

Arthur Leff as a Scholar of Commercial and Contract Law

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In an Afterword to last winter's Legal Scholarship Symposium at Yale, Arthur Leff wrote of the joy of crafting "something true and truly put."¹ I find that a particularly apt description of Arthur's work in the field of commercial and of contract law. It is Arthur's contribution to that field of law that I want briefly to recall this afternoon.

In the spring of 1967, as a young assistant professor of law at the Washington University Law School, Arthur published an article entitled *Unconscionability and the Code—the Emperor's New Clause*.² That fall, because of the publication of that article, Arthur joined the faculty at Yale. When it was first published, Friedrich Kessler and I read it virtually simultaneously, and Yale moved quickly, anticipating, correctly as it turned out, that faculty appointments committees at Harvard and at Chicago and at other distinguished schools would also immediately take notice. All of us were immediately impressed by every aspect of the article: by the originality of its research, the subtlety of its analysis, and the felicity of its presentation. Today, shepardizing that article, one of the most celebrated in the bibliography of the Uniform Commercial Code, one finds that it has been cited an astonishing 156 times since the date of its publication.

The reasons for the article's immediate, well-deserved renown are clear. Arthur took as his assignment an inquiry into a part of the Uniform Commercial Code that had been profoundly troublesome to the Code's draftsmen and had been severely criticized in the deliberations attending its enactment. It bears remembering that, in 1967, the battle over enactment of the Code had just concluded. Intensive debates about the merits of particular provisions and extended controversy about the wisdom of its new approaches had left scars which had not yet had time to heal completely. There was a section in Article Two of the Code that allowed courts to set aside contracts in whole or in part for the sole reason that the

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1. Leff, *Afterword, Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955, 1296 (1981).

2. Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

offending contract provisions failed to comply with an undefined standard of unconscionability.³ This was one of the Code's innovations that had been most frequently and most vehemently denounced.⁴ Even some of those who agreed that some contracts, at least, warranted judicial policing, were doubtful whether the concept of unconscionability was up to the task: it was too murky, too mushy, in short, it was unmanageable. Arthur, in his article, devised a framework for dialogue about unconscionability that stripped the relevant statutory language, and its attendant drafting history, to its bones. Having demonstrated the nakedness of the emperor, Arthur proceeded to restore his dignity by devising a distinction between unconscionability that is *procedural* and unconscionability that is *substantive*. That distinction, that framework for analysis, brought the draftsman's effort into focus and made it workable. Since the publication of Arthur's article, no one has ever again been able to address the problem of unconscionability without incorporating the watershed distinctions that Arthur created. In commercial law, his article has taken a place in history similar to that accorded to Warren and Brandeis in the law of privacy,⁵ and Fuller and Perdue in the law of remedies.⁶

Ironically, the instant acclaim with which the article was received, while of course gratifying, had curious side-effects. It was almost as if the rhetoric was so automatically illuminating that the contents of the body of the article could be taken for granted, virtually unread. Commentators jumped to conclusions about the purpose that the procedure-substance distinction was designed to serve. The article itself became something of a target for criticism, as if its discovery of analytic shortcomings in the drafting of the Code was properly to be seen as a failing of the author rather than as a failing of the draftsmen.⁷ It is, of course, not unusual to blame the messenger who bears unwelcome tidings. What surprised Arthur was the critics' apparent failure to perceive that his distinctions would enable the disputed section to play a much more important role than it would have enjoyed in its prior, amorphous, unanalyzed state.

For Arthur himself, the central themes developed in the article on un-

3. U.C.C. § 2-302 (1962).

4. See Ireton, *The Commercial Code*, 22 MISS. L.J. 273, 280 (1951); Comment, *Policing Contracts under the Uniform Commercial Code*, 18 U. CHI. L. REV. 146 (1950); Note, *Definition and Interpretation of Unconscionable Contracts (Uniform Commercial Code)*, 58 DICK. L. REV. 161 (1954); see also Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROBS. 141 (1951) (criticizing the Code's new concepts as unsettling to commercial law); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

5. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

6. Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936-1937).

7. See Ellinghaus, *In Defense of Unconscionability* 78 YALE L.J. 757 (1969); Murray, *Unconscionability: Unconscionability* 31 U. PITT. L. REV. 1 (1969)..

conscionability transcended that article's necessarily narrow focus. Intrigued by the varieties of ways in which contracting parties could be deceived, or could deceive themselves, he wrote an article entitled *Injury, Ignorance and Spite*,⁸ and a few years later, a book on *Swindling and Selling*.⁹ In these works, he brought to bear his formidable wit and his lively sense of drama to illuminate the frailty of the human condition—the readiness with which so-called rational contracting parties succumb to self-delusion and to greed. These inquiries served to reinforce his earlier views that healthy skepticism was the proper vantage point from which to view many claims of procedural unfair dealing.

To me, his work concerning substantive unconscionability is potentially even more significant. Responding to his own skepticism about the gains likely to be achieved from further emphasis on imperfections in the bargaining process, Arthur began to challenge the role of the bargaining process in contract itself. For over two hundred years, it has been a commonplace of contract law that the enforceability of promises is established by showing that the contracting parties have engaged in the process of bargaining. This fundamental tenet of the law of contracts has survived unscathed in the *Restatement Second of Contracts*, which provides in an official comment to the revised section 75 that, "[i]n modern times the enforcement of bargains . . . is extended to the wholly executory exchange in which promise is exchanged for promise The promise is enforced by virtue of the fact of bargain, without more."¹⁰ What contract law has done, as Arthur trenchantly pointed out in an article entitled *Contract as Thing*, is to enshrine the process of bargain, rather than the product of bargain, as the quintessential hallmark of what contract is.¹¹ In fact, the process of bargain has, in recent years, been substantially expanded to incorporate the effect of reliance upon a promise as a basis for the enforcement of that promise. Grant Gilmore has prophesized that this expansion signals the end of contract as we know it.¹² Arthur's critical attack on contract is more fundamental. Whether a contract is the result of a bargain or of reliance, it is still validated by reference to the process which led to its creation. Arthur's inquiry cast doubt on the utility of such a pervasive singly-focused approach. Building on the work of Wesley Newcomb Hohfeld,¹³ he argued that contract, like property, might well be viewed as a bundle of powers, privileges and rights. From a Hohfeldian

8. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

9. A. LEFF, *SWINDLING AND SELLING* (1976).

10. RESTATEMENT (SECOND) OF CONTRACTS § 75, comment a (1979).

11. Leff, *Contract As Thing*, 19 AM. U.L. REV. 131 (1970).

12. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

13. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

perspective, he maintained that it might be useful to scrutinize the contract as a product, as a thing, as a device that imposes private regulatory law on the contracting parties.¹⁴ At least in some contexts, where bargaining is conspicuously ephemeral, such as in contracts of adhesion, Arthur suggested that more emphasis on product and less on process would enable courts and commentators to achieve desired goals more openly and hence more efficiently.¹⁵ It was an insightful idea that will continue to engage the attention of serious scholars in the field of contract law for many years to come.

I do not want to end this brief description of Arthur's work without adding a more personal note. It was a joy to be able to work with Arthur as a colleague. The exuberance of his curiosity about the law was exhilarating to us all. It was contagious. We would share wonderful cases that became more wonderful for the sharing, cases newly discovered in the advance sheets, or old chestnuts with newly discovered oddities. I was delighted when the Southmayd Chair that I had occupied before I went on the bench came to be Arthur's endowed chair. Words cannot express how much I miss him. But his memory will remain, always, and his works will endure.

14. Leff, *supra* note 11, at 144-47; see generally Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (analysis of role of principles, rules, and precedents in private negotiation).

15. See Leff, *supra* note 11, at 148-55.

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29 STAN. L. REV. 879 (1977), reviewing R. UNGER, KNOWLEDGE AND POLITICS (1975).

49 TEX. L. REV. 827 (1971), reviewing P. KEETON & M. SHAPO, PRODUCTS AND THE CONSUMER: DEFECTIVE AND DANGEROUS PRODUCTS (1970).