article serve to set up a standard

23. *See* 15 U.S.C. §§ 1601-1677 (1994).
24. *See* 15 U.S.C. §§ 2301-2312 (1994).
25. *See* U.C.C. § 2-702 (1989).
26. *See* U.C.C. § 2-725(1) (1996).
27. As Nathan Isaacs points out:

> In ordinary transactions, people cannot or will not stop to make special agreements "to the contrary." Therefore, they find themselves governed by the statute with its prescribed insurance policy, its prescribed bill of lading, warehouse receipt, stock-transfer, negotiable instrument, articles of partnership, its prescribed type of sale. When the question arises whether title has passed to a buyer, they will find the answer in the mechanical rules of the code for the ascertainment of their "intention," a constructive intention. The effect is a making of contracts in wholesale lots, just as we now make corporations in wholesale lots. A practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract, and a standardization of legal relations, are the net results.

Nathan Isaacs, *The Standardization of Contracts*, 27 YALE L.J. 34, 38-39 (1917).

Nathan Isaacs was a contemporary of Llewellyn. Llewellyn cites this article in his sales casebook. *See* KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 51 (1930) [hereinafter LLEWELLYN, CASES].

sales contract. Parties need only agree on a quantity term,[28] however loosely expressed,[29] and Article 2 will supply the price,[30] delivery and payment terms,[31] time provisions,[32] and quality terms.[33] Parties have to contract out of the terms for them not to apply.

Another parameter that affects commercial dealings is ongoing court or administrative regulation. Examples are the regulations of the Food and Drug Administration and of the Consumer Product Safety Commission. Article 2 does not set up any regulating body to oversee sales, but the system set up by original drafts, which gave power to a judge working with the merchants jury to invalidate contract terms and prescribe reasonable practices, approximated a regulatory system.

Llewellyn's primary insistence, however, was on enforcing trade norms in commercial law. I use the term "norms," rather than "practices," because he was looking for good, rather than merely standard, merchant practices. Professor Leff points out that unconscionability is "one technique for controlling the quality of a transaction when free market control is ineffective."[34] But Llewellyn never started with the assumption that free market control alone *was* effective. The bargaining process needed control by the courts.[35] He was searching to enact into law the desirable social practices of merchants. In a letter expressing his hopes and fears at the outset of his long enterprise of drafting the Code, he wrote: "I feel very clear indeed that there are a reasonable quantity [sic] of behavior sequences and the regulations of such sequences which are desirable, so that the so-called social disciplines have reason for existence,—or that there are [no] such sequences, and no man knows such desirabilities."[36]

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28. *See* U.C.C. § 2-201(1) (1989).
29. *See* U.C.C. § 2-306 (1989).
30. *See* U.C.C. § 2-305(1) (1989) ("a reasonable price").
31. *See* U.C.C. § 2-511 (1989).
32. *See* U.C.C. § 2-309 (1989) ("a reasonable time").
33. *See* U.C.C. §§ 2-314, 2-315 (1989).
34. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 350 (1970).
35. *See* Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159 (1938).

> I do not regard the dominance of bargain in our economy as even remotely justifying passive acceptance by court or other tribunal of the letter of an "agreement" merely because a "writing" turns up under that label. Those once moderately fungible legal persons, A and B, or S and B, have ceased to be at all fungible in fact; and the process of agreeing—which once implied not only meditation but room to choose and freedom within that room, not only choice but relatively conscious choice with some inkling of consequence—that process, thanks to differential uses of forms, differential character of the forms used, differential knowledge, power and bargaining skill in the "agreers," has also ceased to be fungible in fact. This means need for control, lest old rules based on Adam Smithian postulates be made tools of outrage.

Id. at 175 n.25.

36. Memorandum No. 1, from Karl N. Llewellyn to William H. Schnader (May 19, 1940) (on file with the University of Chicago Law School).

Positive statutory regulation, administrative/judicial control, and the imposition of trade norms together create a standardized contract that supplants individual contracting. Nathan Isaacs points out this opposition between standardized relations and intentions of the parties:

> But so are many of the peculiarities of an agreement ignored in later stages of society where a formal contract of this or that type results in a more or less standardized relation. Here, we include not only the early Roman forms of sale and the old English conveyances of land, but marriage, the taking up of the feudal relation at other stages in the law, and the purchase of a standard insurance policy today. The point of likeness is that a relation results in which the details of legal rights and duties are determined not by reference to the particular intentions of the parties, but by reference to some standard set of rules made for them. In origin, these relations are, of course, contractual; in their workings, they recall the regime of status.[37]

The history of the U.C.C.'s drafting can be seen as a conflict pitting the standardizing forces of statutory dictates, administrative regulation, and trade norms against the individualization of private contract. As stated by Isaacs in 1917, "[s]ome of the greatest legal battles of the day are being fought over statutory collisions with the principle of freedom of contract."[38]

To oversimplify, Llewellyn wanted to create a commercial law consistent with both his anthropological vision[39] and the folkways of merchants; Wall Street wanted to achieve an efficient, persuasive, profit-maximizing commercial regime based on individual contracting. There are three themes that constantly recur in Llewellyn's thought: the primacy of trade usages, the goal of modernistic efficiency, and the need for balanced trade rules. The history of the drafting of the U.C.C., therefore, is the story of how the drafters attempted to make room for each vision, to choose between the visions, and to come up with devices that would mediate between them.

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37. Isaacs, *supra* note 27, at 39.

38. *Id.* at 38 n.17.

39. The co-author with Llewellyn of THE CHEYENNE WAY, *supra* note 14, characterized him as a practicing anthropologist:

> Llewellyn became a practicing anthropologist. Through the years he developed a wide knowledge of anthropological literature, and he accumulated enough field experience to equal that of a good many full-time anthropologists. In addition to his relatively brief introduction to anthropological fieldwork among the Cheyennes in 1936, he spent five full, consecutive summers (1945-49) of field research on legal aspects of Pueblo culture among the Keresan-speaking Pueblos of New Mexico. The present author was co-researcher during four of the five summers, as was also Soia Mentschikoff during three. The results of this research still await processing. He thought of his own masterwork of research in terms of the anthropological jurisprudence of American appellate courts. "This study of lawways and primitive law among the higher United States legal shamans," he called it. (Inscription penned in this author's copy of *The Common Law Tradition.*)

Hoebel, *Anthropoligical Jurisprude*, *supra* note 14, at 738 n.13.

Llewellyn wanted to apply the teachings of contemporary social science to the law. These teachings gave rise to his goals for his proposed commercial statute: the use of norms of merchant behavior, the achievement of fairness that would result from balanced trade rules and equality of bargaining, and the achievement of modernistic efficiency that would come from discarding outmoded concepts and formal rules unrelated to commercial reality. I have written at length of the contemporary background of Llewellyn's thought;[40] here I wish to summarize the relation of his reformist program to the social thought contemporary with the Code's drafting.

Llewellyn saw merchants in anthropological terms, as being equivalent to tribes with definite folkways. Three social scientists he cites as influences, John Commons, Franz Boas, and William Graham Sumner,[41] were all concerned with how a group evolved social customs, the "folkways."[42] Llewellyn subscribed to the folkways concept:

> 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.[43]

In an unpublished article, *This Cut Rate American Culture*,[44] Llewellyn explicitly equated trade with tribe. Although Americans look alike, they divide into occupations: "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,

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40. *See* Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995).

41. *See* Karl N. Llewellyn et al., *Law and The Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 84 n.1 (1931).

42. 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.

WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 4 (1940); *see also* JOHN R. COMMONS, THE ECONOMICS OF COLLECTIVE ACTION 125-26 (1950) (to Commons, "working rules" governed how workers did their jobs).

43. Karl N. Llewellyn, *Law Observance Versus Law Enforcement*, *in* PROCEEDINGS OF THE CONFERENCE OF SOCIAL WORK 127 (1928), *reprinted in* KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 399 (1962).

44. Karl N. Llewellyn, *This Cut Rate American Culture* (1927), *microformed on* Karl N. Llewellyn Papers B.V.3.j. (on file with *SMU Law Review*).

hardware men, we are as different as are Czechs and Spaniards."[45] Therefore, merchants carry on their trade against a background of trade custom and usage. These trade usages, like folkways, compete under a social Darwinistic model of human behavior to gain acceptance. As stated by Karl N. Llewellyn folkways 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.[46]

Another thinker who influenced Llewellyn, John Commons, noted that commercial practices evolve in a more conscious manner:

> Their evolution is like that of a steam engine or a breed of cattle, rather than like that of a continent, monkey or tiger. If you watch how the steam engine evolved from John Watt in 1776 to the Mogul locomotive in 1923 you will see how economic institutions evolved. The steam engine evolved by studying the mechanisms of nature, experimenting with the parts, and then rearranging them, so that steam would act in two directions instead of one direction, as nature intended. So with the evolution of that process of behavior which we name political economy. The subject-matter is the habits, customs and ways of thinking of producers, consumers, buyers, sellers, borrowers, lenders and all who engage in what we name economic transactions. The method has been the adoption of common rules applying to the similar transactions of all who come within the same concern . . . . The desirable customs were selected gradually by the courts, the undesirable customs were progressively eliminated as bad practices, and out of the whole came the existing economic process, a going concern, symbolized by a flux of prices, and operating to build up an artificial mechanism of rules of conduct, creating incorporeal and intangible property quite different from the unguided processes of nature.[47]

Llewellyn drew on both Sumner and Commons to develop his own commercial jurisprudence:

> 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.[48]

Thus, Llewellyn's Code has been characterized as "rather like a consti-

45. *Id.* at 8.
46. *Id.*
47. JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 376-77 (1924).
48. Llewellyn, *Effect*, *supra* note 14, at 671 n.20.

tution—a framework for internal groups."[49] Llewellyn often wrote of another concern: the efficiency that modernistic standardization can produce. Standardized contracts fit in with high-volume, modern, efficient production. In 1931, he stated:

> Standardized 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.[50]

The third theme was his note is his concern over equal bargaining power. Llewellyn was concerned, like many in the 1920s and 1930s, with leveling the playing field in contractual bargaining. Thinkers who influenced Llewellyn, such as John Commons and Robert Hale, saw laissez-faire economics as being economically coercive of the weak by the strong and sought, by legislation, to enable parties to bargain equally.[51] The National Labor Relations Act is an example of this concern.[52] The type of deal produced by equal bargaining was the normative standard by which deals should be measured. An agreement was fair only if coercion was absent. Coercion was more than physical threats; it could also stem from one party's larger resources and ability to wait for the other party to give in. A present-day economist explains the views of Commons:

> Accordingly, outcomes will be "better" as they come progressively closer to the outcomes that *would* obtain if everyone actually possessed equal power to wait for the other to give in, that is, equal bargaining power. The same interpretation of "better" would obviously apply equally to the working rules that shape those outcomes.[53]

Equal bargaining leads to greater income for consumers, which leads to increased consumption and production. "Underlying these reforms [the NRA and other New Deal legislation] was the thought that in the twenties too small a share of the national income had gone to workers and

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49. Carol Weisbrod, Article Two as a Framework for Groups 6 (1986) (unpublished manuscript, on file with *SMU Law Review*).

50. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931) [hereinafter Llewellyn, *What Price*].

51. *See* Yngve Ramstad, *From Desideratum to Historical Achievement: John R. Commons's Reasonable Value and the Negotiated Economy of Denmark*, 25 J. ECON. ISSUES 431 (1991); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. L. 470 (1923).

52. *See* 29 U.S.C. § 151 (1994) (collective bargaining serves to restore "equality of bargaining power between employers and employees").

53. Ramstad, *supra* note 51, at 434.

farmers—the consuming classes—and too large a share had gone to savers."[54]

The process of equal bargaining also works to prevent "chiseling." Llewellyn points out that "'chiseling,' the corner cutting practices or lopsided, oppressive usages which are unfair to one side of the bargain, develop."[55] Here Llewellyn referred to a central concept of contemporary economics, or more precisely, the economics of the pre-Keynesian era, which saw the "chiseler" as a central economic problem and a primary cause of the Depression. A prevalent view was that chiseling created a vicious cycle—it caused the lessening of the quality of goods and cheating, leading to the paying of lower wages, decreased demand, overproduction, and, finally, to additional chiseling. This process was characterized by chaotic fluctuations in production, shoddy goods, ruinous cut-throat competition, and wages too low to support workers and their families in minimum standards of health and welfare.[56]

Llewellyn's expansion of the warranty of merchantability and making express warranties non-disclaimable stemmed from his desire to cure the downward spiral of chiseling. These concepts reintroduced trust and confidence into the market:

> 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.[57]

Prevention of chiseling and control of the marginal businessman had concerned Llewellyn since 1925, as shown in his article *The Effect of Legal Institutions on Economics*,[58] in which he wrote about the necessity for the law to control the individual. The implications of his position are hard to appreciate at first, because they are so contrary to our individualistic, "rights"-oriented way of thinking:

> Finally, when one attacks the effect of the law in shaping conduct, is the profusion of cases where established morals or habits of self-dis-

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54. HERBERT STEIN, THE FISCAL REVOLUTION IN AMERICA 48-49 (1990). Stein points out that American economists did not concern themselves with the theories of Keynes until 1936 at the earliest. *See id.* at 149.

55. Karl Llewellyn, *General Comment on Parts II and III Formation and Construction* 38, *microformed on* Karl N. Llewellyn Papers A.A.J.2. (on file with *SMU Law Review*) [hereinafter Llewellyn, *General Comment*].

56. *See* Franklin D. Roosevelt, *The President's Fireside Chat* (May 7, 1933), *in* LOUIS GALAMBOS, COMPETITION AND COOPERATION: THE REEMERGENCE OF A NATIONAL TRADE ASSOCIATION 198 (1966); DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION (1988).

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

58. *See* Llewellyn, *Effect*, *supra* note 14.

> cipline 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.[59]

The individual at the margins is neither a member of a minority group nor the non-conformist whose rights deserve the protection of the law, but rather a criminal. The merchant who deviates from group standards is not the entrepreneurial hero, but the cut-throat competitor. Group norms are good; the legal problem is enforcing them.

Thus, rules that were the product of equal bargaining in trade associations would prevent chiseling; control the corner-cutting, marginal businessman; and would be fair, reasonable, and workable. Llewellyn's program for achieving rules produced by equal bargaining power was similar to those of the institutional economist John Commons. Professor Charles Whalen describes Commons's views on how to achieve good rules of behavior: "[T]he most appropriate social provisioning occurs when a going concern's working rules are produced by disputants with equal bargaining power."[60] Where such equality does not exist however, *Institutional Economics* recommends that *commissions* (including representatives of all affected parties) determine the rules governing economic activity. Specifically, Commons sees commissions as bodies capable of identifying and diffusing "the best practices of those concerns that actually maintain survival."[61]

Whalen's description of Commons's programs also serves to describe Llewellyn's. Llewellyn also wanted to achieve well-balanced working rules of commercial law. His "commission" was at first the drafting committees of the Code, and then the judge who, working together within his proposed "merchants tribunal," would regulate trade practices. He was in search of the "good practices of the market place."[62]

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59. *Id.* at 682. Llewellyn's article on Commons probably grew out of a seminar on business organizations which took place in the 1924-25 academic year, taught by Professors Oliphant and Bonbright of the Columbia Business School. Fellow students included Underhill Moore and Robert Hale, whose writings argued that unequal bargaining caused economic coercion. *See* SCHLEGEL, AMERICAN LEGAL REALISM, *supra* note 3, at 16.

60. Charles J. Whalen, *John R. Commons's Institutional Economics: A Re-Examination*, 23 J. ECON. ISSUES 443, 450 (1989) (citation omitted).

61. *Id.*

62. At the 1940 NCC Conference, a Mr. Harno stated:

> My thought was that you are asking us to instruct the Committee to bring in a draft which complies with or is in accordance with the practices of the market-place. Now, that may be . . . .

Llewellyn's system of incorporating trade association agreements into the law resembles the operation of the National Recovery Administration (NRA). The NRA sought to regulate the economy by empowering trade groups to regulate themselves.[63] The trade group was to establish codes of fair competition that would stamp out "chiseling."[64] Violations of the codes would lead to criminal prosecutions, as they did in *Schecter Poultry Corp.*[65] In return, labor would obtain guarantees of minimum wages and maximum hours and the right to engage in collective bargaining.[66] The contemporary importance of achieving fairness and preventing chiseling is shown by the NRA's use as *the* program to cure the Depression in the early New Deal.

The NRA promulgated specific industry codes that were usually proposed by trade associations. The proposing group conferred with the NRA's three advisory boards (representing business, labor, and the consumer) and NRA officials. After this group reached a consensus, a public hearing was held. After considering new proposals, the proposals were sent on to the NRA administrator, who finally sent it on to the President for final approval.[67] The NRA codes of fair competition were to become a "*law merchant*" for the relevant industry.[68] Thus, Llewellyn's system of commercial law with the drafters, judges, and merchant tribunals seeking the "better" trade practices and enforcing fair trade agreements resembles that of the NRA. He and the NRA sought normative rules of commerce. "The balance he had struck in the earlier drafts was normative. The rules were chosen as the better rules intended to establish better patterns of behavior."[69] Furthermore, both the NRA and Llewellyn sought rules specific to particular trades rather than relying on the universal rules of classical contract law.[70]

> Llewellyn replied: There was no such intention. I believe in controlling the practices of the market-place where the practices of the market-place need control. That is my personal opinion. I believe in conforming to the practices of the market-place where they are sound to conform to. The law is not to abdicate to business.
>
> Mr. Harno: Then it is the good practices of the market-place?
>
> Mr. Llewellyn: Right!

National Conference of Commissioners on Uniform State Laws, Forty-Ninth Annual Conference, at 14 (1940), *microformed on* Karl N. Llewellyn Papers A.A.J.8 (on file with *SMU Law Review*).

63. *See* FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 126 (1990).

64. *See id.*

65. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

66. *See* FREIDEL, *supra* note 63, at 143.

67. *See* BERNARD BELLUSH, THE FAILURE OF THE NRA 37 (1975).

68. *See* BRAND, *supra* note 56, at 11 (1988). *See generally* HUGH S. JOHNSON, THE BLUE EAGLE: FROM EGG TO EARTH (1935) (attempting to revitalize NRA principles by discussing the author's experience as head of the NRA).

69. Barnes, *supra* note 13, at 126.

70. *See* Breck P. McAllister, *Government and Some Problems of the Market Place*, 21 IOWA L. REV. 305 (1936).

> The particularistic character of the legislation of the codes [the NRA Codes] should be preserved in any future legislation. If government is to legislate to preserve a plane of trade methods or of competition in the market places, it

Llewellyn's approach was not universally accepted. The internal tension between trade regulation and freedom of contract can be seen in an objection by Hiram Thomas, the lawyer for the New York Merchants' Association, to Llewellyn's approach:

> Undue emphasis or stress is given to what might be called the variations or exceptions or limitations to fundamental contract rules. You lose sight of the fundamental contract rules when we get into matters of construction; it left me with the impression that what we are doing in this Act is to enlarge and keep on enlarging the scope of the contract and I got this impression that really what is written in the contract even the dickered terms do not amount to much but the emphasis upon the variation by usage and course of dealing. The emphasis is not on the contract as written, but on the variation.[71]

After Llewellyn admitted an undue neglect of contract law, Thomas replied, "I regard it as a stop to immature and superficial things."[72]

III. THE 1940-41 DRAFTS

A. TRADE NORMS

Looking at our four parameters (statutory requirements, regulation, trade norms, and contract), we may see that the initial U.C.C. drafts of 1940-41 legislated a commercial system based on regulation and trade norms. For example, the Revised Sales Act of 1941 required a merchant or banker to show that an action "was taken in the reasonable course of business," in order to show "good faith;"[73] the withdrawn section 1-C would have regulated form contracts and invalidated one-sided contracts.[74] "[T]he usage of trade, or of a particular trade" were "presumed to be the background which the parties have presupposed in their bargaining and have intended to read into the particular contract . . . ."[75] It was purposed that "fair and balanced" trade association rules be incorporated into sales contracts:

> must be remembered that it is not legislating for any one market place but rather for almost an infinite number of market places in which the practices and the customs and the forces that are brought to bear on concrete transactions are as myriad as the markets themselves. Practices will vary from market to market and the same practice will have different economic effects in different markets. The machinery of distribution, the methods of pricing, of delivery, of service to consumers, and many other important matters, will be different. To legislate in universals, as we have in the past, is to lay a crude and heavy hand on a delicate and complex piece of economic machinery.

Id. at 319.

71. Joint Advisory Committee Meeting, at 1 (May 21-22, 1945), *microformed on* Karl N. Llewellyn Papers J.VII.2.a (on file with *SMU Law Review*).

72. *Id.* Thomas was an outsider on the advisory committees while the others had previously worked together primarily in academia. *See* TWINING, *supra* note 3, at 285.

73. Draft for a "Uniform Sales Act, 1940" (1940), *reprinted in* 1 UNIFORM COMMERCIAL CODE DRAFTS 217, 225 § 59-1(c) cmt. (Elizabeth S. Kelly ed., 1984).

74. R.U.S.A. § 1-C, reprinted in UNIFORM COMMERCIAL CODE CONFIDENTIAL DRAFTS 18-25 (Elizabeth S. Kelly & Ann Puckett eds., 1995) (Section 1-C was withdrawn and not included in the official drafts) [hereinafter CONFIDENTIAL DRAFTS].

75. Draft for a "Uniform Sales Act, 1940," *supra* note 73, § 1-D, at 334.

> Wherever the usages of a particular trade or mercantile situation have, in whole or in part, been reduced to fair and balanced form by a body representing both buyers and sellers of the character engaged in a particular transaction, the incorporation of such body of usages into the transaction, as the background of the particular terms of the bargain, is presumed.[76]

Llewellyn proposed a standard of "mercantile performance" as a substitute for the commercial standard of strict performance.[77] Mercantile performance was defined as that which would not materially increase the risks or burdens on the buyer.[78] The merchant tribunal (a group of merchants empaneled to decide commercial issues) would judge whether a party's performance met the required standard. The mercantile performance standard presupposed "a skilled and specialized mercantile tribunal to pass on the questioned fact."[79]

Section 15 of the 1941 Revised Uniform Sales Act (the "1941 Act") provided for the warranty of merchantability, defined in terms of trade norms, "such as by mercantile usage pass without objection in the market under the designation in the contract."[80] This definition appeared to heighten the required quality of goods. However, there was disagreement as to the contemporary meaning of "merchantable." One view held that it meant only resellable. Also, there was *no* section that specifically addressed disclaimer of warranty in the 1941 Revised Uniform Sales Act.

Section 1-D of the 1941 Act stated that "Between merchants, the usage of trade, or of a particular trade . . . are presumed to be the background which the parties have presupposed in their bargaining and have intended to read into the particular contract . . . ." That section's comment proposed that:

> Wherever the usages of a particular trade or mercantile situation have, in whole and in part, been reduced to fair and balanced form by a body representing both buyers and sellers of the character engaged in a particular transaction, the incorporation of such body of usages into the transaction, as the background of the particular terms of the bargain, is presumed.[81]

Section 11-A of the 1941 Act proposed to substitute a standard of mercantile performance for the traditional commercial law requirement of

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76. *Id.* § 1-D cmt., at 335.

77. *Id.* § 11-A, at 379-84.

78. *Id.* § 11-A(b), at 380.

79. *Id.* § 11-A cmt., at 381.

80. *See id.* § 15(2), at 390. *See also* 1 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS § 243, at 641-43 (rev. ed. 1948).

81. R.U.S.A., 1941 Draft, *supra* note 2, § 1-D cmt., at 355. Under the modern U.C.C., trade practices continue to be central, but in a different way. Usage of trade becomes part of the "agreement." According to the U.C.C., "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." U.C.C. §1-201(3) (1996).

strict compliance with contract terms.[82] Mercantile performance was defined as the situation in which the risks and burdens on the buyer were not materially increased and the goods met the "operating or marketing requirements of the buyer in the course of his business."[83] The comment to section 11-A pointed out that the question of mercantile performance was to be decided by the mercantile tribunal, which provided for merchants' control of the standard.[84] The implied warranty of merchantability was also redefined in terms of mercantile norms.[85] Trade associations were to set trade norms; the merchants' tribunal was to apply them to specific situations.

> The *fixing* of trade practice and standard is believed to be properly a task for associations. The task here is to assure counsellors and buyers and sellers of an *informed* judgment, after the event, as to what trade practice, trade understanding, or the mercantilely reasonable, comes to; so that both the making of a contract and action under it, have some reliable basis to reckon with.[86]

The sections addressing "Merchant Experts on Mercantile Facts" proposed a merchant jury system that would allow merchants themselves to decide issues of commercial law.[87] The merchant experts were to determine issues such as the contractual effect "of mercantile usage, or of the usage of the particular trade," the "mercantile aspect of any delivery," the "mercantile reasonableness of any action," and "[a]ny other issue which requires for its competent determination special merchants' knowledge."[88]

The merchants' jury provisions[89] directly empowered merchants to apply trade norms and regulate the chiseler who did not conform to them:

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82. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 11-A, at 378-81; *cf.* U.C.C. § 2-601 (1996).

83. R.U.S.A., 1941 Draft, *supra* note 2, §11-A(b), at 380.

84. The comment to section 11-A states as follows:

> *Presupposition*: The proposed policy presupposes the availability of *a skilled and specialized mercantile tribunal to pass on the question of fact* in case of dispute. Section 59. There is no question of incurring the uncertainty which would be involved by letting such a matter go in first instance to an ordinary jury.

Id. § 11-A cmt., at 381.

85. *See id.* § 15(2), at 390.

> Where there is a contract to sell or a sale by a seller who [regularly] deals in goods of the kind or description required by the contract, there is an implied warranty that the goods shall be merchantable goods of that kind or description, i.e., of at least fair [average] quality, and such as by mercantile usage pass without objection in the market under the designation in the contract, and that they shall be reasonably fit for the ordinary and usual purposes for which such goods are used. A manufacturer who sells his product "deals" therein, within the meaning of this Act.

Id. See also WILLISTON, *supra* note 80, at 641-43 (indicating that "merchantable" had been interpreted previously to mean only "resalable").

86. R.U.S.A., 1941 Draft, *supra* note 2, § 59-C cmt., at 536.

87. *See id.* introductory cmt. to §§ 59 to 59-D, at 531-37.

88. *Id.* § 59, at 534.

89. *See id.* §§ 59 to 59-D, at 534-37.

> [I]n transactions, certainty in negotiations, and reasonable insurance against the mercantile tricks of the business chiseler and the jury tricks of the legal chiseler, are not to be had without a sound and workable procedural device to get such questions of mercantile fact settled competently.[90]

Professor Whitman traces Llewellyn's idea for merchant tribunals back to nineteenth century German Romanticism, in which "the establishment of lay commercial courts would represent direct rule for the *Volk* . . . ."[91] To Llewellyn, "his Code was intended somehow to promote a rule of the American people through an altered form of the rule of law."[92]

The merchants jury was dropped early in the Code's drafting process; today, it is hardly remembered. Llewellyn, however, saw it as an essential part of the new sales law: "This is a key-problem, and a key-section; some such solution is quite as vital for existing law as for law under the [d]raft."[93]

Professor Peter Winship points out the centrality of Llewellyn's merchant tribunals. "This machinery for the determination of mercantile fact is the foundation on which other important 1941 Draft provisions rest."[94] The tribunals were to ascertain both usages of trade and the standard of mercantile performance.[95]

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90. *Id.* introductory cmt. to §§ 59 to 59-D, at 532. *See generally id.* §§ 59 to 59-D, at 534-37.

91. James Whitman, *Commercial Law and the American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 165 (1987).

92. *Id.* at 173. Professor Whitman states:

> To be sure, Llewellyn's 1940-41 conception of the "friendly . . . neighborly" *Volk* was not a German one. The Llewellyn of 1941 was guided as much by the social vision of Frank Capra as by the legal-historical vision of Levin Goldschmidt; behind Llewellyn's theorizing lay a Depression-era longing for small-town cooperation and social normalcy, in which the power of the community would stand by the "little man" in his conflict with the "big man." But if Llewellyn had a mental picture of the American people that differed in detail from the Romantic picture of the German *Volk*, his hopes for commercial law were fundamentally German Romantic hopes: he was motivated, not only by a sober intellectual distrust of formalism, but by an intoxicated faith that courts could somehow speak for the spirit of the nation. Llewellyn's scheme represented, to be sure, realism of a kind. But it was realism with a democratist tinge. Rule of merchant jurors, premised on staunch anti-formalism, would be rule of the people. Commercial "reasonableness" would be a subset of the American people's "reasonableness and decency." The draft that Llewellyn laid before the Conference of Commissioners on Uniform State Laws in September of 1941 would be a code for the American *Volk*.

Id. at 173 (footnotes omitted).

93. *Report of the Special Committee on a Revised Uniform Sales Act* 6 (1941), *reprinted in* 1 UNIFORM CODE DRAFTS 281, 286 (Elizabeth Kelly ed., 1984).

94. Peter Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote,"* 31 SW. L.J. 843, 853 (1977).

95. *See id.*

B. LEGISLATIVE DICTATE

Looking at the 1941 Act in light of our four parameters, we see that there are many positive statutory commands. Express warranties, for example, are given by words of description and cannot be disclaimed. Additionally, disclaimers of remedies are regulated in detail by the 1941 Act. Most important, the 1940 draft contained a revolutionary proposal, predating section 402A of the Restatement[96] by more than twenty years, which provided for direct liability of manufacturers to those injured in person or property.[97] This section, in one form or another, lasted through the 1949 Draft. It finally was withdrawn due to heavy opposition, but it did inspire modern products liability law. It read as follows:

> SECTION 28. (NEW) OBLIGATION TO CONSUMER WHERE DEFECT IS DANGEROUS.
>
> (1) Where it can reasonably be foreseen that goods, if defective in design, workmanship or material, will in the ordinary use thereof cause danger to person or property, the manufacturer thereof by selling them or delivering them under a contract to sell, when they are so defective in a manner not apparent to the ultimate users thereof, assumes responsibility to any legitimate user thereof who in the course of ordinary use is damaged in person or property by such defects.
>
> (2) "Manufacturer," within the meaning of this section, includes any person who processes or assembles goods which he thereafter markets for ultimate use in consumption, and any person who by brand, tradename or otherwise assumes the position of a manufacturer or supervisor of manufacture.
>
> (3) This section is subject to control by contact under section 18 only in contacts to sell or sale made by a merchant with a merchant and only so far as concerns use by the merchant buyer.[98]

The 1941 Act contained a complicated set of rules governing contractual modification of remedies.[99] Modifications were to be examined in terms of the trade, the contract, and the breach: "A modifying term is valid which reasonably adjusts the remedy to the circumstances of[:] (a) the trade; (b) the contract; [and] (c) the breach."[100]

Section 57-B provided for tight controls on modifying remedies by (a) prohibiting any prevention of rejection or return; (b) limiting rejection or return of non-conforming parts "of a whole dependent on such parts;" (c) limiting the remedy to repair or replacement where the result would fail "to give the buyer the substantial value contracted for;" and (d) "exclud-

96. *See* John B. Clutterbuck, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131, 1133 (1988) (discussing how Llewellyn's proposals formed the basis of strict products liability).

97. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 16-B, at 402-03. *See also* Report and Draft for a "Uniform Sales Act, 1940" (1940), *microformed on* Karl N. Llewellyn Papers J.II.2.a. (on file with *SMU Law Review*) [hereinafter Uniform Sales Act, 1940 Draft].

98. Uniform Sales Act, 1940 Draft, *supra* note 97, at 32.

99. *See* R.U.S.A., 1941 Draft, *supra* note 2, §§ 57 to 57-C, at 514-522.

100. *Id.* § 57(2), at 514.

ing or limiting consequential damages for defects due to reasonably avoidable fault of the seller . . . ."[101]

Too numerous to note specifically are the special "merchant rules" that pervade the 1941 Act and provide for the incorporation of merchant norms into sales law. For example, (1) a buyer can recover expenses of cover "which are by mercantile usage reasonable;"[102] (2) market price may be determined at a place "which in mercantile judgment would serve as a reasonable substitute;"[103] and (3) between merchants, consequential losses from breach may be included "unless such losses are clearly out of line with the general practice of the particular trade or market."[104]

Many of the more intrusive and controlling sections of the first drafts did not survive. Provisions for the direct liability of manufacturers, the merchant tribunal, certain merchant rules, and the regulation of remedies were dropped. Other regulatory provisions that cropped up in later drafts were also ultimately rejected.[105]

The role of the comments to the 1941 Act should be mentioned. Until 1957, the proposed law explicitly gave the comments official status.[106] The comments were to explain the act and the relations between the parts.[107] Along with the comments, however, Llewellyn wanted a "short treatise or handbook on every chapter . . . . The hand-book [was] intended . . . to develop the *use* of the act, by judges in judging, and by counselors in dealing with the practical situations involved."[108]

This idea of a "hand-book" seems to have developed into "introductory comments" drafted by Llewellyn, but never made it into an official text. In 1944, Llewellyn spent two months drafting a thirty-four page *Introductory Comment to Parts II and III of the Act relating to formation and construction.*[109] Such introductory comments were to explain the use of the Code, yet we will see that they never saw the light of day.[110]

C. THE REGULATORY MODEL

The system of creating, applying, and judging commercial law in the Revised Uniform Sales Act of 1941 would have replaced the traditional

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101. *Id.* § 57-B, at 520.

102. *Id.* § 58-E, at 530. *See also* Wiseman, *supra* note 16, at 465 (discussing in detail the merchant rules).

103. R.U.S.A., 1941 Draft, *supra* note 2, § 65, at 558.

104. *Id.* § 70-A, at 566.

105. *See* discussion *infra* Part X.B.2. (discussing the secured transactions article's attempt to regulate holders in due course in consumer transactions).

106. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 1-A(2), at 327; ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES 9 (1970).

107. *See* Letter from Karl N. Llewellyn to William Draper Lewis (Feb. 27, 1942) (on file with *SMU Law Review*).

108. *Id.*

109. *See* Statement of William Draper Lewis, at 5 (April 12, 1945) (on file with *SMU Law Review*).

110. *See* William Draper, Report of the Director to the Meeting of the Executive Committee at the Association of the Bar of the City of New York (June 1, 1945) *microformed on* Karl N. Llewellyn Papers J.VII.1.a. (on file with *SMU Law Review*).

system of private contracting governed by legal and judicial control. The revised system was one in which merchant practices, merchant associations, and merchant tribunals would govern commercial law. The judge, with the merchant jury and trade associations to guide him, would have had the power under section 1-C to rewrite the formal contract of the parties.

The comments to the 1941 Act would have also increased the regulatory power of the courts. Today, the status of the comments is problematical. Should they be treated as legislative history or ignored as not being enacted?[111] Llewellyn originally saw the comments as a way to educate courts as to the meaning of the statute as a whole: "[A] condition of sound development by courts is an *adequate* commentary which guides to the legal material concerned *as a whole.*"[112]

In an introductory section to the 1941 Act, entitled *The Problem of a Semi-Permanent Code of a Whole Field*, Llewellyn stated that it is necessary for the courts to know of and apply the sense and purpose of a non-readily amendable statute as well as its literal language:

> Instead, where a statute seems to make good sense, and the courts see what that good sense is, there has appeared a vigorous and healthy practice—by no means consistent or universal, but present in the daily work of the highest courts all through the country—to work out the effect of the statute quite as much in terms of its sense and purpose as in terms of its meticulously examined wording.[113]

The comments were to present and include the reason and principles of the sections:

> The way to induce a consistent approach by the courts in these terms is
>
> (a) to invite that approach expressly, and give it legislative authorization;
>
> (b) to make explicit the principles which underlie any series of particular provisions;
>
> (c) to provide an authoritative Comment full enough so that the reason and reasonableness of the provisions and the principles are both apparent, and cannot be mistaken; and so that it is easy to see, also, where the reason of a provision leaves off.[114]

The comment to section 1-A of the 1941 Act repeats these points and argues that any comments have to be full and that they are necessary to integrate the sections of the 1941 Act.[115]

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111. *See* NORDSTROM, *supra* note 106, at 9-10.

112. Karl N. Llewellyn, *Memorandum to Executive Committee, Committee on Scope and Program Section on Uniform Commercial Acts* 4 (1940), *microformed on* Karl N. Llewellyn Papers J.II.1.b. (on file with the *SMU Law Review*).

113. R.U.S.A., 1941 Draft, *supra* note 2, at 305.

114. *Id.*

115. *See id.* § 1-A(3) cmt., at 330.

> What has been said above applies to every Uniform Act. But where the Act is to be the law of a whole field, of semi-permanent character, and, as projected, a chapter in a Uniform Commercial Code, *the Comments must of*

Thus, the 1941 Act explicitly provides that the comments are to be used as a guide in the construction of the Act.[116] The original intent, therefore, was for the comments to explain the reasons and principles of the Code. Some official recognition of the comments lasted until 1957.[117] Such recognition meant that the comments definitely were to be used in deciding cases and that courts were explicitly empowered to consider the policies and principles of the statute in their decisions. The official recognition of the comments would have increased the ability of the courts to go outside the literal language of the Code and would have increased the freedom and power of the courts to regulate commerce on the basis of policy. The system resembles a regulatory, administrative law model, such as the defunct National Industrial Recovery Act (NIRA), in which groups of merchants were supposed to promulgate codes of fair competition that were to be given the force of law.[118]

The role of the judge under the proposed act was to be more like an active administrative regulator than a neutral common law judge. The judge would have worked with the merchants jury and trade association rules in deciding sales issues. It was important to involve those affected by commercial law—the merchants. The merchants were to supply the facts and expert opinions necessary for the jurisprudence of legal realism:

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necessity be rather full, and the importance of their receiving official recognition rises materially.

In particular, it is only in the Comments that the bearing of one section on other sections can be consistently explored, and the Act integrated, for use, into a working whole. No man can expect a Court handling a single case to find time to absorb, for the purpose, an Act covering a whole field of law. Cross-bearings of other relevant sections require to be built into the Comment sufficiently to bring relevant matters reasonably together. Even more important is the indication in the Comment of the reason and purpose of the rules laid down, of the reasons for choosing one expression rather than another, of the matters intended to be included, and of those intended to be left out. The importance of the reason given grows, it must be repeated, with the expected life of the Act, and with its expected resistance to detailed amendment which would destroy uniformity. An ordinary statute, if misconstrued, can be amended. A Uniform Act of a Whole Field must continue to make out with its original language, and needs safeguard against misconstruction by mistake of intention.

Id.

116. *See id.* § 1-A(2), at 327.

Since uniformity of intent, construction and application is no less important to the dominant purpose of this Act than uniformity of language, the Legislature declares that the Act is adopted for the purposes and with the intent set forth in the official Comments of the Conference of Commissioners on Uniform State Laws, and that those comments are to be used as a guide in the construction and application of this Act.

Id.

117. *See* NORDSTROM, *supra* note 106, at 9.

118. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act (NIRA) unconstitutional). *See also* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 713, 721 (1936) (supporting some of the goals of the NIRA); Llewellyn, *United Front*, *supra* note 14, at 288 (supporting President Roosevelt's court-packing plan in response to Schechter). Llewellyn saw a "guildish organization" like the NIRA as a cure for the problems of sales law. Karl Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 380 (1937).

> The next feature of the modern style which strikes one could be called factuality; it could be called realism; it could be called technological contact. Its essence is the supplementation of legal authority on the one hand, and of ordinary common sense on the other, with such technical data of fact and expert opinion as are available, or can in the time at hand be made available, to inform a judgment.[119]

Private contracting would have its place, but only within strict limits.

In 1937, Llewellyn advocated regulative legislation that would define quality, lay down minimum standards, and invalidate contracts inconsistent with statutory purpose:

> 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.[120]

Indeed, although it is hard to believe that of the principal drafter of the most widely adopted private law in history, Llewellyn did prefer an administrative law system. In 1942, he wrote that law must be made intelligible to those who use it. "Today, 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."[121] Such a system would involve those affected as participants in the administration of justice.

Llewellyn's merchant tribunal provisions were designed to empower merchants, to make them a part of the process of creating and administering commercial law. The determination of the best commercial rules was to be made by the merchants, not by the legislatures, the ALI, or the

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119. Karl N. Llewellyn, *On The Good, The True, The Beautiful, In Law*, 9 U. CHI. L. REV. 224, 244 (1942) [hereinafter Llewellyn, *On The Good*].

120. Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 408 (1937) [hereinafter Llewellyn, *Warranty II*].

121. Llewellyn, *On the Good*, *supra* note 119, at 261. The Tennessee Valley Authority is an example of the right approach:

> When I watch the care, the skill, the patience, with which the Tennessee Valley Authority is knitting the active cooperation of the beneficiary into every least job undertaken for his benefit, I see a lesson in democratic government which carries over into all the work of law. 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, and the morale of official, citizen, and group alike bogs in morass, and pressure-groups become a by-word.

Id. at 263.

NCC. Professor Wiseman points out that the merchant tribunal worked to eliminate or reduce "the monitoring of merchant practices by the larger community."[122] That was the point; the merchants were supposed to govern themselves.

D. Freedom of Contract

Looking at how freedom of contract would be limited by the 1941 Act is simply restating what was discussed above. For example, a merchant's form contract is invalidated under the proposed section 1-C, and a buyer has to provide explicitly for exact performance. However, a party to a contract can waive the requirement for strict performance by subsequent conduct.[123] Express warranties shift the burden to the seller to show that the buyer was aware of limitations,[124] and the implied warranties of fitness for a particular purpose and merchantability cannot be disclaimed by general language if a reasonable person would rely on the warranties.[125] The manufacturer's liability for defective products can be negated only by a merchant buyer.[126] Working together, the judge and the merchant tribunal approach the function of an administrative agency fixing fair trade practices. Trade norms are pervasive. They determine the meaning of contract terms, fix standards of performance, and determine remedies. Llewellyn saw the function of contract as providing for the regulation of groups, not as structuring relations between individuals.

> To sum up, the major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups, up to and including states—a frame-work highly adjustable, a frame-work which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work.[127]

Individual contracting was not the focus of the Revised Uniform Sales Act of 1941.

E. The Problem of the Standardized Contract and the First Drafts

1. The Problem

A major concern of Llewellyn was standardized contracts. Llewellyn proposed as part of the Revised Uniform Sales Act of 1941 a section 1-C that was to regulate form contracts.[128] The section was withdrawn and

122. Wiseman, *supra* note 16, at 515.
123. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 11-A(f), at 100-101.
124. *See id.* § 12(3)(b), at 105.
125. *See id.* § 15(6), at 110.
126. *See id.* § 16-B(3), at 123.
127. Llewellyn, *What Price*, *supra* note 50, at 736-37.
128. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 1-C, at 51.

never made it into a proposed draft. However, it is important because it grew into the present U.C.C. section 2-302, the unconscionability clause.

Another metaphor based on New York geography may be helpful to understand the role of standardized contracts in Llewellyn's contractual system. Situated on opposite sides of Central Park are the Museum of Natural History and the Metropolitan Museum of Art, the two main museums in New York. The Museum of Natural History contains exhibits about seemingly disparate phenomena such as rocks, dinosaurs, and non-Western tribes. Seen in light of the concept of evolution, however, one realizes that the founders of that museum saw geology, biological evolution, and folkways as products of the unconscious process of natural history. The Metropolitan Museum of Art, however, exhibits products of art—of artificial, conscious creation. Whether a particular artifact is a tribal handicraft or a piece of art is still a question today. An article in the *New York Times*, for example, discussed the question raised by an exhibit of African artifacts displayed by the Royal Academy of Arts of London. The *Times* noted that "[t]he show would revive the debate about whether work done by anonymous African craftsmen was really art . . . . But at the Royal Academy, objects made by African hands are separated from their cultural context and can be judged simply as art."[129]

A deal between merchants includes the products of evolution—trade usages—and the products of artifice—consciously crafted contract language. Llewellyn saw the need in his Sales Act to provide mechanisms that considered both trade custom and individual bargaining in determining the legal effect of the commercial deal. The merchant tribunal, the regulatory role of the judge, and the standardized contract section were all mechanisms to do this. Moreover, form contracts could threaten both established trade norms and individual bargaining. They were to be policed by a section specifically dealing with form or standardized contract language.

The differences between the early form contract sections and the present section 2-302 represent a profound change in the nature of the Code. The term "unconscionability" was not in the original drafts and, as we will see, did not enter commercial law discourse until August of 1942, by way of an off-hand comment by Hiram Thomas.[130] Up to then, Llewellyn had not concerned himself with the term, nor had he mentioned it in his writings. The genesis of what became section 2-302 lay in Llewellyn's concern with the growing use of standardized contracts. His 1930 sales casebook contains a case comment that discusses the issues raised by form contracts.[131] He points out that "[b]usiness men make contracts, especially in sales transactions, against a background of more or less defined prac-

129. Alan Riding, *"Primitive" No More: African Art Finds A Proper Respect*, N.Y. TIMES, Oct. 29, 1995, at H43.

130. *See* discussion *infra* Part V.A. Hiram Thomas was the lawyer and spokesman for the New York Merchant's Association in the NCC proceedings. *See* Wiseman, *supra* note 16, at 520.

131. *See* LLEWELLYN, CASES, *supra* note 27, at 51.

tices of the particular trade. This involves the case of shorthand symbols such as "c.i.f.," "f.o.b.," etc. It involves assumption of most of the contract without its expression."[132] An increase in the size of firms "leads to *standardizing* the contract. As a matter of internal administration the virtues of this are clear; it amounts to machine production of transactions, and makes available for the clerk who conducts a routine transaction the experience of the executive and lawyer who drafted the form."[133]

Such form contracts can be oppressive:

> 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.[134]

2. *Section 1-C of the 1941 Draft*

With the above concerns in mind, Llewellyn proposed section 1-C. The section was to be the key device to mediate between the Act's provisions and individual bargaining. It was withdrawn, however, and never included in an official draft. The proposed section can be analyzed as follows: first, the proposed Act represents a "balanced allocation of rights and liabilities,"[135] developed out of the best case law and mercantile practice. Where, however, a provision of the Act is subject to agreement, where parties "have deliberately desire to vary from the Act, the parties particular bargain should control."[136] Particular trades and situations may also require departure from the Act, and such departures may be incorporated in a form contract, even though the parties did not bargain over them. However,

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132. *Id.*

133. *Id.*

134. *Id.* *See* Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)). Llewellyn wrote the review just before the drafting of the 1940-41 Acts.

> It is an unfortunate legal situation which puts it into the hands of any outfit that can get the jump on its customer (as, for instance, by "our standard form") or which can get the jump on whole categories of customers (as by an automobile manufacturers' association standard form, or a seed dealers' standard form) to twist the neck of commercial decency at any legal time and in any legal manner it may choose. For it is the societal function of private law, as of public law, to provide ring, referee, and rules.

Llewellyn, *Warranty II*, *supra* note 120, at 394 (footnote omitted).

135. R.U.S.A. § 1-C(1)(a), *reprinted in* CONFIDENTIAL DRAFTS, *supra* note 74, at 18.

136. *Id.* § 1-C(1)(b).

where a group or bloc of provisions are not studied and bargained about in detail by both parties, then actual assent to the incorporation of such a group or bloc . . . is not in fact to be assumed where the group or bloc of provisions, taken as a whole, allocates rights and obligations in an unreasonably unfair and unbalanced fashion.[137]

Therefore, the following rules apply:

1. "If the bloc as a whole is shown affirmatively to work a displacement of the Act in an unfair and unbalanced fashion not required by the circumstances of the trade," then the party wanting to apply a provision must show the other party intended the provision to displace or modify the relevant provision of this Act.[138]

2. On the other hand, if the bloc as a whole is "shown affirmatively to work a fair and balanced allocation of rights and duties in view of the circumstances of the trade, its incorporation into the particularized terms of the bargain is presumed."[139]

3. "If no affirmative showing is made either way, then the entire bloc" may be applied if justified.[140]

The comment to section 1-C notes the following: (1) particular trades need particular rules, and it is best to specify these rules rather than to leave it to the courts; (2) these rules, however, can be one-sided, or in Llewellyn's words, "jug-handled;"[141] (3) the principle of freedom to bargain goes only to an intended bargain. Merchants "*think* and *talk* of such matters as price, credit, date of delivery, description and quantity. These are the bargained terms. The unmentioned background is assumed to be the fair and balanced usage of the particular trade;" (4) the courts have adopted a variety of ad hoc responses to the situation, although, (5) "*[t]he true principle is clear enough*: the expression of a body of fair and balanced usage is a great convenience . . . on the other hand, the substitution of private rule-making by one party . . . is not to be recognized without strong reason shown."[142]

Section 1-C emphasizes the incorporation of balanced trade rules as opposed to private legislation. The section limits individual contracting; therefore, bargaining that alters provisions of the Act must be shown affirmatively to be actually intended.

IV. THE MODERNIZATION OF CONTRACT DOCTRINE

Another of Llewellyn's goals was to reform contacts by discarding obsolete formalisms and instituting modern efficiency and flexibility. First, the concept of title as an organizing principle of sales law was discarded. Such a formal, abstract concept did not fit Llewellyn's modernistic and

137. *Id.* § 1-C(1)(d).
138. *Id.* § 1-C(2)(a).
139. *Id.* § 1-C(2)(a)(ii).
140. *See id.* § 1-C(2)(a)(iii).
141. *Id.* § 1-C cmt. (1), (2).
142. *Id.* § 1-C cmt. (2), (4), (5).

realistic program.[143] Rather, the focus was on contract formation and performance.[144]

We have seen how Llewellyn attempted to change the weight of group norms, judicial and legislative regulation, and individual contracting. He also changed contract law itself. His first drafts proposed a new system of contract law, one that replaces a formal and rigid doctrine with a flexible one. Under Llewellyn's contract law, it is easy to get into a contract, but hard to get out of one. The Statute of Frauds[145] is the only remnant of the formal contract system.[146]

Under the 1940 Draft, a contract could be made in writing, by word of mouth, or inferred from conduct.[147] The early drafts rejected the doctrine of "indefiniteness" that held that all significant terms had to be agreed upon for there to be a contract. For example, a contract could be made with the price to be determined later,[148] and the quantity term can be expressed as "output" or "requirements."[149] Firm offers without consideration are allowed.[150]

The 1941 Act contained several alternative sections that change formal contract rules of offer and acceptance and replace them with a focus on "whether the parties, as a matter of fact, have reached a business agreement to buy and sell goods."[151] In the 1941 proposals and in today's U.C.C., it is not necessary that a particular moment of agreement exists and terms such as price can be set later.[152] Together these sections work against older doctrines, such as the Statute of Frauds, formal require-

143. By "modernistic," I mean the discarding of old methods and rules in order to achieve such goals as productivity, efficiency, and rationality.

144. *See, e.g.*, U.C.C. § 2-101 (1989).

> The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. 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.

Id. § 2-101 cmt.

145. *Id.* § 2-201.

146. Section 2-201 just requires "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." Only the quantity term must be specified. *See id.* § 2-201(1). Section 2-201 is subject to the exceptions of specially manufactured goods and of goods that have been paid for or accepted. *See id.* § 2-201(3). Furthermore, unlike prior law, one cannot admit to a contract and still use the Statute of Frauds as a defense. Once a contract is admitted, section 2-201 becomes irrelevant. *See id.* § 2-201(3)(b), cmt. 7.

147. *See* Uniform Sales Act, 1940 Draft, *supra* note 97, § 12. *See also* U.C.C. § 2-206 (1989).

148. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 9(4); U.C.C. §§ 2-204, 2-305(1) (1989).

149. R.U.S.A., 1941 Draft, *supra* note 2, § 44(4). *See* U.C.C. § 2-306 (1989).

150. *See* R.U.S.A., 1941 Draft, *supra* note 2 § 3(b)(2). *See* U.C.C. § 2-205 (1989).

151. R.U.S.A., 1941 Draft, *supra* note 2, Alternative § 3-A(1), at 67. *See* U.C.C. § 2-204(3) (1989).

152. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 9(4); U.C.C. §§ 2-305, 2-308, 2-310 (1989).

ments, the mirror image rule, and indefiniteness, which would defeat the finding of a contract. It is much easier under the Code to be bound contractually than it was under classical contract doctrine.

Once in a contract, it is more difficult to get out of one. Llewellyn wanted to substitute "substantial performance" for the strict performance standard of commercial law.[153] Although his proposal was rejected for single-installment contracts,[154] it was retained for installment contracts[155] and for delays in shipment[156]. The buyer's right to reject is further limited by the requirement of good faith, course of dealing, course of performance, and usage of trade.[157] The right to cure a defective tender also limits the ability of a buyer to get out of a contract.[158] The limit on rejection for failure of transportation and the right to cure were introduced in the early Drafts.[159] The 1941 Act also provided for what is now known as "adequate assurance of performance"[160] in order "to provide informal machinery for adjustment" to keep deals alive.[161]

The first drafts gave a wronged party more flexibility in remedies and easier ways to prove them. Llewellyn wanted to restrain the marginal wrongdoer who violated social norms. As he said in *What Price Contract*, if the contract-breaker were not responsible, he could breach with impunity and "[o]nly saps [would] work . . . ."[162] Additionally, Llewellyn wanted to free damages from formal requirements. "The claimant shall not be forced to elect one theory of damage measurement, but shall develop each of any alternative theories separately, and develop each in its entirety at any one time."[163] No precise theory of damages is required: "Under the draft the search is not for *the* correct measure of damages, but for *a* measure which is reasonable, and a recovery based on *any* such measure is to be sustained."[164]

Thus, Llewellyn created the buyer's remedy of "cover," the buying of substitute goods.[165] The right to specific performance was broadened from situations in which the goods are unique to those in which they are not "readily procurable,"[166] and a buyer can sue for damages even if he

153. *See* Uniform Sales Act, 1940 Draft, *supra* note 97, § 2(a); U.C.C. § 2-601 (1989).
154. *See* U.C.C. § 2-601 (1989).
155. *See id.* § 2-612.
156. *See id.* § 2-504.
157. *See id.* §§ 1-203, 1-205, 2-208.
158. *See id.* § 2-508.
159. *See* Uniform Sales Act, 1940 Draft, *supra* note 97, § 67(3). *See also* R.U.S.A., 1941 Draft, *supra* note 2, § 54.
160. *See* U.C.C. § 2-609 (1989).
161. R.U.S.A., 1941 Draft, *supra* note 2, § 45(5)(b).
162. Llewellyn, *What Price*, *supra* note 50, at 725 n.47.
163. R.U.S.A., 1941 Draft, *supra* note 2, § 63-B(2). *See* U.C.C. § 2-608, cmt. 1 (1989).
164. R.U.S.A., 1941 Draft, *supra* note 2, § 63-B cmt. (2).
165. Uniform Sales Act, 1940 Draft, *supra* note 97, § 68. *See* U.C.C. § 2-712 (1989). Llewellyn's innovation is described as "radical" in Barnes, *supra* note 13, at 125 n.24.
166. Uniform Sales Act, 1940 Draft, *supra* note 97, § 86 cmt., at 256. *See* U.C.C. § 2-716 (1989).

has accepted the goods.[167] Other liberalizations included the use of substitute markets to fix damages[168] and the option to complete work on goods rather than junk them.[169]

The principles underlying the remedy sections were "that the remedy shall be adequate, flexible, and as direct and speedy as may be . . . ."[170] The entire contractual system of sales reflects that "an approach to the contractual relation has been developing which deals with contract less as an arm's-length single deal than as a getting together on a type of joint venture . . . ."[171]

Llewellyn's modernistic proposals to reform contract law, with the exception of the controversy over his attempted abolition of the perfect tender rule, drew less protest and were the most successful of his reform efforts. The drafters of the Code must have known what they were doing. In 1941, Samuel Williston pointed out that the drafters were ignoring settled principles of contract law.[172]

> Not a few of the sections of the draft state principles of contract law which are of general application. The Law Institute spent years in the preparation of a Restatement of the Law of Contracts. In drafting the sections of the Restatement, cases involving sales were often the chief authority. It seems unfortunate that this draft gives so little heed to the Restatement.[173]

Of course, reform of contract law formation did not threaten any economic interests as did, for example, the direct action against manufacturers. During the drafting process, contract law became even less formal. For example, the "conforming memorandum" exception was added to the Statute of Frauds, and the "battle of forms" section[174] was introduced to do away with the "mirror image" rule. Llewellyn's changes in sales contract doctrine went on to change general contract doctrine in the *Restatement (Second) of Contracts*.[175]

Llewellyn accomplished this major change of contract doctrine even though this was not one of his main concerns, such as making merchant norms the basis of commercial law and achieving fairness and balance. His "General Comment" on contract formation and interpretation focuses on merchant practices and fairness, not on a more modern contract doctrine. Yet it was his proposals to modernize contracts, not those to institute a merchant tribunal, to regulate form contracts, and to police contracts for balance, that became central to the modern law of contracts.

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167. Uniform Sales Act, 1940 Draft, *supra* note 97, § 87(1)(c). *See* U.C.C. § 2-608 (1989).

168. Uniform Sales Act, 1940 Draft, *supra* note 97, § 82(3). *See* U.C.C. § 2-723 (1989).

169. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 63-A(3), at 275; U.C.C. § 2-704 (1989).

170. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 56-A, at 233. *See* U.C.C. § 1-106 (1996).

171. R.U.S.A., 1941 Draft, *supra* note 2, § 46-A cmt., at 195.

172. *See* Comments by Samuel Williston on Revised Uniform Sales Act/Second Draft—1941, ALI Archives (on file with *SMU Law Review*).

173. *Id.*

174. *See* U.C.C. § 2-207 (1989).

175. RESTATEMENT (SECOND) OF CONTRACTS (1981).

V. YOU MIGHT USE "UNCONSCIONABLE"—REGULATION OF FORM CONTRACTS STARTS TURNING INTO UNCONSCIONABILITY

A. "UNCONSCIONABILITY" ENTERS SALES DISCOURSE

Llewellyn's first drafts created a system in which judges and merchants juries would have extensive regulatory power over sales contracts. Section 1-C would have empowered courts to disregard contractual terms by considering whether they were actually bargained over, the source of the terms, and the consistency of the terms with equality, balance, fairness and trade practices. The section applied to merchant-merchant transactions as well as merchant-consumer transactions, and explicitly concerned equal bargaining power. Issues raised by the section were to be applied in part by a merchants jury, focusing on provisions other than the explicitly bargained-for price and quality terms. It applied to all form contracts, not just those so unfair as to be unconscionable. This section grew into the present section on unconscionability, section 2-302.

But what does section 1-C have to do with unconscionability? Not much. While the present section 2-302 applies to all contracts, it primarily applies to those involving consumers,[176] and is decided on the subjective basis of whether or not a provision shocks the conscience, and not directed to questions of unequal bargaining power.[177] Issues arising under the section are a matter of law to be decided by the judge alone,[178] and the section is concerned more with questions of price and quality rather than contract provisions that differ from those of the U.C.C. or normal trade practices.

One should not be surprised that Llewellyn's initial proposals did not contain anything about unconscionability, as he had never written about the concept, or even considered it.[179] The term entered the Code as a result of an off-hand comment by Hiram Thomas at an NCC meeting in August of 1942. Thomas was notorious for speaking without thinking. In December of 1942, William Draper Lewis, the director of the ALI, complained that Thomas was wasting time: "The difficulty, so it seems to me, is more than his habit of merely thinking out loud . . . . His difficulty is to

176. *See* WHITE & SUMNERS, *supra* note 10, § 4-9, at 155, 237 (stating that section 2-302 should rarely apply to merchant-merchant deals); Steven Goldberg, *Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors*, 58 WASH. L. REV. 343 (1983) (discussing unconscionability in non-consumer commercial settings).

177. *See* U.C.C. § 2-302 cmt. 1 (1989).

178. *See id.* § 2-302(1).

179. Here, my story of the unconscionability clause differs from Professor Arthur Allen Leff's brilliant analysis in *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) [hereinafter Leff, *The Emperor's New Clause*]. He breaks the concept of unconscionability into the two components of substantive unconscionability and procedural unconscionability and reviews the history of the clause in order to ascertain how the drafters considered these two components. *See id.* at 488-528. I start with Llewellyn's form contract clause and describe what it grew into, rather than looking backward to explain the present law.

see the issue in a sufficiently clear manner to prevent his talking about irrelevant matters."[180]

Lewis did not realize that this habit of "thinking out loud" initiated the creation of the unconscionability doctrine in sales. At the 1942 NCC conference, discussion was on modifications of remedies.[181] Llewellyn was concerned with unreasonable contractual limitations of statutory remedies. However, he saw the need for "individualization" of remedies in certain instances, for example, the need for a seller to call for expert repair of farm equipment rather than have the farmer indulge in amateur tinkering.[182] Thomas was worried about the use of the term "reasonable" as a guide to what would be a permissible modification of remedies because the meaning of the term was elusive.[183]

At a 1942 meeting, Mr. Stanley criticized the practice of listing specific instances of remedy limitations that were permissible and suggested instead that the non-permissible limitations be listed.[184] Hiram Thomas pointed out that many sales clauses may seem unreasonable, but are not, and suggested that the problems lie at the extreme and should be prohibited:

> There are certain things that are obviously so contrary to public policy that no court would stand for certain provisions in contracts. Your gold bond case that Mr. Llewellyn mentions is one of them. That is just plain fraud, and I think if that case ever got before the court, it wouldn't take five minutes to dispose of it. But those are not in the ordinary course of business. They are tricks of occasional sharpers, and a man who tries that thing very often isn't going to stay in business long. I don't know how a statute which has to be phrased in general terms is going to expect to cure all possible abuses in the trade. I am afraid of this thing as it stands. That is about all I can say about it now. I quite agree that certain practices should be prohibited if we know what they are and can provide against them with some degree of particularity. There are statutes which do limit these restrictions on warranties in certain trades. I have had those called to my attention.[185]

Thomas saw the remedy limitations sections as manifesting "a desire to prevent what are essentially tricky and fraudulent practices."[186] It was at the end of this discussion that Thomas suggested the alternative term "unconscionable." He was searching for some standard that would distinguish between permissible and impermissible limitations of remedies, stating:

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180. Letter from William Draper Lewis to Willard B. Luther, ALI Archives (Dec. 17, 1942) (on file with *SMU Law Review*).

181. National Conference of Commissioners on Uniform State Laws, Fifty-Second Annual Conference (1942), *microformed on* Karl N. Llewellyn Papers J.IV.2.f (on file with *SMU Law Review*) [hereinafter 52d Annual NCC Conference].

182. *Id.* at 25-26.

183. *See id.* at 28.

184. *See id.* at 27.

185. *Id.* at 29.

186. *Id.* at 31.

> I would suggest "or oppressively," some word like that. If you are going to have some standard, let it not be pure reason. You might use "unconscionable" or something the court can look at and say, this is so arbitrary and oppressive and unconscionable that we won't stand for it.[187]

Llewellyn welcomed Thomas's suggestion: "[t]he line of thought raised by 'unconscionable' is exactly what one wants and also gives a draftsman guidance. You can tell when you are approaching the verge of the unconscionable."[188] Thus entered the term "unconscionable" into the discourse of commercial law. The term "unconscionable" would go on to hijack the proposed section 1-C and convert that section into something entirely different. Perhaps Llewellyn, whose jurisprudence of legal realism disparaged formalism, did not see how the power of the term "unconscionability" would profoundly change the application of the U.C.C.

Llewellyn's initial draft proposed a tight regulatory scheme prohibiting everything that was not expressly permitted. For example, form contracts and limitations of remedies were invalid unless validated by the Act. Now, form contracts and limitations of remedies were valid unless expressly invalidated by the Act. In procedural terms, the burden of persuasion was placed on those seeking to invalidate the contract. Additionally, the Act evolved from a statute that would regulate the run-of-the-mill commercial transaction to one that would invalidate only the one at the margins, the supposedly rare deal infected with fraud or trickery. Moreover, the first drafts regulated run-of-the-mill deals using definite standards, such as equality of bargaining, and reasonableness in terms of the trade and the merchant's needs. Now these transactions would be regulated under vague terms such as "unconscionable" and "commercially reasonable."

B. UNCONSCIONABILITY: THE EQUITABLE DOCTRINE

Unconscionability, at the time of Hiram Thomas's comment in 1942, was an obscure concept with a long history. A review of old treatises, legal encyclopedias, and case books reveals that it had only marginal historical importance at best. The encyclopedia *Corpus Juris*[189] does not mention the term in the outline of its section on contracts, although its section on equity does cite to the doctrine.[190] Langdell's 1879 case book does not include the doctrine,[191] while Parsons, the author of another early treatise, only mentions it in a single sentence.[192] The doctrine was

187. *Id.* at 33.
188. *Id.* at 34.
189. *See* 13 C. J. *Contracts* §§ 214-34 (1917).
190. *See* 21 C. J. *Equity* § 87 (1920).
191. *See* CHRISTOPHER COLUMBUS LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS Part II (1879).
192. *See* THEODORE PARSONS, LAW OF CONTRACTS (1884).

historically restricted to equity.[193] There was little evidence that the Pennsylvania courts had ever dealt with the concept at the time of the Code's adoption in that state.[194] Thomas and Llewellyn, in the NCC Conference of 1942, seem to have been searching for some boundary term that would limit the power of judges to invalidate contract language that varied the remedy sections of the proposed Act.[195] A standard of "reasonable" would invalidate too many remedy limitations, whereas a standard of "unconscionable" would only invalidate the more extreme remedy limitations. The distinction is equivalent to that between negligence and gross negligence. It is difficult, if not impossible, to explain the difference, but it does draw a line between behavior that is somewhat bad and behavior that is really bad. Llewellyn used the term in the next draft of the form contract section:

> Section 24. Form Clauses, Conscionable and Unconscionable. (1) A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing when read in its entirety including the form clauses is an unconscionable contract and he has not in fact read the form clauses before contracting, except that a merchant who signs and returns such a writing after having had a reasonable time to read it is bound by it.[196]

By using the term, the U.C.C. refers to, if not adopts, the doctrine of unconscionability developed by the English equity courts.[197] This is a standard interpretation of section 2-302.

> For at least two hundred years equity courts have refused to grant specific enforcement of, or have rescinded, contracts so unconscionable "as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." The doctrine of unconscionability is enshrined in the statutory law of forty-nine states.[198]

The history of the equitable doctrine reveals, however, that the unconscionability concept served vastly different social purposes than Llewellyn's proposed form contract section. The English doctrine concerned the preservation of estates, the protection of those in vulnerable circumstances, the invalidation of really stupid bargains, and the prevention of quasi-fraud. It did not serve to invalidate commercial contracts that stepped outside of accepted trade norms.

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193. *See* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 316 (1990).

194. *See* Bernard D. Broeker, *Articles 2 and 6: Sales and Bulk Transfers*, 15 U. PITT. L. REV. 541, 557 (1954).

195. *See* 52d Annual NCC Conference, *supra* note 181.

196. Leff, *The Emperor's New Clause*, *supra* note 179, at 492 (citations omitted). The collected drafts do not include the 1943 version. Professor Leff's article does reproduce § 23 and a copy is in the Karl Llewellyn Papers. *See id.*

197. *See generally* K.L. Fletcher, *Review of Unconscionable Transactions*, 8 U. QUEENS. L.J. 45 (1973).

198. WHITE & SUMNERS, *supra* note 10, § 4-2, at 208 (citing Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750)); *see also* U.C.C. § 2-302 (1989).

The English doctrine dates back to its use by Lord Jeffreys in *Berney v. Pitt*.[199] There, the plaintiff had borrowed £2,000 from the defendant with the proviso that if the plaintiff debtor outlived his father and came into the estate or if he should marry, he would pay the defendant £5,000. The plaintiff's bill prayed for relief from the debt, "which complained of a fraud, and a working upon the plaintiff's necessity when in streights."[200] Lord Jeffreys saw this as an "unconscionable bargain."[201] In *Twisleton v. Griffith*,[202] the court observed that Lord Jeffreys in *Berney* had declared "that these bargains were corrupt and fraudulent, and tended to the destruction of heirs sent to town for their education, and to the utter ruin of families; and that the relief of the court ought to be extended to meet with such corrupt and unconscionable practices."[203]

Thus, the unconscionability doctrine grew out of the English Court's concern with family property. John Habakkuk points out that Chancery in the seventeenth and eighteenth centuries protected the family estate.[204]

> Chancery was hostile to transactions which "supplied the necessities of young heirs for lucre," that is, which enabled heirs to borrow on their expectations . . . . When legal logic left such wide room for social sympathies, it cannot be irrelevant that almost all the Lord Chancellors of the eighteenth century . . . established landed families and had personal experience of the problems of such families.[205]

Berney[206] and the case that attempted to systemize the unconscionability doctrine, *Chesterfield v. Janssen*,[207] grew out of the practice of an expectant heir borrowing on his expectations "in return for an undertaking to pay back a much larger sum when his expectations were realized."[208]

Chesterfield involved a cast of characters that today could be in *People* magazine. It concerned the estate of John Spencer, the grandson of the First Duke and Duchess of Marlborough,[209] who was "addicted to several

199. 23 Eng. Rep. 620 (1686).
200. *Id.* at 621.
201. *Id.*
202. 24 Eng. Rep. 403 (Ch. 1716).
203. *Id.* at 404. Lord Jeffreys is better known for his "hang'em high" practices during the Bloody Assizes after The Monmouth Rebellion, in which he showed no mercy to the defeated rebels. Jeffreys's punishment of the rebels and his invalidating such contracts as in *Berney* can be seen as both stemming from his desire to preserve the settled English system of authority and inheritance. The court in *Twisleton* pointed out that keeping an heir without funds would increase a father's authority: "this might force an heir to go home, and submit to his father, or to bite on the bridle, and indure some hardships; and in the mean time, he might grow wiser, and be reclaimed." *Id.*
204. *See* JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LAND OWNERSHIP: 1650-1950 71 (1994). "In all cases, however, the test which Chancery applied to its interpretation of any particular provision or situation was simple: was it for the benefit of the family?" *Id.*
205. *Id.* at 73.
206. 23 Eng. Rep. 620 (1686).
207. 28 Eng. Rep. 82 (1750).
208. HABAKKUK, *supra* note 204, at 269.
209. *See id.*

habits prejudicial to his health, which he could not leave off."[210]

Spencer was the younger son of the family that was to inherit the dukedom (it is from the elder branch that Sir Winston Churchill descended), but he (along with his sister Diana) was his grandmother's favorite and became her chief legatee.[211] John Spencer is an ancestor of the Earl Spencer, and thus of the late Princess Diana. *Chesterfield* described his situation and that of his grandmother, the Duchess of Marlborough:

> [s]he was seventy-eight; of a good constitution for her age; and careful of her health. He sent to market a proposal, which he supposed, would easily meet with a purchaser; as it was natural to expect in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one.[212]

His proposal was that he would pay his lender double if his grandmother died before him, but nothing if he died first. Although Spencer was desperate at the time of the loan, he had great financial expectations as his grandmother's favorite. The grandmother did die first, but John Spencer died the next year. His executor, the Earl of Chesterfield, brought an action for relief from paying double the amount borrowed under the terms of the agreement.

Relying in part on the fact that the creditor had not acted wrongfully and that Spencer had refinanced his debt after his grandmother's death, the court gave relief only from the penalty. The *Chesterfield* case did attempt to systematize the doctrine of unconscionability.[213] It was seen as a type of fraud:

> There has been always an appearance of fraud from the nature of the bargain . . . . In most of these cases have occurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark: the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and also reformation.[214]

What was so unconscionable in *Chesterfield*? Speculating on the death of one's grandmother seems tacky, but should it be illegal? The case rejects any such policy, as argued by Professor Epstein, that individuals should be able to order their private affairs without interference from the government.[215] That was the point; the English equity courts did not see the parties as individuals but as representing but one generation in an ongoing family. John Spencer was not a private citizen; he was the grandson of a Duke and the father of Earls. Therefore, the estate had to be

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210. *Chesterfield*, 28 Eng. Rep. at 82.

211. *See* A. L. ROWSE, THE EARLY CHURCHILLS, AN ENGLISH FAMILY 53 (Greenwood Press 1974) (1956).

212. *Chesterfield*, 28 Eng. Rep. at 82.

213. *See generally* Fletcher, *supra* note 197, at 50-52.

214. *Chesterfield*, 28 Eng. Rep. at 101.

215. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).

transmitted from one generation to another without interference. Furthermore, the Churchills, Spencers, and Chesterfields were not separate from the government but, at times, *were* the government. The unconscionability doctrine thus served to prohibit the family *from* individual contracting.

Chesterfield also refers to cases of sharp dealing, betrayals of trust, and "uncontentious bargains." Over the centuries such cases made up most of the instances in which the unconscionability doctrine was applied. Professor Leff lists the type of cases:

> In these cases one runs continually into the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naive and the sick, all on one side of the transaction, with the sharp and hard on the other. Language of quasi-fraud and quasi-duress abounds. Certain whole classes of presumptive sillies like sailors and heirs and farmers and women continually wander on and off stage. Those not certifiably crazy, but nonetheless pretty peculiar, are often to be found. And in most of the cases, of course, several of these factors appear in combination.[216]

As stated above, the doctrine was obscure, being noted only in footnotes or marginal sections of legal texts. The reasoning of *Chesterfield* was specifically rejected by Learned Hand in 1916 in *Provident Life & Trust Co. v. Fletcher*.[217]

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216. Leff, *The Emperor's New Clause*, *supra* note 179, at 532-33 (citations omitted).

217. 237 F. 104 (S.D.N.Y. 1916). Like John Spencer, one Conrad Morris Braker had borrowed money with the proviso that if he died before age 55, his creditor would get nothing; but that if he lived until age 55, and thus inherited the corpus of a trust that would vest at that age, his creditors would get more than what had been borrowed. Braker had been refused life insurance because of "a supposed affection of the kidneys." *Id.* at 106.

To simplify, the creditor sued to realize on the larger amount. Learned Hand enforced the bargain, rejecting the authority of *Chesterfield*:

> The second question of law is whether the case is one of those "catching bargains" against which a court of equity will relieve. The jurisdiction is among the oldest of the Court of Chancery (Aylesford v. Morris, L.R. 8 Ch. App. 484, 489), and is certainly connected with the preservation of family property (Twistleton v. Griffith, 1 P. Wms. 310), and the importance of protecting wealthy young heirs from ruining a patrimony before they feel the force of family traditions. It has never been defined with much clearness, for the language of Lord Hardwicke in Chesterfield v. Janssen, 2 Ves. Sr. 125, 155, 156, which seems to have been regarded as the best statement of the doctrine, does not, with deference, define anything at all beyond saying that there are circumstances short of deceit in which the court will regard one of the parties as at a relative disadvantage to the other.

Id. at 109. Justice Hand rejected the policy behind the English cases:

> We have no public concern for the preservation of family inheritances, and ought, I believe, have no tenderness towards expectants of rich reversions. It may be that the purchase of a remainder carries with it the burden of showing that there was no exploitation of extreme need, no beguiling of youthful heirs, and even that the ancestor consented, when there is one — a doctrine very strange in American ears.

Id. at 110 (citations omitted).

Moreover, he had no sympathy for the parties involved:

> Most important of all, he was already affluent; his income of $9,000 a year not only provided for his necessities, but gave him much greater wealth than of 99 men out of 100. I find it hard to have patience with the waterish senti-

Looking at the unconscionability doctrine in the early 1940s, the best that can be said is that courts of equity had the power to reform contracts that were too one-sided and infected with what Professor Leff calls "bargaining naughtiness" and the "infliction of serious hardship."[218] The U.C.C. empowers a common-law judge, as well as a chancellor in equity, to refuse to enforce a contract. However, with the merger of law and equity under modern procedure,[219] this empowerment was unnecessary. It does raise the doctrine from obscurity and place it in plain view in the middle of Article 2. But Llewellyn had originally wanted to do something different than give an old equitable doctrine a second chance at stardom. His proposed section 1-C would have been the basis of a systematic regulation of form contracts for the judge and merchant's jury.

VI. THE 1944 DRAFT

A. THE DRAFTING PROCESS

In 1944, there was an agreement between the ALI and the NCC to draft the Code together. Llewellyn kept his strategic position in overseeing the drafting, being given a free hand in the choice of the reporters and advisory committees. His former pupil and research assistant, and soon-to-be wife, Soia Mentschikoff, was chosen as Assistant Chief Reporter.[220] Those he chose as draftsmen were mostly younger professors. We now see such scholars as Grant Gilmore among the giants of commercial law; but, at the time of the drafting, they were junior professors.[221]

> ment which seeks to make such a man the court's ward, and to protect him against the consequences of his own folly. If he is to have the enjoyment of great wealth, let him share its responsibility.

Id.

There is no evidence that Llewellyn had ever been aware of Hand's opinion in *Provident*; yet it is interesting that the classic case on unconscionability had been rejected by one of New York's and the nation's leading judges.

218. Leff, *The Emperor's New Clause*, *supra* note 179, at 539.

219. *See e.g.*, FED. R. CIV. P. 1.

220. *See* TWINING, *supra* note 3, at 283.

221. *See* Frederick K. Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROBS. 141, 143 (1951).

> The real work of drafting and criticism is done by the smaller group of draftsmen and advisers under the direction of Professor Karl N. Llewellyn who has much experience in this type of work. It is upon their shoulders that the greater burden of creating a workable code must necessarily fall. In setting up this inner organization the plan of the American Law Institute, with only slight changes, has been adopted.
>
> The eight or more draftsmen who are creating the Code, as set out in an earlier draft, all seem to be people who are or at some time have been law teachers. At the time of their appointment three had held full professorships, the rest were of lower academic rank. Five of the ten articles of the Code seem to have been in the direct charge of Professor Llewellyn and the remainder were drafted by the other seven under his supervision.

Id. at 143 (citations omitted). Gilmore suggested that Llewellyn had picked Prosser, who had no experience in negotiable instruments, to draft Article 3, in order to keep control of the drafting process. *See* Letter from Grant Gilmore to Donald J. Rapson (Oct. 8, 1980), *in* Donald Rapson, Book Review, 41 BUS. LAW. 675, 676 n.4 (1986).

In order to understand the drafting process, we have to step back to see what was and was not happening while the Code was being drafted. To a great extent, one has to infer the political processes involved from the objective changes in the drafts because no official record was kept of the oral negotiations on the provisions.[222] World War II and the start of the Cold War captivated the country. Obviously, the nation's attention was not going to be focused on a long-term process of revising commercial law.[223] Interested parties such as the American Bankers Association would be anxious to participate, but no one else. Moreover, there were no organized consumer groups in this era to counteract the business groups that would be affected by the U.C.C.[224] A 1943 memorandum describing an interview with John Wilson reveals the political milieu surrounding the U.C.C.'s drafting:

> Wilson stated he was on the boards of the General Electric Company, International Harvester Company and The Marshall Field Corporation. He thought, emphasizing the first two, that there might be a reasonable possibility of a donation from those corporations provided the matter could be presented to them as something which would benefit the business of the corporations.[225]

A document from 1942 reveals that William Draper Lewis, President of the ALI, was seeking support from big business, banking, and large law firms.[226] It notes that possible sources include the First National Bank of Boston, the Chase National Bank, the Rockefeller Foundation, the American Bankers Association, and the Investment Bankers Association.[227] The ALI was also considering approaching forty of the larger law firms of the United States for similar contributions.[228]

The records of the drafting process reveal various meetings, travel, proposals, and counterproposals. The correspondence in the Llewellyn papers reminds us that the drafters were human. The letters tell of colds, flus, broken limbs, and long train trips to meeting sites. The routine details of committee work had to be addressed.[229]

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222. *See* TWINING, *supra* note 3, at 458 n.6.

223. Llewellyn noted this in 1944 in an unpublished manuscript, stating that "[t]he war has cut off most of the general discussion in the law reviews which had been hoped for and invited." History of the Uniform Revised Sales Act (1944), *microformed on* Karl N. Llewellyn Papers J.V.2.k. (on file with *SMU Law Review*).

224. *See* TWINING, *supra* note 3, at 292.

225. The American Law Institute Commercial Code Project (Dec. 7, 1943), *microformed on* Karl N. Llewellyn Papers J.V.1.h. (on file with *SMU Law Review*).

226. *See* Notes of William Draper Lewis on William A. Schnader's Suggested Draft Letter in Resecuring Funds, ALI Archives (June 1, 1942) (on file with *SMU Law Review*).

227. *See id.*

228. *See id.*

229. For example, Herbert F. Goodrich, Assistant Director of the ALI, wrote to Miss Soia Mentschikoff on December 9, 1946, attempting to set up a time and place to eat lunch in New York: "I don't like to seem so fussy over this small matter, but I don't want good conference time licked up in longer luncheon periods than we have to take. Midtown in New York is pretty terrible these days." Letter from Herbert F. Goodnich to Soia Mentschikoff, ALI Archives (Dec. 9, 1946) (on file with *SMU Law Review*).

Early documents also reveal that the drafters did not realize the enormity of the task they had undertaken. In 1942, Llewellyn wrote to William Draper Lewis that the NCC had "hit on the device of a Congressional Act, to coverage [sic] interstate and international commerce. The Conference foresaw that a Congressional Act would come close to forcing adoption of a parallel act by the States—and very speedily."[230] Also in 1942, a "Time Schedule" estimated that the Code would be completed by 1946.[231] In 1943, Lewis expressed surprise that it had taken $15,000 to complete the Sales Act, stating that "not one of us had any idea that to get the matter into proper shape Karl would have to have not only an assistant like Colgan but a person of the experience and ability of Miss Mentschikoff."[232]

Drafting the Code was hard work. It took much more time, money, and effort than expected; an outcome that left the drafters in a bind. They could hold out for principle or they could make the compromises necessary for the Code's adoption. A participant at the ALI meeting of 1950 queried: "[t]he question is, are we going to have a Code or aren't we? We have run out of money. We have spent ten years on this Sales Act."[233] It may be also that Llewellyn's disdain for pure intellectualism in favor of "action-directive thinking" made it necessary for him to try to make a difference in the commercial and political world rather than to undertake pure scholarship. The circumstances forced compromise for the sake of enactment.

The drafting process took place virtually unnoticed, with no significant articles commenting on it from 1944 through 1947. For example, in 1947, the *Business Lawyer* gave just a general description of the proposed Code.[234] There was no sustained, systematic, or critical academic commentary on the proposed Code. There are many articles devoted to the U.C.C. in the forties and early fifties, but almost all are short descriptive pieces.[235] A survey of four law reviews (New York University, Columbia, Yale, and Harvard) for the years 1948, 1952, and 1955, reveals only eight articles about commercial law. Commercial law was apparently not a topic of academic concern during the era of the Code's drafting.[236]

The NCC's limited success up to that date in having its proposals enacted may have played a significant role in the lack of attention paid to the drafters. Professor Twining reports that it had taken at least ten years

230. Letter from Karl N. Llewellyn to William Draper Lewis, ALI Archives (Jan. 27, 1942) (on file with *SMU Law Review*).

231. *See Commercial Law/Time Schedule*, ALI Archives (1942) (on file with *SMU Law Review*).

232. Letter from William Draper Lewis to William A. Schnader, ALI Archives (Mar. 25, 1943) (on file with *SMU Law Review*).

233. JUDGE MILLER, CONSIDERATION OF PROPOSED FINAL DRAFT OF THE UNIFORM COMMERCIAL CODE 183 (May 18, 1950).

234. *See* William A. Beers, *The New Commercial Code*, 2 BUS. LAW. 14 (1947).

235. *See e.g.*, Allison Dunham, *The New Commercial Code*, 55 COM. L.J. 197 (1950).

236. Nor is it now—a survey of the recent volumes of these four law reviews reveals no commercial law articles.

between the promulgation of an act and its adoption by a majority of states.[237] In retrospect, it seems that people should have paid more attention to what would become the basis of American, as well as international, commercial law, yet the Code's overwhelming success could not have been predicted at the time.[238]

Another reason for the lack of interest in the drafts was that information about the Code was hard to get. Of course the Code was drafted at a time before copy machines, faxes, and the internet. It was much more expensive in the 1940s to duplicate and send drafts than it is today. In the late 1940s, the word processing system of the ALI was Eleanor Twonig, who cut the stencils for the mimeograph reproduction of the Code.[239] Much of the ALI archives are taken up with correspondence from people requesting copies of the Code. For example, on January 31, 1947, William Draper Lewis wrote to Merton L. Ferson of the University of Cincinnati College of Law, stating that no current draft of the Sales Act was available, but that he was sending a copy of the 1944 Draft.[240] Lewis wrote, "Please return it to me when you are through with it as this is one of my four remaining copies."[241] The physical copies were simply not available for comment.

The times, the political situation, and the lower status of commercial law among academics resulted in a Code that was drafted in isolated, obscure circumstances. Thus, major decisions affecting how people live their everyday economic lives were made with hardly anyone paying attention.

B. THE 1944 DRAFT

The 1944 Draft dropped both the mercantile performance standard for the rejection of goods and the merchants tribunal.[242] With the demise of mercantile performance and the merchant tribunal, the strength of trade norms lessened, as did the power of merchants to decide issues of commercial law. The Code was created as a system of traditional judicial in-

237. *See* TWINING, *supra* note 3, at 273.

238. Although by 1940 seven major uniform acts had been adopted by a substantial majority of American jurisdictions, and in some cases by all of them, the adoption process was extremely slow and laborious. For instance, no less than ten years had ever passed between the date of promulgation of an act and its adoption by a majority of the states; in fact, it had taken forty-seven years to secure every jurisdiction's enactment of the Uniform Stock Transfer Act, which was promulgated in 1909, and after fifty years only thirty-four states had enacted the Uniform Sales Act. Further difficulties arose when amendments were proposed. For example, although all jurisdictions enacted the Uniform Warehouse Receipts Act, even as late as 1958, only sixteen had adopted the amendments proposed by the conference in 1922. *See id.*

239. *See* Letter to Eleanor A. Twonig, Secretary, ALI Archives (Jan. 20, 1948) (on file with SMU Law Review).

240. *See* Letter from William Draper Lewis to Merton L. Ferson, ALI Archives (Jan. 31, 1947) (on file with *SMU Law Review*).

241. *Id.*

242. *See* Uniform Revised Sales Act § 91 (Proposed Final Draft 1944), *reprinted in* 2 UNIFORM COMMERCIAL DRAFTS (Elizabeth Kelly ed., 1984) [hereinafter Proposed Final Draft 1944].

terpretation of contract language, rather than one of interpretation by merchants. Merchants felt that relaxing the standard of strict performance would open them up to sales of non-conforming goods. Thus, the modern Code returns to the strict compliance standard for non-installment contracts.[243] The Conference Reports reveal that the drafters doubted the constitutionality of the merchants tribunal as well as to its workability.[244] Hiram Thomas questioned the basis of Llewellyn's faith in the impartial expert, stating that in real life one could get an expert to testify as to anything.[245] Moreover, Schrader doubted whether the proposal would be politically feasible.[246]

Thomas had specific criticism of the proposed merchant tribunals as well. First, Llewellyn's proposal did not provide for cross-examination, which was necessary because opposing experts frequently gave contradictory testimony. Thomas said, "[y]ou come to cross-examine a witness who testifies to a usage and very often there is no usage. He believes there is because in his particular firm they follow it, but when the evidence is all in, there isn't any usage."[247] Here Thomas was striking at the core belief of the Realist faith; the belief that there was an objective reality that could be readily ascertained. If experts could be found to testify to anything, then the use of merchants tribunals to fix trade custom would be futile.

Moreover, Thomas thought that the use of the merchants tribunal would violate the constitutional right to a jury trial.[248] A Mr. Lane agreed, stating that "[t]he jury system is so fastened upon all our state constitutions that I think it would be impossible to amend those constitutions within ten years or maybe more . . . ."[249] In the discussion, President Schnader indicated he thought that this procedural innovation had no place in a commercial code.[250] Furthermore, he felt it would cause a delay in adoption because the political support was not there:

> Then the second thing about which I would like to hear the frank views of the members of this conference is, in how many of their states do they think that an act could be passed which contained this procedure? I suspect that in forty-five out of forty-eight states this procedure would mean a delay of possibly ten years in getting the sales act passed. I think a great deal of educational work must be done before even the members of the Bar would advocate a procedure of this sort. Now it may be that if the prominent merchants

243. *See* U.C.C. § 2-601 (1996). Handwritten annotations to Llewellyn's copy of the 1941 draft show that the substantial performance standard was criticized as too general, not sufficiently predictable, and encouraging of chiseling by unscrupulous sellers. *See* George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the U.C.C.: An Economic Approach*, 91 HARV. L. REV. 960, 971 n.27 (1975).

244. *See* 52d Annual NCC Conference, *supra* note 181, at 131.

245. *See id.*

246. *See id.* at 136.

247. *Id.* at 131.

248. *See id.* at 132-33.

249. *Id.* at 137.

250. *See id.* at 136.

> associations, trade associations, were all behind it and for it and demanded it, that would change the picture, but I doubt whether that situation exists. I certainly think that we ought not to wrap up in one package a procedural reform, however good, with the substantive law of sales and the other subjects which go into a commercial code.[251]

The merchants tribunal sections were dropped and with them went a large part of Llewellyn's proposed system of commercial law. The U.C.C. terms "usage of trade," "commercially reasonable," and "merchantable" were originally to be determined by merchants, not by judges or lay juries. The fixing of the merchant norms that were to control commercial dealing was to be done by merchants themselves. The power of merchants was decreased, thus increasing the power of lawyers, judges, and lay jurors.

Professor Whitman points out that while the merchants tribunal sections were dropped, a host of provisions that were to be decided by the tribunals were not:

> But when the commissioners abandoned Section 59, they did not abandon a host of provisions that assumed the institutional framework of Section 59. Llewellyn's Code retained its deference to "custom," the "law merchant," "good faith" and "reasonableness." In Llewellyn's Romantic vocabulary, however, "custom," the "law merchant," "good faith" and "reasonableness" were not terms of substantive law, but procedural directives, indications to a court that it should refer its decision to lay specialists with a feel for commercial law.[252]

Whitman concludes that though the provisions on reasonableness originally assumed that "merchant juries would be available to develop a case-law of 'reasonableness,'" the absence of such juries has caused courts to flounder.[253] This "reasonableness" has become a major source of non-uniformity in the application of the Code, while the determination of custom and usage has presented complex hearsay and burden of proof problems, and the "law merchant" has become a dead letter. "Lacking merchant juries, commercial courts must work with a mystical language disengaged from the institutions that would have given it meaning."[254] By December of 1944, however, Llewellyn had not given up hope on his merchants tribunal. In *Plans for Uniform Commercial Code*, he hoped for "[a] companion Act setting up a commercial tribunal or procedure for handling questions of commercial fact, which may have to be left out of the Code because of the jury-provisions of the various constitutions, and which may in any event be politically impracticable."[255]

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251. *Id.*

252. James Whitman, *Commercial Law and The American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 174 (1987).

253. *Id.*

254. *Id.* at 175.

255. Plans for a Uniform Commercial Code, at 2 (1944), *microformed on* Karl N. Llewellyn Papers J.VI.1.e. (on file with *SMU Law Review*).

Other provisions downplayed the enforcement of merchant norms and increased the power of individual contracting. The 1944 clause dealing with form contracts was much reduced from the earlier proposed section 1-C. Section 23 of the 1944 draft stated that one who signs a form contract *is bound unless* the writing in its entirety is unconscionable:

> A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing in its entirety including the form clauses is an unconscionable contract. A contract rendered unconscionable by form clauses shall be subject to reformation.[256]

A prior confidential draft of the same clause contained language limiting a merchant's rights and explicitly mentioned equity:

> A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing in its entirety including the form clauses is an unconscionable contract, except that a merchant who signs and returns such a writing after having had a reasonable time to read it is bound by it. A contract rendered unconscionable by form clauses shall be subject to reformation in equity.[257]

In the NCC's consideration of the Sales Act in 1943, Llewellyn had asked for the sense of the committee:

> We think that there is general agreement through the house that unconscionable form clauses or sets of form clauses are good things to keep from operation. Have I caught the sense of the house in that? Very well. I see no objection to that one.
>
> We believe, secondly, that the mere incorporation of form clauses in your opinion can be an extremely useful thing when they are balanced and decent sets of forms that help adjust the law to the particular deal. Am I right on that one? I seem to be right on that one.[258]

Also in 1943, Llewellyn sketched out the comment for section 214 called *Form Clauses, Conscionable and Unconscionable.* His language speaks of the

> Old[er] rule that a man is bound by what he has signed derives from the days when a written document represented a careful dicker arrived at in leisure, and has no proper application to the situation in hand. The fact is that a person signing such a form agrees, blind, to any reasonable terms—or even, to any not unreasonable terms—which may be found thereon. But he does not intend to sign a blank check.

256. Proposed Final Draft 1944, *supra* note 242, § 23.

257. Sales Section (Sales Act) § 23, Council Draft No. 1 (Feb. 9, 1944), *reprinted in* CONFIDENTIAL DRAFTS, *supra* note 74, at 274-75.

258. National Conference of Commissioners on Uniform State Laws, Fifty-Third Annual Conference, at 230 (1943), *microformed on* Karl N. Llewellyn Papers J.V.2.h. (on file with *SMU Law Review*) [hereinafter 53d Annual NCC Conference].

> The Comment should show that since the rules of the Act are drawn with a careful balance of the rights and needs of buyer and seller, a form which cumulates too many departures from those rules in material particulars, and in favor of one side only, begins to take on the aspect of the unconscionable; and the obligation of good faith implicit in all contracts for sale entitles a person signing a form to expect that its contents will not unreasonably depart from a fair adjustment of rights and duties on the matters which were not particularly discussed by the parties.[259]

The comments show the divergence between Llewellyn's concept of "unconscionability" and the historical, equitable concept. He spoke in terms of "balanced and decent sets of forms," not a situation that was procedurally unconscionable or substantively a bad deal. He talks in terms of a contract that was balanced and decent in rights and responsibilities.

The 1944 Act gave more weight to contract terms, stating that "express terms shall control both course of dealing and usage of trade and course of dealing shall control usage of trade."[260] Commercial standards are read into merchant dealings, however, by virtue of the requirement of "good faith," which "in the case of a merchant includes reasonable observance of commercial standards"[261] and section 26(2), which mandated: "Every contract within this Act imposes an obligation of good faith in its performance and one between merchants shall also be interpreted in accordance with commercial standards."[262] The 1944 Act, moreover, set forth that "parties engaged in a particular vocation or trade are bound by its usages."[263] The Act thus did not resolve the conflict between express terms and commercial usage.

Avoiding the imposition of implied warranties was made easier by the deletion of the prior section that prevented general disclaimers where a reasonable person would rely on the merchantability and fitness of the goods.[264] The new sub-sections spelled out how to exclude warranties, stating that

> (a) all implied warranties are excluded by general language like "as is," "as they stand," "with all faults" or other terms which in common understanding call the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty; and
>
> (b) when before contracting the buyer has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which

259. Informal Appendix to Revised Uniform Act, Third Draft, 1943 Tentative Sketch of Material for Comments, at 11-12, *microformed on* Karl N. Llewellyn Papers J.V.2.d (on file with *SMU Law Review*).

260. Proposed Final Draft 1944, *supra* note 242, § 21(4)(b).

261. *Id.* at § 10.

262. *Id.* at § 26(2).

263. *Id.* at § 21(3).

264. *See* R.U.S.A., 1941 Draft, *supra* note 2, § 15(6).

an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.[265]

Section 43 extended warranties

to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person or property by breach of the warranty. A seller may not exclude or limit the operation of this section.[266]

The 1944 Act dropped the detailed section providing for products liability, but it did provide for a direct action and an impleader against a prior seller for damages resulting from breach of warranty.[267] This provision was finally eliminated in the Proposed Final Draft Number 2 of Spring 1951.[268]

A new section, called *Breach in Installment Contracts*, prescribed a standard of substantial performance.[269] Such performance, however, is not defined in terms of mercantile performance as it was in the 1941 Act.

The sections on limitations of remedies[270] were much less detailed than the prior version. Now a sole remedy could be provided unless "circumstances cause it to fail of its essential purpose."[271] Limitations of remedies to return of goods and replacement became presumptively valid, except where such a limitation "deprives the buyer of the substantial value of the goods . . . ."[272] Generally, the specific detailed controls of the 1941 Act were replaced by the vague term "reasonable." The prior detailed rules regarding modification of remedies, for example, were con-

265. Proposed Final Draft 1944, *supra* note 242, § 41(2)(a)-(c). There was little case precedent for the principle that "as is" should work to disclaim warranties. The few cases that involved the term concerned such peculiar goods as forfeited merchandise and a used tugboat. *See, e.g.*, W.E. Hedger Co., Inc. v. United States, 52 F.2d 31 (2d Cir. 1931) (sale of tugboat by U.S. Shipping Board); Dalton v. United States, 38 F. Supp. 476 (E.D.N.Y. 1941) (sale of jewelry and watches seized by U.S. Customs); Montagne v. Bank for Sav. in N.Y., 43 N.Y.S.2d 321 (N.Y. Sup. Ct. 1941) (sale of building as "fireproof").

266. Proposed Final Draft 1944, *supra* note 242, § 43.

267. *See id.* §§ 120-21.

> SECTION 120. IMPLEADER BY BUYER. A buyer sued for any breach against which his seller has warranted to hold him harmless under section 40 may implead his seller [in like manner and with like effect as is or may be provided in the Federal Rules of Civil Procedure] and any person so impleaded may in turn implead his warrantor.
>
> SECTION 121. DIRECT ACTION AGAINST PRIOR SELLER. Damages from breach of a warranty sustained by the buyer or by any beneficiary to whom the warranty extends under Section 43 may be recovered in a direct action against the seller or any person subject to impleader under Section 120. An action against one warrantor does not of itself bar action against another.

Id. §§ 120-21 (alteration in original).

268. *See* Uniform Commercial Code Proposed Final Draft No. 2 (1951), *microformed on* Karl N. Llewellyn Papers J.XIV.1.a (on file with *SMU Law Review*).

269. *See id.*

270. *See id.* §§ 122-24.

271. *Id.* § 122(2).

272. *Id.* § 123.

densed and disclaimers made easier to include.[273] Consequential damages could be limited if the limitations were not "unconscionable."[274] The detailed proto-402A provision was changed into a simple provision for a direct action.

Reviewing the 1944 Draft in the light of our four parameters (statutory dictate, regulation, trade norms, and contract), we see a change from the 1941 Act. The power of trade norms over commerce was lessened by the rejection of mercantile performance and the merchants jury. However, the language that parties in a trade are bound by its usages reintroduced control by trade norms; however, as does the requirement of good faith in the Act, it was defined in terms of commercial standards.

Many of the earlier specific merchant rules were dropped in the 1944 Draft.[275] Many provisions were generalized, having been made applicable to non-merchants as well as merchants. For example, the recovery of expenses section of the 1941 Draft for cover limited to merchants' recovery of expenses that "are by mercantile usage reasonable" changed in 1944 to merely require "any commercially reasonable changes."[276] The focus was taken off "mercantile usage" and was instead based on the vaguer term "commercially reasonable."[277]

A court could still regulate commercial dealings, but the standards were made more vague. The substitution of "unconscionability" for the objective standards of Proposed section 1-C and the 1941 Act's detailed sections on limitation of remedies reduced the scope of the positive regulation by the statutory commands of the 1941 Act. The parties were free to make their own deal with only marginal judicial intervention.

VII. COMMERCIAL PAPER AND SECURED TRANSACTIONS

While Article 2 was being developed, Article 3 was also being drafted. A key issue when drafting Article 3 was whether or not objective good faith was to extend beyond Article 2. The 1946 Tentative Draft No. 1, Article III defined "good faith" as meaning only "honesty in fact."[278] The Reporters and Chief Reporters had proposed in addition that good faith should also include "'reasonable observance of the standards of any business or trade in which the purchaser is engaged,'" but their proposal was turned down.[279] The debate over whether to use objective or subjective good faith in Article 3 was to continue, with subjective finally to win the day. Adopting the suggested language in Article 3 would have ex-

273. *See id.* at § 124.
274. *Id.* § 124(3).
275. *See, e.g.*, R.U.S.A., 1941 Draft, *supra* note 2, § 3-6 (course of business and performance relevant to acceptance of silence).
276. Proposed Final 1944 Draft, *supra* note 242, § 117.
277. *See* Wiseman, *supra* note 16, at 522-23, app. A at 542-45 (listing generalized merchant rules).
278. Commercial Code Tentative Draft No. 1, Article III § 42, *reprinted in* 2 UNIFORM COMMERCIAL CODE DRAFTS 273 (Elizabeth S. Kelly ed., 1984).
279. *Id.*

tended Article 2's imposition of trade norms to the domain of negotiable instruments. In the 1946 Draft, good faith with regard to investment instruments "in the case of a professional includes reasonable observance of commercial standards."[280] In 1947's Article 3, good faith also "includes reasonable observance of the standards of any business or trade in which the purchaser is engaged."[281] With a few minor changes, objective standards of good faith were promulgated through the July 1948 versions.[282] For the next four years, the action was in negotiable instruments, bank collections, securities, foreign remittances, documents of title, and secured transactions. There was not another official draft of Article 2 until 1948.[283]

The history of the secured transactions article (formerly Article 6, now Article 9) also shows a progression from a statute with detailed regulation of commercial activity to one in which freedom of contract reigns. In the lending context, with large financial institutions facing individual debtors, freedom of contract between secured party and debtor means the secured party prevails. Moreover, the point of a security interest is to affect other parties (e.g., trade creditors, tort victims, employers) who have claims against the debtor.

Today, the secured party and the security agreement are supreme. Section 9-201 of the U.C.C. states that "except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."[284] The "floating lien" is the most powerful security device by which the lender can reach all the present and future assets of the debtor. However, this unfettered supremacy was not the original intent of the drafters.

The story of modern secured transactions law begins, as does so much of our present commercial, contract, and tort law, with an idea of Llewellyn. He drafted two acts dealing with secured transactions, the Uniform Chattel Mortgage Act and the Uniform Trust Receipts Act.[285] The first was a total failure, never enacted by any state, but the second was a success, enacted by several states after its approval by the NCC in 1933.[286] Although the Trust Receipts Act's exact scope was impossible to ascertain (Gilmore labels it "one of the world's most difficult statutes"[287]), it was intended to be restricted to purchase money loans for goods held for

280. Preliminary Tentative Draft No. 1, Article V § 20 (1946), *reprinted in* 3 UNIFORM COMMERCIAL CODE DRAFTS 1 (Elizabeth S. Kelly ed., 1984).

281. Commercial Code Tentative Draft No. 2, Article III § 45 (1947), *reprinted in* 3 UNIFORM COMMERCIAL CODE DRAFTS 45 (Elizabeth S. Kelly ed., 1984).

282. *See* Proposed Final Draft No. 2, Article III § 306 (1948), *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 1 (Elizabeth S. Kelly ed., 1984).

283. *See id.*

284. U.C.C. § 9-201 (1989).

285. *See* GILMORE, SECURITY INTERESTS, *supra* note 19, at 98-99.

286. *See id.*

287. *Id.*

resale.[288] It did not amount to a "floating lien."[289]

A planning document entitled "Scope and General Plan," dated November 18, 1943, stated "[t]he Code plan, as thus far developed, looks to the production of a comprehensive battery of security devices covering every needed aspect of finance; but in general the plan looks to providing only a single device to fill any particular type of need."[290]

The Plan went on to propose a chattel mortgage on equipment that "must be made capable of covering replacements of or additions to equipment."[291] But this type of floating lien was not to extend to inventory. The plan stated the provision of this end "must not be capable of being turned to the mortgaging of a retailer's stock in trade."[292]

In 1944, William Draper Lewis made notes on an interview with Karl Llewellyn. Llewellyn sketched out the future drafting of the Code, putting security interests into a section that would generate political controversy.

> *BLOCK II: Chattel Security, worked into simpler and more automatic format*
>
> Chattel mortgage on equipment, accompanying realty mortgage. (No important political difficulty.)
>
> Agricultural chattel mortgage. (No important political difficulty.)
>
> [Extension of trust receipt idea into stock-in-trade generally. (Political difficulty expected.)]
>
> Single-type of purchase-money security; a modernized and exclusive Conditional Sales Act. (Political difficulty certain.)
>
> [Book account financing. (Political difficulty certain.)]
>
> [Auto-title-certificates. (Political difficulty probable.)]
>
> Other chattel mortgage limited to non-current finance. (Political difficulty.)
>
> [Commercial and banking phases of pledge. (Probably no important political difficulty.)]
>
> [A standard usuary law on all points but the interest rate, making the needed exceptions and providing workable sanctions and criteria for "masked usury." (Political difficulty; and the overlap into the "small" loan field has, in practice, already occurred.)][293]

The idea of a purchase money lien embodied in the trust receipt was thus extended into general inventory financing. The note about "a standard usury law" indicated a thought about consumer protection legislation being incorporated into the proposed secured transaction article. In

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288. *See id.* at 106.

289. *Id.* at 124-25.

290. Karl N. Llewellyn, *Document B: Scope and General Plan Uniform Commercial Code, Scope and General Plan*, at 4 (Nov. 18, 1943), *microformed on* Karl N. Llewellyn Papers J.V.1.e (on file with *SMU Law Review*).

291. *Id.*

292. *Id.* at 2.

293. Memorandum from William Draper Lewis to William A. Schnader and Herbert F. Goodrich, ALI Archives (June 13, 1944) (on file with *SMU Law Review*) (alterations in original).

1947, however, Llewellyn still referred to the floating lien as applicable to "industrial machinery."[294] The drafters had not yet come up with the unitary Article 9 security device that can attach to all the debtor's present and future collateral.

VIII. THE GENERAL COMMENT

A. DESCRIPTION

During this time (1944-48), there was a set of explanatory materials, labelled "Introductory Comments or General Comment on Parts II and III" (the "General Comment"), which never made it into the official drafts.[295] In the materials, Llewellyn described what *he* thought the Code accomplished. The General Comment did not change in any material respect from 1944 to 1948, although it was fleshed out with more annotations and underwent some language changes. It was never adopted *in toto*; however, parts were incorporated into the comments for individual sections. The cases now listed in the Comments to section 2-302,[296] for example, derive from footnote 7 of the General Comment.[297]

The 1944 Act explicitly provided that the General Comment and the comments to specific sections could be consulted "to determine the underlying reasons, purposes and policies of this Act."[298] The 1944 Draft is accompanied by some 187 pages of comments, indicating that the early sections were supposed to be read in conjunction with a voluminous commentary.

In the General Comment, Llewellyn sets out the basic principles behind the formation and construction of commercial contracts under the U.C.C. These basic principles are "good faith, the elimination of surprise and technical traps, and the interpretation of all phases of the formation and performance of the contract in the light of reasonable behavior under the existing circumstances."[299] The three principles have to be understood in terms of commerce: "[w]hen the parties to a sales contract are commercial men, the reasonable meaning of either language or actions in the commercial circumstances, and commercial good faith calls for obser-

294. Llewellyn thought that in the latter case, an industrial loan with industrial machinery as security, it was possible to devise a method whereby individual chattels and other items given as security need not be separately designated and a record kept for each by filing. *See* Minutes of Joint Editorial Board, at 3 (Nov. 1, 1947), *microformed on* Karl N. Llewellyn Papers J.IX.3.d (on file with *SMU Law Review*).

295. *See e.g.*, Karl Llewellyn, Introductory Comment to Parts II and III Formation and Construction, *microformed on* Karl N. Llewellyn Papers J.VI.2.h. (on file with *SMU Law Review*).

296. *See* U.C.C. § 2-302, cmt. 1 (1989).

297. *See* Llewellyn, *General Comment*, *supra* note 55, at 19.

298. Proposed Final Draft 1944, *supra* note 242, § 1(2). Sustained effort has been made to make the reason and purpose apparent either on the face of the text or in the Comments, and the court is expressly authorized to consult the Comments. The Comments therefore acquire a status equivalent to that of a Committee Report on the basis of which a proposed bill has been enacted by a legislature. The section adopts as the sound construction of the Act the well-established. *See id.* § 1 (cmt.).

299. Llewellyn, *General Comment*, *supra* note 55.

vance of commercial standards by men of commerce."[300]

Treating the forty-one page General Comment as a whole, the specific concerns previously expressed in the withdrawn section 1-C have been made applicable to the entire Sales Article. Although the scope of section 1-C was narrowed to cover only invalidating unconscionable contracts, that section's emphasis of such trade and its limitation on a party's freedom to contract out of Code provisions and trade norms is now applied by the General Comment to the Sales Article as a whole. The General Comment mandated that any explicit terms of the contract must be read in terms of the usages of trade, the circumstances of the parties, and the principles of equality.[301] Analyzing the General Comment in terms of our four parameters (individual bargaining, trade norms, statutory dictates, and administrative regulation), we can see that Llewellyn, despite the criticism of Hiram Thomas that he neglected fundamental principles of contract law, still de-emphasized the parties' bargain.

Section 2 of the General Comment stated "*Explicit dickered terms are the foundation of the contract. Usage of trade read into explicit terms.* This Act accepts as of course the general law under which the parties control the terms of the contract (always subject to qualifications based on public policy)."[302] This recognition of explicit terms was only put in, however, after Thomas protested that the General Comment ignored basic principles of contract law. He remarked, "I got this impression that really what is written in the contract even the dickered terms do not amount to much but the emphasis upon the variation by usage and cause of dealing."[303] Llewellyn agreed: "We agree with Mr. Thomas's suggestion that there be inserted as a paragraph 2 in the technical comment on Parts II and III a paragraph dealing with the importance of the dickered language."[304] But this privileging of the parties' language was quickly qualified by the General Comment; "First, then, words are used which must be read as they are understood in the trade. Whatever their meaning in the trade is the meaning which the agreement incorporates either between merchants or as against a merchant."[305] Trade usages may be localized. For example, a footnote refers to a case that adopted the local usages of Philadelphia.[306] After discussing the strict construction of overseas documentary shipment contracts,[307] section 4 discusses the broader principles of construction that should be applied to all other sales contracts.[308]

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300. *Id.*
301. *See id.* at 1, 35-40.
302. *Id.* at 4.
303. Karl Llewellyn, Joint Advisory Committee Meeting, at 1 (May 21-22, 1945), *microformed on* Karl N. Llewellyn Papers J.VII.2.a (on file with *SMU Law Review*).
304. *Id.* at 2.
305. Llewellyn, *General Comment*, *supra* note 55, at 5.
306. *See id.* at 6 n.2.
307. *See id.* at 6-7.
308. *See id.* at 8-10.

Section 6 dealt with "[c]ontracting out of trade usage, course of dealing or the interpretation indicated by the circumstances of the case: Avoidance of surprise."[309] It stresses the parties' course of dealing and the "circumstances of the case as in usage of trade."[310] The circumstances will dictate what is reasonable or may add to the explicit terms, as in the creation of a warranty of fitness for a particular purpose.[311]

Llewellyn noted that section 21 then provided that express terms control usage and course of dealing. But "express terms shall dominate only when such construction is reasonable."[312] Llewellyn here reiterated the principle of section 1-C—that variation from trade usage must be explicitly flagged and thus brought to the other party's attention.[313] "Surprise" is to be prevented. Surprise is defined in terms of unexpected deviation from trade usage. "Therefore, *attention must be called to a desire to contract at material variance from the accepted commercial pattern* of contract or use of language. Thus, *this* Act rejects any 'surprise' variation from the fair and normal meaning of the agreement."[314]

Section 7 reiterated section 1-C's division of explicit terms into two types: those "consciously dickered out by the parties" and "those clauses contained in a form or inserted by one party in a lengthy contract which the parties never consciously bargain out and to which the attention of the other party is never directed."[315] Form clauses, however, can make commercial sense. Thus, the rule of "construction most strongly against the party preparing the document" may work against commercially reasonable clauses.[316] Under the Act, "the test of reasonableness in such cases is consonance with the general commercial background or with the perceptible commercial needs of the particular trade or case."[317] Clauses that deviate from trade norms are suspect; "[b]ut when a clause or set of clauses is so unfair or so one-sided that it is not to be expected either between decent merchants or from a decent dealer, their contents enter by surprise."[318]

The section on unconscionability[319] came between the section on reasonable construction and the section entitled "9. *Avoiding surprise, in practice, where terms are varied from the expected background.*"[320] Thus Llewellyn continued to see the concept of unconscionability in terms of deviance from trade practice rather than in terms of its traditional equity sense of quasi-fraud, which Professor Leff calls "one-clause

309. *Id.* at 12.
310. *Id.*
311. *See id.* at 12-13.
312. *Id.* at 13-14.
313. *See id.* at 14.
314. *Id.*
315. *Id.* at 15.
316. *Id.* at 16-17.
317. *Id.* at 18.
318. *Id.*
319. *See id.* § 8, at 19-21.
320. *Id.* at 21.

naughtiness."[321]

Under the heading *Unconscionability*, Llewellyn pointed out that courts have dealt with "unfair surprise clauses" by various means:

> 8. *Unconscionability*. Frequently, the courts have adopted other lines of approach to this same problem of unfair surprise clauses. They have called upon the rule against trick, artifice or stratagem, have eviscerated the unfair clause by adverse construction, have manipulated the rules of offer and acceptance to keep the clauses out, or have knocked it out as contrary to public policy or to the dominant essence of the contract.[322]

Here, Llewellyn appended the famous list of exemplary cases that are now included in the comment to section 2-302. Professor Leff points out that these cases are a strange bunch. None are later than 1937, and generally deal with warranty disclaimers.[323] Llewellyn saw these cases as "based upon a single principle: they deliberately disregard or misconstrue the language of *one* party in order to make effective the actual bargain made by *both* parties, eliminating as unconscionable those elements which rest on unfair surprise."[324] This makes the jurisprudential point that the "diversity of reasoning" of the cases has prevented the creation of "consistent and accessible lines of guidance for the draftsman or the court which has led to much unnecessary litigation."[325] Llewellyn saw the unconscionability section as providing an explicit mechanism for striking out unconscionable clauses. The General Comment stated that unconscionability can be found in the "pure content of a clause or set of clauses as applied to a given situation" and also "in the combination of an unfair (although less extreme) clause or set of clauses with the element of surprise."[326]

Llewellyn frequently used this jurisprudential justification to defend the unconscionability section. To the accusations that the sections would allow courts to rewrite contracts, he answered that courts did it anyway, but they did it surreptitiously. The unconscionability section allowed them to rewrite contracts openly and to create a body of precedent. For example, in a 1943 committee meeting, a participant objected to the form contract section:

> MR. IMLAY: Mr. Chairman, I wonder if we have between ourselves and the Committee a definite understanding as to what we are trying to do. I have been assuming that this codification in the law of sales is based upon a common legislative experience and something of a common judicial interpretation. I may be wrong in that assumption, but if I am right in that assumption, it seems to me that this section 24 will revolutionize the whole common law of contracts in

321. Leff, *The Emperor's New Clause*, *supra* note 179, at 513.
322. Llewellyn, *General Comment*, *supra* note 55, at 19.
323. Leff, *The Emperor's New Clause*, *supra* note 179, at 526 n.155.
324. Llewellyn, *General Comment*, *supra* note 55, at 20.
325. *Id.*
326. *Id.* at 21.

> all the states, and it will put in the hands of an individual judge the determination of what is and what is not a conscionable contracting every case. The form of contract, the printed form, is very common, I suppose universally used in the sale of goods.
>
> Now wherever that form is used and furnished by the seller or the buyer, as the case may be, and is signed by the other party, then it becomes open for the judge to say whether the other party has bound himself to something that is conscionable or unconscionable, and would this not, in addition to upsetting the common law of contract as we generally understand it, would it not be the most productive means of litigation that you could imagine?[327]

Llewellyn replied:

> The courts apart from the actual resort that they have made from time to time to a touch of strong-arming by saying it is perfectly obvious that this deal wasn't read or was put over, they have indulged in extremely interesting "construction" by a technic which if I were not speaking for the record, I might call high-powered and rather beautiful technic of misconstruction in the interests of justice.[328]

His reference to the list of cases now found in section 2-302's comment illustrated the various ways courts deal with unfair surprise clauses. Professor Leff points out that all these cases (except one) involved form clauses.[329] This is not surprising because we know that Llewellyn was concerned with form contracts at least since the writing of his casebook in 1930. The unconscionability clause was limited to form contracts until 1948.[330] Leff states, "if these cases show the way, *any form contract* is up for grabs under 2-302."[331] The rest of the General Comment indicates that this may well have been Llewellyn's original intent.

The General Comment went on to discuss "[a]voiding surprise, in practice, when the terms are varied from the expected background."[332] Llewellyn pointed out that the trade or the circumstances can require a particular interpretation, for example, in a contract for precision parts. Where it was not "entirely clear to both parties that performance above and beyond the usual commercial pattern will be necessary, attention must be called to that fact."[333] Thus, in Llewellyn's view, standard prac-

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327. Consideration in Committee of the Whole of the Revised Uniform Sales Act, at 72 (Aug. 18-21, 1943), *microformed on* Karl N. Llewellyn Papers J.V.2.h. (on file with *SMU Law Review*).

328. *Id.*

329. Leff, *The Emperor's New Clause*, *supra* note 179, at 502.

330. *See id.* at 494-95.

331. *Id.* at 504.

332. Llewellyn, *General Comment*, *supra* note 55, at 21. Llewellyn assumes that businessmen expect the non-dickered language to be fair and not deviate too much from trade norms. Professor Leff contradicts this assumption:

> Let me submit an alternative possibility: most businessmen, insofar as they think about the question at all, expect that the other party's form will be the same kind of form which they had their lawyers draft for them, that is, a form which attempts to take everything for the owner of the pad.

Leff, *The Emperor's New Clause*, *supra* note 179, at 506-07.

333. Llewellyn, *General Comment*, *supra* note 55, at 21-22.

tices of merchants could not be varied by the parties *except* by circumstances or express "specially dickered portions of the agreement."[334]

The next two sections of the General Comment discussed how a commercial contract should be interpreted in light of course of dealing, course of performance, and waiver. Llewellyn emphasized "*[t]he flexible character of commercial contracts.*"[335] These principles of contract interpretation survived the drafting and enactment process and can be found in the modern Code.[336] Together they make up a contractual system that is based on the model of a longer term relationship between the parties rather than one of single transactions.[337] As Llewellyn stated:

> Actually most commercial obligations have a flexible character which our legal vocabulary has had some trouble in grasping but which has always been reflected in the spirit of the better commercial cases. They represent a going relationship not rigidly defined at the moment of contracting but changing in shape and structure in the process of performance or of getting ready to perform or to fit supervening circumstances.[338]

B. The General Comment and Economics

The last section of the General Comment dealt with incorporating usages developed by trade associations into the agreement. Llewellyn started by stating that now, practices have to change to meet new conditions. "These are days in which the usage of various lines of trade is frequently forced to reshape itself rapidly in order to fit new conditions."[339] Note that to Llewellyn, it is the trade, not the trader, that evolves new trade practices in response to new conditions.

Llewellyn contrasted "balanced and reasonable" codified usages with the "unbalanced and unreasonable usages."[340] He found that under this Act "it is recognized that a balanced reasonable set of provisions of this kind 'makes law' for the members and refines the more general rules of this Act to meet effectively the specialized needs of a particular commodity and a particular organization of the market."[341] Later in the General Comment, Llewellyn stated that the court can look to the origin of the rules to determine "whether a set of standard provisions call for sympathetic and expansive application or for a hostile attitude."[342] The court should look to whether or not the rules are the product of equal bargaining:

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334. *Id.* at 22.
335. *Id.* § 10, at 24.
336. *See, e.g.*, U.C.C. §§ 1-205, 2-208, 2-209 (1989).
337. *See generally* Amy H. Kastely, *Cogs or Cyborgs?: Blastphemy and Irony in Contract Theories*, 90 Nw. U.L. Rev. 132 (1995).
338. Llewellyn, *General Comment*, *supra* note 55, at 24.
339. *Id.* at 35-38.
340. *Id.*
341. *Id.* at 36-37.
342. *Id.* at 38.

> Where, as in the dried fruit contracts or the lumber usages, both sides have been effectively represented in the building of the "codification," the results are rarely unbalanced, and what may seem to be queer provisions to the outsider usually have a fair and good reason within the particular trade. In most cases, indeed, the balance in standard terms thus arrived at shows on their face.[343]

Here, Llewellyn applied the institutional economists' position that equal bargaining produces fair, reasonable, and valid relationships between the parties to a bargain. Robert Hale's *Bargaining, Duress, and Economic Liberty*[344] appeared in 1943 and argued that more equality in bargaining could lead to more freedom of contract. He claimed that "by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms."[345]

According to the General Comment, how the contract terms were bargained for has one index of their validity; the other was "the provisions of this Act itself."[346] Their "prime characteristic is a *balanced* adjustment of the rights and interests of both the buyer and the seller."[347] It would be permissible to modify provisions of the Act "as circumstances of the trade or of the parties may seem to require. But cumulative modifications in a single direction raise the suspicion that what they are seeking is not an adjustment of the deal to the needs of the trade or of the particular situation, but rather an overreaching by one party to the contract."[348] Thus, imbalanced contracts that met particular circumstances were all right but overreaching by one party is not. If one party is getting a better deal than the other, there is cause for a "hostile attitude" on the part of the courts.

Here, Llewellyn gave objective guides: (1) the contract term's deviation from the Act's provisions; and (2) the bargaining process that produced them. Using the two guides, courts could police contracts in more instances than they could under the equitable doctrine of unconscionability, which only operates at the extremes. Additionally, the guides were objective, unlike the unconscionability doctrine's subjective test of shocking the conscience.

In the last sections of the General Comment, Llewellyn confessed that the favoring of balanced trade agreements, arrived at through a process of equal bargaining, could not be enacted through legislation. Llewellyn

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343. *Id.* at 39-40.

344. *See* Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

345. *Id.* at 628. Llewellyn cites Hale's classic *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), in Llewellyn, *What Price*, *supra* note 50, at 706 n.8. Llewellyn also attended a seminar with Hale on business organization in 1924-25. *See* SCHLEGEL, AMERICAN LEGAL REALISM, *supra* note 3, at 16.

346. Llewellyn, *General Comment*, *supra* note 55, at 38.

347. *Id.*

348. *Id.* at 39.

recognized that there was no effective way of drafting a statute that would realize this goal. This may have been the moment when Llewellyn, like Wile E. Coyote, looked down and realized that he had run off the cliff. Although Llewellyn maintained that a court should enforce trade norms and balanced agreements and not enforce unbalanced ones that deviate too far from trade norms, he could not point to any supportive statutory language. The drafting committees had rejected the merchants' tribunal, many of the merchant rules, the detailed regulations for form contracts, and the limitations on remedies. Doctrines based on the goals of institutional economics—the prevention of chiseling, enforcement of group norms of trade, and equal bargaining power—were replaced by that of unconscionability and its equitable history of protecting the vulnerable. The U.C.C. was sliding out from under him, but Llewellyn continued to draft his General Comment as if the 1941 version of the Revised Sales Act was still on the table.

IX. 1946-1948

The years 1946-1948 were relatively quiet. The drafters were evidently at work on the 1949 codification of the articles for the proposed Code. The lack of significant law review commentary continued during this period. However, there were developments in two areas: (1) the 1948 Code discarded the restriction that unconscionability applied only to form contracts, and (2) sections dealing with consumer protection and general creditor protection appeared in the secured transactions article.

In proposing consumer protection, the drafters may have felt themselves in tune with the times. Grant Gilmore, in his *On the Difficulties of Codifying Commercial Law*,[349] concluded by observing that government intervention, regulation, and supervision were growing:

> Although the political weather is doubtful, nothing is less likely than that the future will see a protracted period of unregulated private agreement.
>
> Here again there is little the draftsman can do except exercise caution and walk warily. What is certain is that a 19th century laissez-faire code, or a code drafted with such an underlying bias, will be far from adequate in an economy which has scrapped laissez-faire principles.[350]

A. Regulation of Secured Lending: The Tentative Proposals

The first draft dealing with secured transactions was the proposed Article VI discussed at the meeting of January 30-February 1, 1948. Dealing with "Consumer Mortgages," it provided for self-help repossession and for preserving claims and defenses of the consumer against the secured

349. Gilmore, *Difficulties*, *supra* note 14, at 1341.
350. *Id.* at 1358.

party.[351] The Code's position on these two issues changed in subsequent drafts. Today, the U.C.C. allows self-help repossession without notice[352] and allows a consumer's claims and defenses against the secured party to be cut off.[353] The Federal Trade Commission, however, has preserved by regulation any consumer claims and defenses from being invalidated by a security agreement.[354] For example, a buyer of a car can enforce any warranty claims against most financers of the car purchase.

Part III of the proposed Article VI provided for "Mortgages on Current Working Assets." It protected non-secured creditors by allowing judicial lienholders to preempt the secured party if no steps were taken within ten days after the levy.[355] The subsequent August 1948 draft, however, subjected a judicial lienholder to a "general inventory lien."[356]

The Tentative Draft No. 2 of Article VII (now Article 9) of August 1948 also included a provision that sought to protect creditors from overreaching inventory financers. It provided the secured party with a floating lien that could "take control of the inventory with consent of the borrower and proceed as an agent authorized to take possession of or to liquidate the inventory for benefit of the creditors."[357] The draft subjected the financer to liability if he did not notify creditors and act with the approval of a creditor's committee.[358] The draft comment stated that this requires the financier "to liquidate for the benefit of all creditors, and prevents him from taking the cream off."[359] These initial proposals would have reined in the power of the floating lienholder. Today such a secured party can tie up all the debtor's assets and leave nothing for the other creditors.[360]

Had this section been enacted, it would have changed the one-to-one relationship between the inventory financier and the debtor into one in which the financier would act for the benefit of all the creditors. It would have subjected him to damages for unilateral, commercially unreasonable acts done without other creditors' approval. But these early versions were greeted by harsh criticism from the practicing bar, which thought them to be unworkable and devoid of practical understanding of the actual financing. They would change into a statute that gives the secured

351. *See* Commercial Code Secured Credit Transactions, Article VI §§ 30, 37 (1948), *reprinted in* 4 CONFIDENTIAL DRAFTS, *supra* note 74, at 288 [hereinafter Commercial Code Secured Credit Transactions].

352. *See* U.C.C. § 9-503 (1989).

353. *See id.* § 9-206.

354. *See* FTC Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 16 C.F.R. § 433.2 (1995).

355. *See* Commercial Code Secured Credit Transactions, *supra* note 351, art. VI § 212.

356. *See* Commercial Code, Article VII § 316 (Tentative Draft No. 2, 1948), *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 435 (Elizabeth S. Kelly ed., 1984).

357. *Id.* § 320.

358. *See id.*

359. Commercial Code, Article VII (Notes and Comments to Tentative Draft No. 2, 1948), *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 151 (Elizabeth S. Kelly ed., 1984).

360. *See* Barnes, *supra* note 13, at 150-51.

party practically uncontrolled supremacy.[361]

B. The Unconscionability Clause

The section that started out regulating standardized contracts finally dropped its reference to such contracts in 1948 and emerged as the unconscionability section applying to all contracts. It now read as follows:

> Section 23. Unconscionable Contract or Clause.
>
> (1) If the court finds the contract to be unconscionable, it may refuse to enforce the contract or strike any unconscionable clauses and enforce the rest of the contract or substitute for the stricken clause such provision as would be implied under this Act if the stricken clause had never existed.
>
> (2) A contract not unconscionable in its entirety but containing an unconscionable clause, whether a form clause or not, may be enforced with any such clause stricken.[362]

The introduction of "unconscionability" limited the regulatory power of the courts to the more extreme cases, but the dropping of the form contract limitation greatly expanded the scope of the clause. Moreover, the proposed comment on section 23 referred to the court as having a wide regulating power.[363] This comment started by attempting to link sales unconscionability to the doctrine in equity: "This section applies the equity courts' ancient policy or [sic] policing contracts for unconscionability or unreasonableness to the field of sales."[364] The standard of the comment, however, differed from that of the traditional equitable doctrine. Neither the term "shock the conscience" nor the concept of taking advantage of a party's circumstances were mentioned. Instead, concepts such as "unreasonableness," "contrary to the essential purpose of the agreement," and the "*true* agreement" were used. The focus was (as it was in the original section 1-C) on enforcing actual bargains, and rejecting certain language as not actually bargained for:

> Action by the courts under this section may be viewed as a type of reformation. Not the usual type of reformation in which a writing is conformed to an antecedent and actual oral agreement but reformation by eliminating a term agreed upon which is so unconscionable or so demonstrates overreaching that a *true* agreement on the term cannot be assumed.[365]

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361. *See* Letter from Irvin L. Livingston to William A. Bars, ALI Archives (June 25, 1948) (on file with *SMU Law Review*). "[T]he draft gives rather conclusive evidence that it was formulated without adequate knowledge or understanding of practical and functional operations of inventory financing and accounts receivable from either the borrower's or the financier's standpoint." *Id.* "I do not think that any drafting staff could work [the] article into reasonable decent shape in any short period of time." Letter from J. Francis Ireton to Milton P. Kupfer, ALI Archives (June 4, 1948) (on file with *SMU Law Review*).

362. Code of Commercial Law, *supra* note 14, § 23.

363. *See* Uniform Revised Sales Act Proposed Comment on Section 23[2-9] (1948), *microformed on* Karl N. Llewellyn Papers J.X.2.e. (on file with *SMU Law Review*) [hereinafter Proposed Comment on Section 23 [2-9]].

364. *Id.*

365. *Id.*

The test is still "unreasonable." "When a clause or set of clauses looks unreasonable to a dispassionate court, then it is up to the clause-writing party to show the court that the clause is not unreasonable in fact, either in general or in the particular case."[366]

Prior to the 1948 comment, Llewellyn had not dealt with the problem of a party entering into a contract knowing that it had made a bad deal. The section previously focused on unexpected language or provisions that were deviant from trade norms found in a form contract. Now the situation that had to be addressed was when the party was aware that he was agreeing to harsh terms:

> The second type of situation arising in connection with unconscionable contracts or clauses involves cases where one party has deliberately entered into a lopsided bargain with full knowledge and awareness and has actually assented to clauses which are unconscionable in effect against him. Such cases are rare but they do occur where one party has been willing to take a gambler's chance that the clause will not be called into action against him or where economic necessity or duress has driven him into the bargain.[367]
>
> Furthermore, even in those cases where one party has *knowingly* agreed to the unconscionable clause, this Act moves on the theory that sales contracts have as their legally necessary effect certain minimum incidents set forth in this Act. The question primarily is whether or not a contract for sale in a business sense was intended. If so, then the transaction is governed by this Act and its minimum legal effects are laid down by the law as embodied in this Act. Typical of such necessary effects are the necessity for reasonable notice of termination under Section 33 [3-8] and the limitations on modification of remedies under Sections 121 [8-19] and 122 [8-20]. Therefore, even where one party has deliberately entered into an unreasonable agreement, the court may, under this Section, refuse to enforce the clause or agreement as unconscionable and declare that the provisions of this Act be made operative instead.[368]

The proposed comment did not deal extensively with the problems raised by form contracts that deviate from trade norms. It did, however, refer to the General Comment, which treated the issues at length.[369] Thus, the proposed unconscionability section was to be read in conjunction with the General Comment's emphasis on enforcement of trade norms.

Today, we may see unconscionability as applying primarily to such central items as price and warranty. Llewellyn's comments on the unconscionability section, however, did not focus on these critical terms, but rather on minor ones involved with trade practices. The examples he gave in the Proposed Comment were "the necessity for reasonable notice of termina-

366. *Id.* at 6.
367. *Id.* at 3.
368. *Id.* at 6.
369. *See id.* at 3. "Standard Forms and Clauses are covered in the General Comment to Part II, paragraph 7 on the principle of reasonable construction against surprise." *Id.*

tion" and "the limitations on modifications of remedies."[370] Therefore, the form contract/unconscionability section was directed at contractual changes from the good merchant rules and provisions of the Sales Article. It policed these changes when they unreasonably or unexpectedly varied from the norms of merchant dealing.

X. THE 1949 DRAFTS

The 1949 drafts represent a definitive stage in the development of the Code. The 1949 drafts are representative of the best work of the drafters before public comment and lobbying took place. It was not until the 1949 drafts that commercial, business, and financial groups woke up and started taking the Code project seriously.

How final the drafters regarded the 1949 version is unclear. The "Foreword" to the 1949 Draft states that "[i]t is obviously incomplete in many respects, [but] . . . we thought it highly desirable to bring it out in the form of a complete printed Code. In that form we can see what we have done and what we still have left to do."[371] The Chairman of the Division of Mercantile Law of the American Bar Association, J. Francis Ireton, stated that:

> The sponsors of the Code had originally intended to approve it finally in September 1949, at their meeting in St. Louis, although in the opinion of many the Code had not then reached the perfection it should have had and outside of comparatively few people, no one knew anything of it.[372]

In any case, in the words of Mr. Ireton, the Code was greeted with protest:

> The result was revision on revision to such an extent that you now would never recognize the September 1949 draft of the Code in the current draft. In the spring of 1950, a new draft was published and distributed as the proposed final draft of text and comments to be approved at Washington in May 1950. Committees of various Bar Associations adopted resolutions requesting deferment of final approval for a period of two years until 1952 so as to give more people time to study the proposal. Difficiencies [sic] were pointed out that made the whole project suspect.[373]

The 1949 Code thus best represents the intentions of the drafters. What came after was a product of political compromise. In submitting the proposed Code for adoption, the drafters were in an extremely bad negotiating position. They were an exhausted army about to fight a bigger, better-supplied, and vastly more effective force. The drafters had been working for approximately ten years and felt that they were at the end of their energy and money. As stated by one of the drafters at a 1950

370. *Id.* at 6.
371. Uniform Commercial Code, Foreword (Draft, 1949).
372. J. Francis Ireton, *The Commercial Code*, 22 MISS. L.J. 273, 279 (1951).
373. *Id.*

Joint ALI-NCC Committee meeting, "I boil it down to this: the question is, are we going to have a Code or aren't we? We have run out of money. We have spent ten years on the Sales Act."[374]

The Chairman of the Committee, William A. Schnader, pointed out that they were not merely restating the law, but preparing a statute.[375] In response to Professor Beutel's statement that "we ought to stand firm for what we regard as fair, regardless of lobby pressure," he replied:

> I was talking about certain regulatory bodies, regulating bodies that are so powerful that if they say no to this Article it won't be passed. That is what I am saying. We have to keep that in mind, because we are not just working this Code for mental exercise; we want to see something enacted.[376]

One wonders if Llewellyn, along with his hand-picked group of young professors (and his wife), was also psychologically vulnerable to business pressure. Given Llewellyn's credo of hard-headed realism, he would be especially sensitive to charges of ivory-towered impracticality. Professor G. Edward White points out that the realists were committed to action, real reform, and pragmatism:

> 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.[377]

Llewellyn displayed his own pragmatism and hard-headedness in an unpublished essay headed: "I. Our present intellectualism is on the road to annihilation and will reach its goal. II. This fact is rather pleasant than otherwise."[378] In his essay, he characterizes intellectualism as a culture built on a foundation of a life where:

> You work, you produce, you pay, while I loaf, study, cultivate myself. . . . [The intellectual degenerates] your physique mentality turn

374. MILLER, *supra* note 233.

375. William A. Schnader was the President of the NCC, First Vice-President of the ALI, and a "long time counsel for Banks." *See* Frederick K. Beutel, *The Proposed Uniform Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 362 n.171 (1952). *See generally* TWINING, *supra* note 3, at 271, 279.

376. Consideration of Proposed Final Draft of the Uniform Commercial Code, at 97, ALI Archives (May 18, 1950) (on file with *SMU Law Review*).

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

378. Llewellyn, unpublished manuscript, *supra* note 14.

> soft and gooey like a spotted apple. . . . [What is good thinking is "Action directive" as opposed to "speculative or cultural."] . . . . *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.[379]

Llewellyn's ethos, the same ethos that led him to volunteer for World War I (for the German army!), would have made it impossible for him to accept his proposed legislation as a mere academic discussion piece.

Although even more significant compromises lay in the future, the 1949 Code itself displayed significant changes from earlier drafts. The power of merchants, merchant groups, and merchant norms were lessened. Gone were the merchants juries, the mercantile standard of performance, and many of the merchant rules. However, the Code still distinguished between merchants and non-merchants.[380] In addition, good faith, defined as observance by a person of the reasonable commercial standards of any business or trade in which he is engaged,[381] applied to the Code as a whole.

Certain aspects of the draft survived the battle. For example, the statute's prescriptive sections, especially with regard to secured transactions and the direct action against manufacturers, still existed. The 1949 Code, especially in the Comments, provided for extensive court supervision over the reasonableness of contracts. Although the form contract provision metamorphosized into the unconscionability section, the 1949 section called for "policing contracts for unreasonableness."[382] Likewise, the 1949 Code provided that "express terms shall control."[383] But the interaction among express terms, the duty of good faith, and the provisions of the Code are unclear. In sum, the General Comment—with its strong empowerment of the courts to regulate commercial dealings in light of merchant norms, fair dealing, and equal bargaining—had been dropped, but some of its policies remained.

A. The Disappearance of the General Comment

The disappearance of the General Comment, sometime between Spring of 1948 and the publication of the 1949 Drafts, was an unpublicized major change in the Code.[384] The 1948 comment to the unconscionability section, for example, referred to the General Comment.[385]

379. *Id.*
380. *See* U.C.C. § 2-104 (Draft, 1949).
381. *See id.* §§ 1-201(16), 1-203.
382. *See id.* § 2-302, cmt. 1.
383. *See id.* § 1-205(4)(b).
384. The General Comment is mentioned in the Proposed Comment on Section 23[2-9], *supra* note 363. The General Comments are not in, nor are they mentioned in, The Uniform Commercial Code of 1948-49.
385. "The severe difficulties encountered by the courts in their efforts to effect this reconciliation (between demands of commercial standards and good faith and leeways in contracting) have been discussed at length in the General Comment on Part II." *Id.*

The Official Drafts of 1949, however, did not include it. At the time, the U.C.C. retained an explicit reference for use of the comments, lasting until 1957.[386] Since that time the extensive specific comments of the 1944 draft, as well as the General Comment have disappeared.

One reason for the disappearance of the comments was that Karl Llewellyn, Soia Mentschikoff, and others had trouble finishing them. In 1945, William Prosser wrote Llewellan complaining about drafting fifty comments due on January 1, 1946. The comments had to conform to the Sections, but the Sections were continually being amended.[387] He felt that he was paying for Llewellyn's delay: "I have the feeling that I am being penalized for your sins in not getting Comments done promptly once the sections were set . . . ."[388] The comment drafting process had become uncontrollable. In 1948, Goodrich wrote Menschikoff that the Comments had to get done or "you and I will be in our graves long before the Code is completed."[389] Moreover, they were too long.[390] In the summer of 1948, after coming back from an excellent vacation, Llewellyn and Mentschikoff agreed to cut the Comments down from one-half to two-thirds. They decided that the entire collection of case material needed to be discarded.[391]

That material was to become the subject matter of a book entitled *Llewellyn and Mentschikoff on Sales*. "Karl said he hoped he would get

386. "The Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in its construction and application of this Act but if text and comment conflict, text controls." NORDSTROM, *supra* note 106, at 9. The Comment stated:

> Uniformity throughout American jurisdictions is the objective of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction, these Comments (which will have been before the Congress or the Legislature at the time of the adoption of this Act) set forth the purpose of various provisions of this Act, thus disclosing the uniform intent of the lawmaking bodies in enacting the Code. Therefore, subsection (2) of the present section recommends these Comments to the consideration of the courts to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction by mistake of legislative intention.

U.C.C. § 1-102(2) cmt. 3 (Draft, May 1949).

387. If past experience is any criterion, you and Soia will tear up a least half of the sections in December, and I shall be making the forlorn and desperate attempt to work nights to revise both Sections and Comments and get them ready *and mimeographed* by January 1. Obviously it can't be done, and I am not going to get it done, and I shall have to get it done, and I shall have to turn in a report as to why not, with some burning words amounting to instruction, selection and not in the public streets.

Letter from William Prosser to Professor Karl N. Llewellyn (Nov. 17, 1945) (on file with *SMU Law Review*).

388. *Id.* at 2.

389. Letter from Herbert F. Goodrich to Soia Mentschikoff, ALI Archives (Feb. 2, 1948) (on file with *SMU Law Review*).

390. "It was ultimately realized that these Comments were so very voluminous that very few lawyers, other than an occasional law school professor, would have the time or patience to read them." Letter from Hiram Thomas to Benjamin Wham, ALI Archives (Dec. 2, 1948) (on file with *SMU Law Review*).

391. *See* Letter from Herbert F. Goodrich to Howard Barkdull et al., ALI Archives (July 13, 1948) (on file with *SMU Law Review*).

the book written and it would have with the Revised Sales Act something comparable with the influence which Williston's had upon the original Act."[392] Llewellyn and his wife, however, never did write their treatise.

In an earlier article, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and The Uniform Commercial Code in Context*,[393] I argued that we ignore the thirties' ideology that informed Llewellyn's thinking because of the social and intellectual changes wrought by World War II, and because of the post-war bias against collectivist thinking.[394] Another reason is just that most of Llewellyn's explanations were edited out of the Code, and he never wrote the treatise that would have explained his Code.

The most important effect of the disappearance of the General Comment was the disappearance of Llewellyn's peculiar approach to contract formation. His was not the only possible interpretation of the Code language, but it was a definite one from one of its principal drafters. Without it, commentators were left to speculate on such issues as the meaning of unconscionability, the interaction between freedom of contract, and the obligation to follow reasonable commercial standards in the trade. The General Comment had proposed two objective indices for contract interpretation, the nature of the bargaining process and the Code provisions. Now the courts would have only the vague, subjective guides of good faith and unconscionability. Some commentators, such as David Melinkoff, would merely conclude that the Code's language is impossibly vague.[395] But the General Comment clarified that terms such as "commercially reasonable" had an objective meaning—that contracting process and results were to be looked at in the light of accepted trade norms, equal bargaining, and the Code provisions. The General Comment's demise unmoored the U.C.C. from its connection to Llewellyn's anthropological vision of basing sales law on merchant practices.

B. The Four Parameters

Looking at the 1949 Code in light of our four parameters, we see that emphasis on merchant norms continued with good faith defined as the "reasonable commercial standards" of any business or trade, applicable to the entire Code.[396] Reasonable commercial practices would also control contractual limitations of remedies: "[G]ood faith requires that such an allocation [limitation or exclusion of consequential damages] shall not exclude risks which could have been avoided by decent commercial practice, good faith, and reasonable care."[397]

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392. *Id.*
393. *See* Kamp, *supra* note 40, at 325.
394. *See id.* at 390-96.
395. *See generally* David Mellinkoff, *The Language of The Uniform Commercial Code*, 77 YALE L.J. 185 (1967).
396. U.C.C. § 1-201 cmt. 16 (Draft, 1949).
397. *Id.* § 2-721 cmt. 3.

The definition of "good faith" in Article III is confusing. The definition of holder in due course requires "good faith;" and a comment to the section on notice states that "good faith" is subjective while notice involves a "community rather than an individual standard."[398] Article I, however, made *objective* good faith applicable to the entire Code.[399]

Article I made clear that the Code treats contract formation and performance as an on-going, cooperative process: "This Act adopts the principles of those cases which see a commercial contract not as an 'arm's-length' adversary venture, but as a venture of material interest, when successful, and as involving due regard for commercial decencies when the expected favorable outcome fails."[400]

Thus, the Code lost the emphasis of the General Comment on trade norms as the basis of the Code's contract law. When the General Comment was deleted, the meaning of unconscionability was changed from its prior focus on trade norms and equal bargaining power to a rule embodying equity practice. In fact, the 1949 Draft was the only one that explicitly referenced the equity tradition of unconscionability.[401] The reference of the unconscionability section's comment to "unconscionability or unreasonableness" and to the "discretion" of the court[402] took the meaning of the section away from its roots in merchants' norms and changed the section into a grant of authority to the court to police bargains on a subjective basis.

In some ways, the 1948-49 Code increased the power of the court to regulate commercial dealings. Certainly the expansion of the scope of the unconscionability clause from form contracts to all contracts and its grant of discretion increased the power of the judge over commercial deals. Under the definition of "good faith," the judge was given power to police commercial practices: "Reasonable commercial standards does not mean the lax standards sometimes permitted to grow up but is intended to permit the court to inquire as to whether a particular commercial standard is in fact reasonable."[403]

1. Sales

As to specific legislative directions, important prescriptive sections are contained in the secured transactions and the sales articles. The 1949 Act dropped the General Comment's use of Article 2's sections as an index to regulate the interpretation and fairness of contracts. However, a comment to section 2-302 required certain "minimum incidents" of a sales contract, which "are laid down by the law as embodied in this Article."[404]

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398. *Id.* § 3-304 cmt. 2.
399. *See id.* § 1-203 (emphasis added).
400. *Id.* § 1-203 cmt. 1.
401. "This section is intended to apply to the field of Sales the equity courts' ancient policy of policing contracts for unconscionability or unreasonableness." *Id.* § 2-302 cmt. 1.
402. *Id.*
403. *Id.* § 1-201 cmt. 16.
404. *Id.* § 2-302 cmt. 4.

> Another common type of situation arising in connection with unconscionable contracts or clauses consists of cases where one party has deliberately entered into a lopsided bargain with full knowledge and awareness and has actually assented to clauses which are unconscionable in effect against him. In such cases this Article goes on the theory that sales contracts have as their legally necessary effect certain minimum incidents set forth in this Article despite any agreement of the parties to the contrary. The question primarily is whether or not a contract for sale in a business sense was intended. If so, then the transaction is governed by this Article and its minimum legal effects are laid down by the law as embodied in this Article. Therefore, the court may, under this section, refuse to enforce the clause or agreement as unconscionable and declare that the provisions of this Article be made operative instead.[405]

Article 2 still included the direct action against manufacturers. This proposal would elicit vigorous lobbying in opposition.

2. *Secured Transactions*

It was the article on secured transactions, then Article 7, which most limited freedom of contract.[406] In the words of J. Francis Ireton, the Chairman of the Division of Mercantile Law of the American Bar Association, "this can be said about the Article, that of all the Articles in the Code this Article had a more definite and decided slant to the left than any of the other Articles in the Code."[407]

Prior to the March 1949 meeting, the secured transactions drafters questioned the primacy of the inventory financier. They noted, "[a]s now drafted, a financing institution can so get a lien on the inventory of a business as to claim all the assets ahead of other creditors."[408] It was fair to protect secured lenders against other lending institutions, but "laborers and small merchandise and service creditors" may also need some protection.[409] The drafters proposed a resolution that some creditors be allowed to reach a certain percentage of inventory. Moreover, they questioned whether it was "good policy to permit inventory liens on the inventory of retail establishments."[410] They proposed that "bulk mortgages" on retailers be permitted only if the proceeds of the loan were put into the business.[411]

The Revision of Tentative Draft No. 2 (February 3, 1949) retained the

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405. *Id.*

406. *See* U.C.C. art. 7 (Revision of Tentative Draft No. 2, 1949).

407. Ireton, *supra* note 372, at 281-82.

408. Preliminary Questions of Policy for Consideration in Connection with Article VII, at 1, ALI Archives (on file with *SMU Law Review*). The document's reference to Article VII and to "the March meeting" probably places it in early 1949.

409. *Id.*

410. *Id.* at 2.

411. *See id.* at 3.

prohibition against disclaiming warranties by the security agreement.[412] Tentative Draft Number 3 (March 1, 1949) limited the self-help repossession where the consumer paid more than a certain percentage of the obligation.[413] Section 7-106(2) prevented a security agreement from limiting or disclaiming express or implied sales warranties, and section 7-106(3) stated that a merchant could always assert claims amounting to a failure of consideration against an assignee. For non-merchant debtors, "a successor in interest of a financier takes subject to any defenses which the borrower has against the original financier."[414] A holder in due course of a note secured by a consumer's goods had the option of claiming on the note or as an assignee. If claiming on the note as a holder-in-due course, the security interest would lapse; if claiming as an assignee, he could not be a holder-in-due course.[415] This limitation on holders in due course in consumer transactions was twenty-eight years ahead of its time; the Federal Trade Commission finally prohibited the holder in due course status in consumer transactions in 1977.[416]

By May of 1949, section 7-605 protected the consumer by requiring twenty days notice before repossession if the consumer had paid more than sixty percent of the obligation secured.[417] Section 7-611 was also nineteen years ahead of its time in providing for such credit disclosures as the cash price, the credit service charge, and the amount of each payment before the Truth-in-Lending Act of 1968.[418]

In the area of inventory financing, the 1949 Code dropped many of its protections for non-inventory financiers and other creditors. Section 7-323(9), however, provided that the debtor and any other secured creditor could sue the inventory financier for damages for failure to follow the prescribed default procedures. The section provided a safe harbor by having the financier's actions approved by a court or creditor's committee and, thus, being immunized from suit.[419]

Speaking of the prior draft's procedures, Mr. Ireton declared them to be unworkable:

> The other kind of inventory lien that could be taken was a lien on a conglomerate mass, such as a pile of coal or cotton seeds in a warehouse; this was a general lien and on default the lender was under the obligation of giving all creditors notice, calling them in, securing

412. *See* Secured Commercial Transactions, Revision of Tentative Draft No. 2, Article VII § 7-106, *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 167 (Elizabeth S. Kelly ed., 1984).

413. *See* Tentative Draft No. 3, Article VII § 7-611 (1949), *reprinted in* 5 UNIFORM COMMERCIAL CODE DRAFTS 222 (Elizabeth S. Kelly ed., 1984).

414. *Id.* § 7-108(2)-(3).

415. *See id.* § 7-612.

416. *See* Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (1997).

417. *See* U.C.C. § 7-605(1)(b) (Draft 1949).

418. *See* 15 U.S.C. §§ 1601-1667e (1994). Generally, one could say that the early consumer protection sections of the Code, which were rejected in the fifties, reappeared as federal legislation in the sixties and seventies. Manufacturers direct liability re-emerged as § 402A liability. *See* Clutterbuck, *supra* note 96.

419. *See* U.C.C. § 7-323(8) (Draft, 1949).

> the borrower's consent, then proceeding with liquidation of the lien with the obligation of a trustee. You can imagine what these provisions would have done. There just would be no inventory financing. Small business would suffer irreparable harm.[420]

Thus, as of May 1949, the Code still proposed some radical changes with intrusive judicial and legislative regulation of commercial law: courts could police unreasonable contracts and limitations of remedies; trade norms were to be the basis of good faith throughout the Code; secured financing was to be regulated;[421] and the provision for a proto-402A liability still existed.

3. *The Later 1949 Drafts*

By September 1949, another revision to the secured transactions article provided that a judicial lien could attach to a borrower's interest "but judicial sale of the collateral may not be had until ten days after notice of the sale has been given to the secured lender."[422]

The October 1949 Drafts made few changes. They dropped the section enabling a judicial lien holder to sell the collateral. The secured transactions article, then Article 8, provided that in the case of purchase money security interests in consumer goods, an assignee takes subject to all of the consumer's defenses. In a broadening of protection from the prior version, a negotiable note that was part of such a transaction would also be subject to all defenses.[423] The secured lender's ability to repossess, however, was strengthened by not requiring twenty days notice to repos-

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420. Ireton, *supra* note 372, at 282.

421. *See* GILMORE, SECURITY INTERESTS, *supra* note 19, § 9.2, at 293 nn.8-9. Grant Gilmore described the consumer protection section of the May 1949 secured transaction article as follows:

> In the May, 1949, Draft, Part 6 on Consumer Goods Financing contained provisions which invalidated an after-acquired property interest which attached more than ten days after the consumer had agreed to give a lien; allowed good faith purchasers of the collateral (other than secondhand dealers) to take free of the lien despite filing; regulated the rights of both parties on default; discharged the consumer from his obligation to the extent of any insurance proceeds received by the "financer" (secured party); regulated the form of contract to be used, requiring an itemized disclosure of the elements making up the time price and making the lien unenforceable against the consumer unless he received a signed copy of the contract which, in addition to the price disclosure items, "conspicuously indicates" that the contract gave the "financer" the right to repossess on default; subjected a holder in due course of a consumer's note to contract defenses if the holder asserted rights against the collateral; regulated, in the consumer's interest, such devices as the "lay-away plan" and the "add-on contract."
>
> Of the May, 1949, provisions referred to [above], there survived in the final draft the limitation on effectiveness of the after-acquired property clause in consumer goods (§9-204(4), . . .) and vestigial traces of the provisions which had allowed certain good faith purchasers to take free of the security interest even though perfected (§9-307(2), . . .) . . . and subjected holders in due course to contract defenses (§9-206(1) . . .).

Id.

422. U.C.C. § 8-305 (Draft, 1949).

423. *See id.* § 8-207(3).

sess "where the secured lender has reasonable grounds to believe that the collateral will be destroyed, damaged or lost before judicial proceedings can be instituted."[424]

By October of 1949, the floating lienholders primacy had been established. It is ironic that the initial proposals that attempted to empower the local merchant had been transformed into an act that empowered financers.

The Bank Collections part of Article 3 was changed to provide for modifications of the statutory provisions by agreement. Agreements were not to be effective, however, to limit bank liability to a customer for collection, to extend time limits, or to limit liability for improper handling.[425] What was "a varying agreement" was left to contract law. Unlike present law, language in deposit slips and the like might not bind the customer.[426] Today, "agreements" in banking include rules of which the customer may not be aware,[427] such as legends on deposit tickets and the like.[428]

The question of variation of the Code's provisions by agreement was to become paramount in the subsequent debate. The question was not settled until after the New York Law Revision Commission did its work, and the 1957 Code was prepared in response. The solution provided by the October 1949 Draft version of Article 3 was to be generally adopted in 1957, with the Article's provisions made generally variable by agreement; but certain duties were not disclaimable.[429]

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424. *Id.* § 8-503(2).

425. *See id.* § 3-601.

426. *See id.* "Cases holding stipulations in passbooks, deposit slips and signature cards not binding against the depositor because not called to his attention are not overruled by the Code." *Id.* § 3-601 cmt. 2.

427. "Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled." U.C.C. § 4-103(2) (1991).

428. As here used "agreement" has the meaning given to it by Section 1-201(3).

> The agreement may be direct, as between the owner and the depositary bank; or indirect, as where the owner authorizes a particular type of procedure and any bank in the collection chain acts pursuant to such authorization. It may be with respect to a single item; or to all items handled for a particular customer, e.g., a general agreement between the depository bank and the customer at the time a deposit account is opened. Legends on deposit tickets, collection letters and acknowledgments of items, coupled with action by the affected party constituting acceptance, adoption, ratification, estoppel, or the like, are agreements if they meet the tests of the definition of "agreement."

See id. § 4-103 cmt. 2.

429. *See* U.C.C. § 1-102(3) (1957).

> The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Id.

C. THE CODE GOES DOWNTOWN

Getting back to our opening metaphor, we now can picture the Code drafters in 1949 getting in their taxis and going downtown to present their creation to the commercial world. The drafting process had started in the Great Depression; now the nation was embarked on a great post-war rise in wealth and power. First drafted as a cure for the Depression, the 1949 Code was introduced to the greatest economy the world had ever seen. The stakes had become much larger.

The drafters were not naive about the downtown world, but they were hopeful that the excellence, rationality, and usefulness of their statute would result in its acceptance. They were too hopeful. Professor Rubin describes a later process of commercial lawmaking, the process of drafting and enacting the revision to Articles 3 and 4, which resembled what would happen to the proposed Code. The process was captured by bank attorneys, who saw the issues from the perspective of their clients. Their influence outweighed that of the only group with a consumer perspective, the few law professors who were involved. Few legislators were interested in these arcane issues. The end result was a pro-bank statute.[430]

In fact, the commercial world did not welcome the proposed Code. Rather, the May and September 1949 Drafts elicited such protest as to force revision on revision: "At that time several affected industries came out with strong pleas against it and publicized their position all over the country. The result was revision on revision to such an extent that you now would never recognize the September 1949 draft of the Code in the current draft."[431] In response to criticisms and comments, the submission of the Code to the legislators was postponed until at least 1952.[432]

On the eve of the Code's presentation in 1949, Llewellyn was true to his institutionalist vision. In a contemporary law review article, *Law and the Social Sciences—Especially Sociology*,[433] he conceptualized law as an "institution," which was an "organized activity, activity organized around

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430. *See generally* Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising U.C.C. Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

431. Irenton, *supra* note 372, at 279.

432. *See* TWINING, *supra* note 3, at 286-87.

> After the publication of the first complete draft in May 1949, comments were invited from a wide variety of sources and a number of organizations were encouraged to undertake special studies of the Code. Between 1949 and 1952 memoranda and reports were received from Bar Associations, law firms, official committees set up in various states, and commercial and business concerns such as the Association of American Railroads (1950), The American Bankers' Association (1951), the National Canners Association (1951), and the American Warehousemen's Association (1951). Literally thousands of suggestions were received from every part of the country. After requests from the ABA and others that they should be allowed more time to study the Code, it was agreed to postpone submission to the Legislatures until at least 1952.

Id.

433. Karl N. Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286 (1949).

the cleaning up of some job."[434] He would have seen his statute's purpose, then, as helping groups of merchants go about their business of buying and selling, rather than as facilitating individual bargaining.

Around this time, however, Llewellyn withdrew more and more from the drafting process. Although continuing to serve as Chief Reporter, he turned more to issues of jurisprudence, and his wife Soia Mentschikoff took over more of the work.[435] It may be that Llewellyn just did not want to participate in the trench warfare of legislating under lobbyist pressures. The political process of promulgating legislation consists largely of haggling over minor changes in wording that can have significant effects. Interested parties seek language that will favor them or create loopholes to protect their special interests. Nowhere in Llewellyn's writings can one find an interest in this type of legislative detail. He was a big picture man; it would be left to others to shepherd the Code through the political process.[436]

In 1951, Grant Gilmore attempted to foresee the future enactment process. He believed the financing institutions should support the enactment of the secured transactions article. The proposed article offered much to financiers, but it was at the price of granting protections for consumers and other creditors such as the following:

> No one should expect something for nothing, and the lenders are being asked to pay a price. The price is stated in the imposition of duties of care on the part of the lender which cannot be contracted out of; in the incorporation of provisions designed to protect the borrower and his other creditors from the undesirable effects of permitting one lender to achieve a monopoly position by tying up all of a debtor's assets; in the requirement of public filing for all non-possessory security interests; and in casting on the lender certain business risks, which arise from the chosen debtor's fraudulent activity.[437]

Gilmore's experience, however, warned him that groups may not be so reasonable: "In dealing with special interest groups over the past few years I have, however, at times found it difficult to escape the impression that what was being demanded was a free statutory subsidy . . . ."[438] He accurately predicted that secured transactions were of concern only to those business interests directly affected.

> By its nature Article 9 cannot become a matter of any great public interest—although there is a certain amount of fun in imagining the Governor of Connecticut or of North Carolina running for re-elec-

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434. *Id.* at 1289.

435. *See* TWINING, *supra* note 3, at 286.

436. My conclusion as to Llewellyn's disinterest in the minutiae of drafting is contradicted by Grant Gilmore, who writes: "He was a remarkable draftsman and took a never-failing interest in even the minutiae of the trade." Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962). In any case, Llewellyn did withdraw from the drafting process, starting in 1949, and never displays in his writings the type of micro-analysis of statutory drafting done by such scholars as White and Sumners.

437. Grant Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROBS. 27, 47 (1951).

438. *Id.*

> tion on the issues of the after-acquired property clause and the floating charge. It is a technical statute for specialists. Unfortunately all the specialists are on the same team and there is no opposition.[439]

The actual enactment of the secured transactions article depended on the wisdom of the finance industry. "To the extent that the passage or defeat of legislation depends on rational grounds, Article 9 will pass or fail depending on the attitude to be taken by the representatives of the financing industry. May their choice be wise."[440] The proposed Code, as well, would depend on the wisdom of the commercial world.

439. *Id.* at 48.
440. *Id.*