1-2007

Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code

Franklin G. Snyder
Texas A&M University School of Law, fsnyder@law.tamu.edu

Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code

FRANKLIN G. SNYDER*

Students in contracts and commercial law courses are routinely taught that Article 2 of the Uniform Commercial Code is a product of the Legal Realist movement—that it was designed by its principal draftsman, Karl Llewellyn, to more accurately reflect the needs and realities of modern business than the prior common law and statutes it displaced. That story is important, because it is routinely retold as we explain to students the provisions in Article 2 that change the powers, rights, and responsibilities of contracting parties. Yet that story is a myth. There is relatively little "Realism" in Article 2, whether we are speaking descriptively or normatively. Moreover, the rhetoric of Realism actually serves to camouflage the deliberate regulatory and social policy decisions that were made by the drafters and the legislators.

This Article, part of a symposium on "Commercial Calamities" focuses on four of the major innovations in contract doctrine introduced by Article 2: the new contract formation rules, the merchant duty of good faith, the relaxation of the certainty requirement, and the greater reliance on trade usage evidence. Upon examination, it turns out that none has any discernable Realist roots. None of them reflects either the needs or desires of actual merchants and the lawyers who represent them. Rather, they are the result of a deliberate but largely unexpressed desire to move away from libertarian ideas of laissez-faire contracting to a regulated communal system purged of hard bargaining and sharp deals. More regulation of contracting in the interest of restraining hard bargaining may be a laudable goal, but it has nothing to do with Legal Realism. This Article argues that the "calamitous" result of this Realist rhetoric is to shift the focus away from the actual policy choices made in the statute to a world of mythical "bargains in fact" where we can pretend that we are simply carrying out the wishes of the parties. Stripping away the rhetoric is the first step in allowing us to take a clean look at what the drafters wrought and to make our own social and political decisions.

---

* Professor of Law, Texas Wesleyan University School of Law. This paper was prepared for the "Commercial Calamities" symposium at the January 2006 annual meeting of the Association of American Law Schools Section on Commercial Law. It benefited from the helpful comments of participants at a faculty colloquium at Notre Dame Law School in January 2006, in particular those of Jay Tidmarsh. Thanks to Jeff Lipshaw, Julian Velasco, Larry Garvin, and Ann Mirabito for reviewing earlier drafts.

"How shall we dispel those clouds of mystery with which politics have covered this strange transaction?"[1]

"Of all of these things, only 'see it fresh,' 'see it clean' and 'come back to make sure' are of the essence."[2]

I. INTRODUCTION

Every great human creation carries with it a mythology. Myths are traditional stories, accepted as history, that serve to explain the origins, history, deities, heroes, and world-view of a people or institution. Myths are not necessarily untrue, and even when they are, they may contain a good deal of truth.[3] Good myths, true or not, clarify and explain. They help us to understand the world at a deeper level than mere facts. But some myths are not good. Bad myths are those that are not merely untrue, but actually obscure our understanding and cloud our judgment.

The Uniform Commercial Code[4] has its own mythology. Like many creation myths, it parallels that of classical antiquity, with the revolt of Jove and his brothers Neptune and Pluto against the rule of the monstrous Saturn (who devoured his children) and the other elemental Titans, breaking their power and establishing a new order on Mount Olympus. In this tale, Jove—here played by Columbia law professor Karl Llewellyn—leads a small band of brethren who call themselves Legal Realists (among them Arthur Corbin, Soia Mentschikoff, and Grant Gilmore) against the life-devouring rule of the Titans of Legal Formalism (Christopher Columbus Langdell and Samuel Williston) to create a new Mount Olympus, the Code.

Basic to this tale are the claims that the Code is a product of Legal Realism, that it was a reaction against inadequacies that business had found under the prior common law and the old Uniform Sales Act (Williston's pre-Llewellyn codification of sales law), and that its provisions were derived

---

[1] 2 ISAAC D'ISRAELI, CURIOSITIES OF LITERATURE 4 (B. D'Israeli ed., 1868).

[2] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 510 (1960).

[3] For example, Abraham Lincoln probably did once walk four miles to give a customer back some change, and George Washington probably did *not* chop down a cherry tree, but both stories accurately reflect the basic honesty of both men.

[4] All references and citations to Article 2 of the Uniform Commercial Code (hereinafter U.C.C., or the Code) are to the pre-2003 version. The extensive revisions in the 2003 Revised Article 2 have not, as of this writing, been adopted by any state and seem unlikely to be adopted in the future. In any event, the changes made in the Revised Article 2 (such as those to U.C.C. section 2-207) would not affect the discussion here. For convenience, I will sometimes refer to "the Code," but my discussion will be focused chiefly on Article 2 and those provisions of Article 1 that apply to sales transactions.

from the study of actual business practices and designed to bring the law into line with modern commercial practices. One of the leading figures in modern commercial law recently referred to the Code as "the ultimate Realist statute,"[5] while others have called it a "great monument" to Realism.[6] Karl Llewellyn declared that it was intended to be a "helpful device" to "men of commerce,"[7] and that it was "to be for consumption by commercial men, as well as lawyers."[8] This Realist myth is understandable since Llewellyn was himself a Legal Realist, perhaps the preeminent one.[9] Llewellyn was also the father of the Uniform Commercial Code and the principal draftsman of Article 2, which governs sales of goods.

But there is, in fact, surprisingly little Realism in Article 2. Llewellyn was a Realist, but he was also, in N.E.H. Hull's perfect phrase, a *bricoleur*, a man who takes bits and pieces of whatever he finds ready at hand to cobble together the structure he desires.[10] Dennis Patterson says that Llewellyn's "ultimate achievement in the Code [is] the articulation of a social vision of the proper relationship between doctrine and theory."[11] Yet a look at what Llewellyn actually wrought suggests that, for him, the proper relationship between theory and doctrine is to use whichever one gives him the result he wants in a given situation. Llewellyn would rely on the practices of merchants and business lawyers when it suited him. When it did not—when the merchants were not doing things the way he thought they should have been done—he ignored them. As he explained: "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."[12]

---

[5] Richard Speidel, Remarks at the Association of American Law Schools Mid-Year Meeting (June 16, 2005).

[6] Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 305 (1994).

[7] Karl Llewellyn, The Reasons for a Uniform Commercial Code, *in* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 525 (1973).

[8] *Id.*

[9] Llewellyn is generally credited with inventing the term in a pair of law review articles. *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 449 (1930); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931).

[10] *See* N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 11–12 (1997).

[11] Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX . L. REV. 169, 175 (1989).

[12] Allen Kamp, *Stories of the Code*, 12 TEX. WESLEYAN. L. REV. 377, 379–80 n.17

Llewellyn's vision, as others have noted, was rooted as much in filmmaker Frank Capra as in Legal Realism. He wanted "small-town cooperation and social normalcy," and to favor the "little man" over the "big man."[13] He believed that government control of industry during World War II proved that managed production was less "blind and wasteful" than the previous laissez-faire regime.[14] In short, he wanted to replace (though the word he used was "adjust") the rough-and-tumble hard bargaining of classical capitalism with a "balanced" statute that would specify the rights and obligations of the parties.[15] What business people actually *wanted* was largely irrelevant.[16]

Llewellyn had an objective in drafting Article 2. He was not fixing an "outdated" legal system, though some parts of the Sales Act (like some parts of Article 2 today) were probably antiquated. Rather, he objected to the social and political premises on which that system was based and wanted to wipe them away. He wanted to replace the largely laissez-faire rules of classical contract law with a New Deal regulatory scheme, to "carry on the program of the National Recovery Act after it was declared unconstitutional" by establishing a mechanism for enforcing "fair commercial practices."[17] He was trying to impose "his own normative vision"[18] of a marketplace purged of the sordid, unregulated competition of the actual business world of his day, and policed by merchant groups and the state.[19] One of the Code's

---

(2005) (quoting Llewellyn from a conversation at the annual conference of the National Conference of Commissioners on Uniform State Laws in 1940).

[13] *See* 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, 173 (1987).

[14] Kamp, *supra* note 12, at 380.

[15] *Id.* at 380–81.

[16] Llewellyn once compared the prior law of sales to a restored New England farmhouse. No matter how much you updated it, it would never have enough closets and the kitchen would still be in the wrong place. *See* Karl Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROBS. 687, 688 (1948), *quoted in* Kamp, *supra* note 12, at 378. He presumably preferred the "modern" architecture of the 1940s. It is an open question whether those 1946 Bauhaus boxes—many being knocked down for parking lots today—will ever match the popular appeal of the old New England farmhouse for comfort and livability.

[17] Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFF. L. REV. 359, 425 (2001).

[18] Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 472 (1987).

[19] Llewellyn's original version of the Code even provided for juries of merchants to try commercial cases. Had that measure survived the drafting process, it would have been a powerful tool for enforcing cartel rules and restricting competition over such things as "unfair" prices or bargains.

drafters, Grant Gilmore—who (perhaps not coincidentally) had almost no experience in commercial law before Llewellyn recruited him for the project—noted in 1949 that a major goal of the effort was to move from laissez-faire contracting to a more regulated system.[20] It is not surprising that Gilmore would later become a leading proponent of the movement to absorb contract law into tort law.[21] Tort law, with its duties defined solely by social regulatory norms, is the antithesis of laissez-faire contracting.

All of this is widely known, but it is not the story most students are taught in commercial law courses. And that is a problem. For not only is the Realist myth untrue, it clouds much of our thinking about Article 2. There are deliberate regulatory choices in Article 2—a reallocation of power both among contracting parties and between contracting parties and the state—that masquerade as Realist insights about how "real" business people do things. There are many situations in which we might decide that an unwilling party should be forced to give a warranty, accept a defective shipment, or submit to arbitration, even when it has strongly objected to such terms. But we will not get very far with our analysis if we pretend that our forcible allocation of liability is merely carrying out what the parties themselves really intended all along as their "bargain in fact."[22]

The drafters of the Code made specific normative policy choices about when liability should be imposed despite a lack of consent by one party, and when a party should be released from a bargain to which it did consent. If we are to evaluate those choices—and maybe make our own—we need to strip away the rhetoric that obscures them. We need to stop the pretense that we are carrying out some bargain of the parties and justify these provisions on regulatory terms, where they can be debated in the open. Some regulations may be justifiable and some not. And when we move our focus from a mythical "bargain in fact" to "should liability be imposed for this or that act?" we may find other areas that could be much better regulated than they are under the Code.

My purpose here is not to quarrel with any particular bit of the Code, but rather to shift the focus from the Realist rhetoric to the nuts and bolts of what is happening and why. To do that, I will take a Realist look at some provisions of Article 2, focusing particularly on those sections that were considered to be innovations at the time of its adoption. Part II provides some necessary background, briefly outlining the state of affairs against which the Realists were rebelling: 19th century Legal Formalism. Part III gives an equally brief sketch of Legal Realism and outlines what, in general, it means

---

[20] Kamp, *supra* note 17, at 427.

[21] *See generally* GRANT GILMORE, THE DEATH OF CONTRACT 95–112 (Ronald K.L. Collins ed., 2d ed. 1995).

[22] U.C.C. § 1-201(3) (2004).

to be a "Realist" statute, at least as that term is regularly used in commercial law circles. Part IV turns to four specific areas of Article 2 jurisprudence and examines whether they fit any of the criteria that might allow them to be labeled as "Realist" in any meaningful sense. Part V draws the various threads together and show that today's Article 2 looks much more like a (frequently botched and inadequate) New Deal regulatory scheme than like a Realist statute attempting to accommodate the law to the needs of business people.

II. LEGAL FORMALISM

In Realist debates about contract law, the term "Formalist" usually refers to one of two things. First, it means the "legal science," championed most notably by Dean C.C. Langdell of Harvard, in which results in concrete contractual disputes can ostensibly be derived from a set of prior principles.[23] Second, it often includes the free-wheeling constitutional interpretation engaged in by the turn-of-the-century U.S. Supreme Court in cases like *Lochner v. New York*,[24] which enshrined freedom of contract as a constitutional right.

These were, in fact, two very different phenomena. Langdell believed that one could derive correct answers to concrete cases based on a series of neutral principles that would lead to predictable results, while the Supreme Court was engaged in wholesale political revisionism. It was possible to be a Langdellian legal scientist while not accepting the Supreme Court's constitutional jurisprudence, and vice versa. The only real connection between them was the fact that both were consistent with a laissez-faire political view of the role of government, a view that dominated the nineteenth century but largely passed away in the twentieth.

There is also a third sense in which Formalism is used. This Formalism—which is, I believe, what most modern Formalists mean when they talk about it[25]—is not tied up with either Langdell's legal science or with the constitutional protection of laissez-faire economics. This Formalism is, at bottom, the idea that rules of law should be fixed, clear, and knowable in advance—or as fixed, clear, and knowable as possible—and that they should apply even where a judge in a particular case may think that the application is unjust. A rule that sets a speed limit at forty-five miles per hour

---

[23] One of the best expositions of Langdell's own version of legal science is still Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

[24] 198 U.S. 45 (1905).

[25] *See* Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 121 (2006) (discussing the theoretical differences between classical and contemporary Formalists).

on a particular road, for example, is Formalist. Its application is entirely mechanical. This is so even though it cannot be deduced from the higher principles of Langdellian science, and even though it is certainly not a laissez-faire rule. The rule may be over- or underinclusive. On this particular road there may be some stretches where a reasonable person might safely drive fifty-five miles per hour, and others where she might need to drive only forty miles per hour. But the driver can, at least in theory, control whether she is in violation. A rule that requires drivers to drive "at a reasonable speed under all the circumstances" is not Formalist in this sense, because a driver cannot with certainty predict the outcome of driving at any given speed.

In contract law, some Formalist rules, like the perfect tender rule,[26] are Langdellian. We can derive the seller's obligation to render perfect performance under a contract of sale from the propositions that a contract is a voluntary undertaking and that the buyer's performance is contingent on the seller's performance. Making the buyer take anything other than what it had specifically agreed to take would violate those principles. On the other hand, there are rules routinely regarded as Formalist that cannot be deduced from general principles, such as the writing requirements of the statute of frauds,[27] the parol evidence rule,[28] and the statute of limitations.[29]

Much of the anti-Formalist rhetoric of the Realists is actually focused on Langdellian legal science, not necessarily on the desirability of fixed and knowable rules. A good deal of that rhetoric is overblown.[30] William LaPiana[31] and Mark Movsesian[32] have shown, for Langdell and Williston respectively, that their jurisprudence bears relatively little resemblance to the later Realist caricatures. Langdell, who had much more actual law practice experience than most of the Realists, virtually invented contract law as a subject for study. He was the first to make university law students do what practicing lawyers do: read actual cases and try to figure them out, instead of sitting in a hall listening to windy lectures on theory. As for Williston, we only need to note how much of his Sales Act is actually in Article 2[33] and

---

[26] *See* U.C.C. § 2-601 (2002).

[27] *See id.* § 2-201.

[28] *See id.* § 2-202.

[29] *See id.* § 2-725.

[30] Part of the reason for the stridency of the rhetoric may be that the Realists were clustered at Yale and Columbia, while Langdell and Williston were Harvard men.

[31] *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

[32] Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

[33] *See infra* notes 67–82 and accompanying text.

how valuable his treatise has been to generations of practicing lawyers[34] to realize that he was by no means an abstract theoretician counting angels dancing on the head of a pin.

Formalists, contrary to some of the calumnies they have endured, are not opposed to changes in the law. The *Restatements of Law* produced by the American Law Institute (ALI) in the 1920s and 1930s are often regarded as the "high water mark" of formalism,[35] but they were not undertaken out of love for abstract doctrine. The ALI was founded as a bastion of the elite practicing bar,[36] a group much less interested in abstract legal theory than even the most Realistic law professor. For example, the actual charge the ALI gave to Samuel Williston and the other Restatement drafters was:

> not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical and constructive.[37]

The goal was obviously more certainty—something practicing lawyers and clients nearly always want—not more theoretical consistency. The goal of better adapting the law to "the needs of life" could have been taken verbatim from the Realist playbook, if Realism had yet existed when the ALI started its work.

A problem with Formalist rules in general, and in the commercial context in particular, is that they sometimes lead to apparent miscarriages of justice. Fixed rules, as noted above, are usually either over- or underinclusive. This means that a system of formal commercial law will lead, in some number of cases, to false positives (finding an obligation where the parties did not intend one) and false negatives (failing to find an obligation where the parties did intend one).[38] A Formal rule can never be as accurate as one that allows

---

[34] It is still in print, though under new authorship. *See* RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 1990).

[35] *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 24 (1995).

[36] *See* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 142 (1995).

[37] *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 14 (1923), *quoted in* DUXBURY, *supra* note 35, at 24. Duxbury reads the first portions of these goals—clearing up uncertainty and getting rid of unnecessary complexities—as showing that the ALI had gone over to Langdellian science. But laws can be made clear and simple in any number of ways, and the ALI leaders—like nearly all experienced practitioners—presumably wanted *practical* certainty and simplicity, not the *theoretical* sort.

[38] Take, for example, the "four corners rule" of contract law, where the court looks

for complete fact-finding and full discretion by the decision-maker,[39] at least if the decision-maker has perfect knowledge, infinite resources, and Solomonic wisdom. Formalism has relative advantages where knowledge is imperfect, resources are limited, and judges are fallible. We will get more wrong answers, perhaps, but we will spend a lot less time and money getting them.

III. LEGAL REALISM

It is impossible to give anything approaching a good account of Legal Realism here. It is probably impossible to give a full account of it anywhere, given that there is likely little about law that someone called a "Realist" has not said somewhere.[40] Morton Horwitz, in writing extensively and sympathetically about the Realists, concluded: "Legal realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory."[41] Many scholars have tried to nail down exactly what Realism *is*. They disagree.

For present purposes we do not need to resolve that question. I am going to focus here on what we might call "Pop Realism" or the "lore of Realism." That is, I will use the version of Realism that seems to be routinely taught in American contracts and commercial law courses when law professors talk about the origins and purposes of the Uniform Commercial Code. This Pop Realism has both a descriptive and a normative component, and both are rooted in Llewellyn's ideas.

Before going on, I should clarify some things that I am not talking about when I talk about Realism. First, Realism here is not simple rule skepticism. Despite some loose rhetoric here and there, neither Llewellyn nor the other drafters who worked on Article 2 were rule skeptics. They would hardly have spent twenty-five years trying to impose a complex body of rules on the world if they thought that rules were pointless. Second, I am not talking about what might be called the "law in action" part of Realism. There are

---

only at the plain meaning of the written language chosen by the parties to interpret their agreement. If the parties' actual agreement was, in reality, at variance with what they wrote, the four corners rule would result either in enforcing a deal that was not intended, or in not enforcing one the parties intended.

[39] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 539 (1988) (noting that by excluding discretion, formal rules impede the process of arriving at accurate decisions).

[40] Sometimes it seems that there is not much about law that Karl Llewellyn himself—a notoriously inconsistent thinker—did not say somewhere.

[41] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169 (1992).

some Realists who argued that law should simply be conformed to what judges actually do. Felix Cohen claimed that to talk about how judges "ought" to go about finding a contract is meaningless, because the court's own decision to enforce is what makes the contract in the first place.[42] But this view, even if it were coherent, was not shared by Llewellyn and the drafters.[43] Llewellyn wanted to overrule some of the decisions that courts were making, not make the law conform to them. Third, I am not talking about the simple notion that law should reflect social policy and social needs. This is, of course, a part of the Realist agenda, but it is hardly unique to them. Practically everyone for at least the last few hundred years has thought that law ought to reflect social needs, even though they disagree about what those needs are and what solutions will meet them. That is why every society has some lawmaker that issues laws after extensive investigation and discussion of the law's good and bad points.[44]

A. *Descriptive Realism*

As a descriptive matter, Realism is not a kind of jurisprudence, but a "technology," the point of which is to see the law afresh and "as it works."[45] When a Formalist would ask, "Are the elements of a contract present in this case?" a Realist would ask, "On the facts of this case, is a court likely to impose liability?" If the answer is yes, the next logical step for the Realist is to ask what factors are present that suggest the court will impose liability.

In one sense, this side of Realism was not new. Every practicing lawyer, even Langdell, knows that many factors other than the legal rules influence the results in particular cases. These factors include the judge's bias, the

---

[42] *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 827–29 (1935).

[43] Cohen might argue that the law on the books ought simply to conform to the law in action. This itself is a normative position. If we can find out what judges are actually doing ("law in action") we can write it down ("law in books") and thus help people better predict what courts will do. The law in books does not bind the judge, it merely predicts what he or she will do. This is a tenable position, but when extended into a general view of rules it carries implications that are distasteful to many. In the area of coerced confessions, for example, I suspect most of us believe that police conduct should conform to the Fifth Amendment, rather than the other way around.

[44] People normally differ as to (1) what those needs are and (2) who ought to be making those decisions. Formalists tend to believe that legislatures should make rules, while Realists are, in general, much more willing to let judges make these policy calls. But, note that this is not an ironclad distinction. It was the ostensibly the Formalist judges of the *Lochner* court who were, after all, charged with attempting to enact "Mr. Herbert Spencer's Social Statics" into law by judicial fiat. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

[45] LLEWELLYN, *supra* note 2, at 509–10.

parties' sex or racial and ethnic backgrounds, the lawyers' respective skills, the ostensibly "irrelevant" equities, the likeability of the parties, the composition of the jury, the political mood of the day, and even cash bribes to a judge or jury. Formalists had largely ignored these elements because they were not *supposed* to affect the outcomes of cases, and because they were looking for common threads. Realists wanted to overcome this narrowness of vision by including these other aspects of the process, a step forward in descriptive terms.

But, this technological side of Realism is limited. It does not tell us anything about what a court should do in a case. Descriptive Realism might tell us, for example, that police officers routinely extort confessions and manufacture evidence, and that judges knowingly condone the process, but it cannot tell us whether this practice is wrong. If courts deciding cases are, in actual fact, relying on abstract notions of "contract" in making their decisions—or on reading tarot cards or flipping a coin—descriptive Realism can only note the fact.

Another problem with descriptive Realism is that it is extremely difficult to do. A thorough understanding of all the factors that affect the result of any single judicial decision—let alone the factors that affect translation of judicial decisions into actual real world effects—is an enormous undertaking.[46] As William Twining wryly noted in describing the loss of enthusiasm for real empirical work among the early Realists, "realism is hard work."[47] The size and difficulty of this undertaking may be one reason why the Formalists tended to ignore the messy details and focus on the one thing that ostensibly does not change from case to case: the legal rule involved. It is also presumably why the Realists did very little actual empirical research into commercial practices when they started on the Code, or, indeed, at any other time.[48]

B. *Normative Realism*

The other aspect of Realism, conventionally regarded, is normative. To decide whether a given case is correctly or incorrectly decided, we need

---

[46] Take, for example, the excellent case studies in RICHARD DANZIG & GEOFFREY R. WATSON, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (2d ed. 2004). The authors invest a considerable amount of effort and do an admirable job in digging into the realities of cases—but they can manage to do this for only nine cases. I might add that for the only one of their cases that I have studied, *Hadley v. Baxendale*, my own unfinished research suggests that they did not uncover a great deal of further important information that may have had an influence on the decision.

[47] TWINING, *supra* note 7, at 59.

[48] *Id.*

some kind of standard. Take a case that Llewellyn may have had in mind when he was drafting Article 2, *Poel v. Brunswick-Balke-Collender Co.*[49] In the case, a buyer gets off the hook on a promise to buy a large amount of rubber, the price of which has fallen substantially, because the acceptance form did not exactly match the offer form.[50] The case is a quintessential example of the "mirror-image rule" in contract law,[51] and the mirror-image rule rests firmly on Formalist notions. Is the decision right or wrong as a matter of moral or social policy? Descriptive Realism cannot tell us. To conclude that the decision is wrong, as Llewellyn did, we need some kind of normative standard. What is it?

For Llewellyn, and for commercial law teachers who follow his lead, it was important that the law consist of what he called "singing rules."[52] Singing rules, unlike "paper rules," are those that carry their "reason and purpose" on their face.[53] In a perfect world, a judge looking at a particular rule should be able to tell why that rule is there and what results it is supposed to achieve, so that he or she can tell how it ought to apply to new factual situations. In this, Llewellyn was following Holmes,[54] who pointed out that "law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated . . . in words."[55] This is in part because a rule whose purpose is obscure will be hard to apply and its applications will be difficult to predict, in part because failure to make the law's purpose explicit is likely to undercut that purpose. As Llewellyn put it, "covert tools are never reliable tools."[56]

---

[49] 110 N.E. 619 (N.Y. 1915). *See* John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1318 (1986) (noting that Llewellyn was considering cases like *Poel* when designing U.C.C. section 2-207).

[50] *Poel*, 110 N.E. at 620 .

[51] This is the rule that if an acceptance varies in any respect from the offer, it does not count as an acceptance, but is rather a counter-offer. No contract is formed until the original offeror accepts the counter-offer.

[52] K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 250 (1941).

[53] *Id.*

[54] *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 408 (2004) (noting the connection between Holmes's and Llewellyn's thoughts).

[55] Oliver Wendell Homes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); *see* DiMatteo, *supra* note 54, at 408.

[56] Karl N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 702–03 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)).

What purpose is a commercial law regime supposed to further? The standard account among commercial law teachers is that Llewellyn thought that the rules should be designed to help business people do business cleanly and efficiently. This was certainly the ground on which the Code was sold to the bar and the legislatures. Llewellyn made this point repeatedly in marketing his vision of a unified Code:

> The legal profession needs to have the men of commerce think of law and legal work, not as a baffling intricacy of ununderstandable [sic] technicality, but as a helpful device which can be seen, directly, to be helpful though safety requires the use of a lawyer's skills in developing its help. . . .
>
> . . . Commercial law requires to be for consumption by commercial men, as well as lawyers.[57]

The point of the new rules, then, was to replace the tired old technicalities of the Formalist era with new rules that would better fit modern commercial practice. Importantly—and this story is still told regularly in American classrooms—the goal was to *help* business people. The following passage gives some flavor of the usual story:

> Like [his teacher, Arthur] Corbin, Llewellyn saw no point in legal doctrine that failed to take account of the nuances and vicissitudes of everyday commercial practices, which were themselves always in the process of evolution and change. Fundamentally a pragmatist, Llewellyn thought that contract doctrine should respond to commercial reality and not, as the classical theorists imagined, the other way around.[58]

Certainly commercial law for Llewellyn (as for the Formalists) was supposed to do more than simply allow business people to do what they liked. In Article 2 he built in a number of provisions that restricted their powers more or less explicitly. But, it seems safe to say that each and every provision of Article 2 is supposed to be justified either as (1) facilitating free exchange among parties, or (2) furthering some other overriding public interest that we have decided outweighs the interest in facilitating free exchange. To say it differently, a rule of commercial law ought on this analysis to be either the one that the parties themselves would choose to help them do business better, or one expressly designed to override their own preferences in favor of some larger interest. A rule that interferes with free

---

[57] Karl Llewellyn, Memorandum, The Reasons for a Uniform Commercial Code (undated c. 1940), *quoted in* TWINING, *supra* note 7, at 524–25.

[58] Patterson, *supra* note 11, at 171 (footnotes omitted).

contracting without achieving any specific regulatory purpose would be, on this analysis, bad.

Many kinds of restrictions on contractual freedom might meet that second criterion. Among the most obvious are rules on capacity, illegal contracts, and consumer protection. Others might, perhaps, be justified in increasing economic efficiency[59] or promoting other social goals. But, for the Realist committed to promoting free economic exchange, the reasons for such restrictions ought to be apparent on their face.

With that background, let's turn to the product of Llewellyn's work, Article 2.

IV. THE REALITIES OF ARTICLE 2

We will focus here not on what Llewellyn and his colleagues said, but upon what they actually created. What do we find when we look at Article 2? Do we see a statute whose provisions reflect deep familiarity with commercial practices and the interests of merchants? Do the rules help business people carry out their daily tasks without being fretted by legal uncertainty? Do the rules lead to a swift, reliable, cost-effective resolution of disputes? Do the rules sing out their reasons? Do they create the kind of simple, predictable system that facilitates contracting and lowers the costs of doing business?

Before we start, I should note that there are some general reasons to believe that they do not. There are, in fact, good reasons for thinking that Article 2 is no better at dealing with commercial realities than the system it supplanted.

First, as noted above, the drafters of the Code undertook no serious empirical research before they went about rewriting the whole face of commercial law, and some (like Gilmore) were very nearly ignorant of the subject before they started work. For these drafters, "[t]he library and the armchair were . . . more attractive than the market place and the courts."[60] This is a weakness for a statute that is supposed to be based not on what legal experts discern by reading cases, but on the actual practices of business people. To the extent that the drafters received input from actual merchants engaged in actual business practices, the merchants turned out to be opposed to most of the innovations.[61] Llewellyn, the principal draftsman, was noted

---

[59] *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 99–100 (1989) (arguing that default rules should be set in such a way as to compel parties to disclose information to each other to increase efficiency).

[60] TWINING, *supra* note 7, at 58.

[61] Llewellyn's struggle to convince merchants of the usefulness of his innovations is detailed in Wiseman, *supra* note 18, at 519–38.

for his aversion to fieldwork, and had a total of two years of law practice as a very junior associate doing bank work during the Harding Administration.[62] He does not seem to have been regarded by the practicing lawyers as having much familiarity with commercial practice.[63]

Second, one of the great virtues of the common law, as Llewellyn himself recognized in other contexts, is its flexibility to adapt to changes in practice.[64] A justification for the new Code was that the old Uniform Sales Act of 1906[65] had already become "outdated" by 1940.[66] But, our present Article 2 is a 1960s enactment of a 1950s statute largely written in the 1940s and reflecting the ideas of the 1930s. There is at least some reason to suspect that there might be problems in fitting today's vibrant and developing world of business into a Procrustean bed designed for a World War II economy.[67]

Third, since the enactment of the Code, the part of the national economy subject to its provisions has not been noticeably more efficient or productive than the parts that remain shackled to the bad old common law. The explosive growth in the services and software sectors, and the boom in real estate, all of which are outside the Code's scope, seem not to have suffered from the lack of a modern statute that reflects "commercial reality."

Fourth, the sales of nearly every good complicated or expensive enough to warrant a written contract (sales of goods over $500 must be in writing to be enforceable under the Code) are done on forms that explicitly reject many or all of the key provisions of Article 2. Realists liked to claim that the old common law and the Sales Act had been based on a "prototypical" face-to-face exchange that did not involve future promises, while "modern" reality was that most commercial contracts were done at a distance and involved future performance.[68] Yet it is precisely these face-to-face nineteenth century transactions (*e.g.*, customer buys groceries at a store and brings them home) in which the parties are most likely to get the Article 2 default rules, and the

---

[62] TWINING, *supra* note 7, at 101, 155. In co-authoring his book on the legal institutions of the Cheyenne, Llewellyn spent a total of ten days in the field with the Cheyenne, leaving the rest of the work to his colleague. The book is K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

[63] Kamp, *supra* note 17, at 394.

[64] TWINING, *supra* note 7, at 5–6.

[65] Uniform Sales Act, *reprinted in* JOHN BARKER WAITE, THE LAW OF SALES 285–336 (1921) [hereinafter U.S.A.].

[66] John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 357 (1987).

[67] Maybe Karl Llewellyn was prescient enough in 1941 to design a fixed and largely unchangeable uniform code that better reflects actual commercial practice in 2006 than a system the common law courts would have evolved—or maybe not.

[68] Wiseman, *supra* note 18, at 475–76.

modern model (*e.g.*, ordering a computer over the Internet) in which the default rules will be almost entirely unimportant. Any review of the purchase orders used by sophisticated buyers and sellers will suggest that few of them are comfortable with the default terms of the Code.

Fifth, in retrospect it is clear that the drafters of Article 2 were wildly wrong about the likely litigation costs under the Code. Llewellyn himself thought that under his system litigation would "wither away."[69] That has not happened. A fixed rule riddled with exceptions may be cumbersome and annoying and lead to unnecessary litigation, but it turns out that replacing it with a "reasonable" standard—as the Code frequently does—does not cut litigation costs.

Sixth, actual merchants who have sales disputes have been fleeing the courts in record numbers since the Code was adopted, opting for arbitration instead of putting their disputes in front of the wise and learned judge applying Llewellyn's Article 2. Litigation costs are certainly a major reason for the move, but it is striking to see how many business people want to run away from a "business-friendly" statute ostensibly designed to carry out the real intentions of the parties. Significantly, this is true not only in business-to-consumer transactions, where we might suspect the stronger party to take advantage of the weaker, but even in business-to-business deals between large and sophisticated enterprises. Interestingly, when business people set up their own arbitration regimes, they seem to follow legal rules that often vary a great deal from Llewellyn's concepts of business reality.[70]

I am not saying here that Article 2 is responsible for the relative decline of the American manufacturing sector or the drastic reduction in commercial law cases that reach the courts. I am merely pointing out that when we strip away the rhetoric there is no obvious evidence that Article 2 is a more commerce-friendly law than the system it displaced, and there is no particular reason to conclude that it has been more successful than would a system based on the common law, a moderately updated Uniform Sales Act, or specific legislation dealing with particular problems.

To illustrate the points that I am making, I will focus on four areas. To a much larger extent than is usually acknowledged, Article 2 is simply a recodification of the prior common law and Sales Act rules. The received view is that the Sales Act was "a monument to the conceptual thinking inherent in Langdellian legal science," and "void of any workable rules."[71] Yet a great many features we teach in Article 2 exist in nearly identical form

---

[69] Kamp, *supra* note 12, at 381.

[70] *See, e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769–70 (1995) (describing how merchants interpret contracts in their own arbitration system).

[71] DiMatteo, *supra* note 54, at 429.

in the Sales Act. Take, for example, the question of what happens when the parties have obviously made a contract but the price has not been agreed to. Here is the U.C.C. provision:

> The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.[72]

Here is the provision from the unworkable Sales Act:

> (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.
>
> . . . .
>
> (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case.[73]

The Sales Act language, incidentally, is virtually identical to that in the even more reviled (on this side of the Atlantic, anyway) British Sale of Goods Act of 1893.[74]

There are a great many other pieces of Article 2 that are taken virtually intact from the Sales Act. Among them are the ability to make a contract by any means, including conduct;[75] what counts as an express warranty;[76] the warranties of title, fitness for particular purpose, and merchantability;[77] the power of one with voidable title to transfer good title;[78] the primary duties of buyers and sellers;[79] what counts as a buyer's "acceptance";[80] sellers' self-

---

[72] U.C.C. § 2-305(1) (2002).

[73] U.S.A., *supra* note 65, § 9(1), (4).

[74] Sale of Goods Act, 1893, 56 & 57 Vict. c. 71 (Eng.), *available at* www.attorneygeneral.ie (Search "Sale of Goods Act of 1893"; then follow "Sale of Goods Acts 1893 and Part II of 1980 Restatement" hyperlink).

[75] U.S.A., *supra* note 65, § 3.

[76] *Id.* § 12. The Article 2 version is a little broader, but the concept is very similar. *See* U.C.C. § 2-313 (2002).

[77] U.S.A., *supra* note 65, §§ 13, 15(1)–(2)

[78] *Id.* § 24.

[79] *Id.* § 41.

help rights when unpaid;[81] sellers' remedies of action for the price and damages for non-acceptance;[82] buyers' damages remedy for non-delivery, right to specific performance, and remedies for breach of warranty;[83] and supplementation by the law merchant and other rules of law and equity.[84] Although Llewellyn claimed that the "central concept" of the prior Sales Act "was the present sale of present goods, about which the seller made no promises,"[85] this is simply untrue. Not only did sellers under the Sales Act make future promises very similar to those under the U.C.C., but the statute specifically included goods not yet manufactured or acquired by the seller.[86] If these are not "workable rules," then Article 2 is not workable. If they are rules of Langdellian Formalism, then much of Article 2 is Langdellian. If they are Realist, then Samuel Williston was a Realist.

I will therefore focus on four areas where Article 2 does make major departures from the prior law: (1) the new approach to creating contracts through exchange of forms; (2) reduction of the requirement of certainty and the greater use of default terms; (3) the mandatory merchant duty of good faith; and (4) the vastly increased importance of evidence of merchant practices in setting contractual obligations. Each of these Article 2 innovations worked a minor revolution in contract law. Each of them has been praised for their intent, if not (in the case of the formation principles) the actual embodiment that the intent took. If any part of Article 2 ought to show the Realism of the drafters, it should be these.[87]

A. *Contract Formation*

It may seem unfair to start a critique of Article 2's Realism with its contract formation principles, because even the Code's most ardent fans recognize that in this area its provisions are at best badly flawed. The centerpiece of the Code's formation principles—and one of its biggest

---

[80] *Id.* § 48.

[81] *Id.* §§ 52–60.

[82] *Id.* §§ 63–64.

[83] U.S.A., *supra* note 65, §§ 67–69.

[84] *Id.* § 73.

[85] W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW 133 (1996).

[86] U.S.A., *supra* note 65, at § 5.

[87] Other innovations in Article 2, like the elimination of the concept of title as regards to risk of loss, are in my view relatively minor and could have been achieved by some simple tinkering with the Sales Act. One major innovation is the creation of the explicit doctrine of unconscionablity in section 2-302. From an analytical perspective, this is little more than an explicit reallocation of power between parties, a protective device unrelated to Realism.

innovations—is section 2-207. Even those who admire the drafters' vision criticize the "miserable, bungled, patched-up job"[88] that they actually produced. As one district judge noted:

> Unfortunately, the section resulting from so noble a purpose is uniformly misunderstood and criticized for its obscurity. Referred to as "a murky bit of prose," and "like the amphibious tank that was originally designed to fight in the swamps, but was ultimately sent to fight in the desert," § 2-207 is a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.[89]

The point here is not that section 2-207, as it actually emerged from the drafting rooms, is a mess. The point is that even if section 2-207 worked perfectly, it would not be a "Realist" innovation in any recognizable sense.

1. *The Common Law*

Under the common law, an offer could be accepted only on its own terms. An acceptance that purported to vary the terms of the deal in any way did not count as an acceptance, but instead was a counter-offer. This "mirror-image rule" worked well enough before the development of standard contract forms. But once contracts began to be made by exchange of forms with different terms—known as the "battle of the forms" problem—the rule meant that so long as neither party had performed, there was no contract if the parties' forms contained different terms. If the parties had performed, then the performance acted as an acceptance of the last form sent before the performance, a result usually called the "last-shot" rule.

The common law approach gave rise to two alleged problems. First, a "welsher"[90] might use different terms in the acceptance and offer as an excuse to escape a deal that was no longer attractive on other grounds. This was the fact pattern of *Poel*,[91] where it appears the buyer wanted out because the price of rubber had fallen. Second, the last party to send a form before performance was entitled to its own terms, no matter how one-sided, because of the last-shot rule. A good example of this kind of case is *Vaughan's Seed*

---

[88] Letter from Grant Gilmore to Robert S. Summers (Sept. 10, 1980), *in* RICHARD E. SPEIDEL, ROBERT S. SUMMERS & JAMES J. WHITE, SALES AND SECURED TRANSACTIONS: TEACHING MATERIALS 514 (5th ed. 1993).

[89] Reaction Molding Techs., Inc. v. Gen. Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa. 1984).

[90] While this term may be offensive, there is no ready synonym for it and thus its use persists in commercial circles. *See, e.g.*, James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 727.

[91] Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619, 620 (N.Y. 1915).

Store, Inc. v. Morris April & Bros.,[92] where a buyer was stuck with a seller's disclaimer of warranties because the seller's form was the last one sent before performance.

It is not clear why the drafters were so eager to change these rules. After all, there had been no studies showing that the rules were causing serious problems—or, in fact *any* problems—with commerce. Nor were there even a significant number of anecdotal complaints. When Llewellyn actually talked to merchants, he learned that they did not consider the welsher to be much of a problem.[93] Merchants seem to have expressed no problems with the traditional mirror-image/last-shot rule. This is not surprising, since neither before nor after the Code was promulgated have there been any serious studies on whether or not the mirror-image rule is good or bad. The services, real estate, and intellectual property portions of the U.S. economy have managed to get along with it reasonably well; many sophisticated foreign legal systems use it; the treaty that governs the international sales of goods by U.S. firms adopts it.[94] There seems to be no good reason to believe that the change was necessary to meet any commercial needs.

Whatever reason there is seems to rest on the opinion of Llewellyn and others that the results in particular appellate decisions, like *Poel*, were wrong.[95] Whether or not merchants were concerned about welshers, such malefactors plainly offended Llewellyn's Frank Capra notions of fair play. Merchants told him that they could police the problem of the welsher informally themselves by simply refusing to deal with those who act in bad faith. Nevertheless, Llewellyn wanted to add a *legal* sanction—not because anyone was demanding it, but because it suited his own moral sense.

2. *Section 2-207*

The result was section 2-207, which worked a revolution in contract formation. Briefly stated, section 2-207 reverses the common law last-shot rule. A "definite and seasonable expression of acceptance" will create an acceptance "even though it states terms additional to or different from those offered."[96] Under the common law, if the buyer's purchase order incorporated a warranty and the seller's response disclaimed a warranty—

---

[92] 7 A.2d 868, 869 (N.J. 1939).

[93] Wiseman, *supra* note 18, at 526.

[94] *See* United Nations Convention on Contracts for the International Sale of Goods art. 19, April 11, 1980, 1489 U.N.T.S. 3.

[95] *See* Murray, *supra* note 49, at 1320 (noting that *Poel* was one of the cases Llewellyn had in mind in drafting section 2-207).

[96] U.C.C. § 2-207 (2002).

this was the situation in *Vaughan's Seed Store*[97]—there would be no contract if neither party had yet performed. Either party could at this point back out. If the parties had performed, the seller's warranty disclaimer, included in the last form, would control. Under section 2-207, however, the seller's response would be considered an acceptance even though it disclaimed the warranty, and a contract would be formed even before any performance.[98] The seller's warranty disclaimer would be ineffective because it had accepted the buyer's warranty term and its own clause would be merely a proposal for a modification, which would not be included unless the buyer accepted it.[99] In such a case, a seller who did not intend to warrant its goods and prominently included a disclaimer of warranties in its own form would nevertheless be held to have agreed to give a warranty. This situation is sometimes called the "first-shot" rule, because the party who sends the first form gets the benefits previously enjoyed by the party who sent the last form.[100]

But let us pause for a minute. What exactly does it mean to "accept" an offer? How exactly can a communication that says, in effect, "We will be happy to sell you the goods you requested except that we will not provide a warranty," mean that, "We agree to sell you these goods, including the warranty you request?" To treat a response that contains any but the most trivial alternative terms as an "acceptance" means one of three things. Either (1) we do not care whether one party is willing to be bound by any particular set of terms, because we believe the terms the lawyers put in merchants' standard form contracts are immaterial; (2) we do not care whether one party is willing to be bound because we have for some reason decided to override the party's expressed wishes; or (3) we believe that there is some "agreement" or "contract" out there that has an existence independent of the actual expressions and desires of the parties.

---

[97] *Vaughan's Seed Store*, 7 A.2d at 869.

[98] U.C.C. § 2-207(2) (2002).

[99] I am grossly simplifying the actual workings of section 2-207; the analysis may be complicated by whether the variant terms are considered to be "additional" or merely "different." The complexities and nuances take up about twenty pages in JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 29–48 (5th ed. 2000).

[100] There are some who disagree that section 2-207 adopts a first-shot rule; they offer a version in which both the buyer's and the seller's terms drop out and the contract is made on terms that neither party sought or expected, the default provisions of Article 2. Judge Posner has suggested that this "knock out" rule is the majority position in courts today. *See* Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994). It is fair to say that this approach relies on a loose reading of section 2-207, something to which the Seventh Circuit is prone. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997) (holding that despite its express language and comments, section 2-207 does not apply unless there are at least two forms exchanged).

As to the first alternative, is there any evidence that this is the case? Do business people really not care about the terms they have paid lawyers good money to put in their agreements? Perhaps surprisingly, there have been very few studies of that issue.[101] Llewellyn himself seems to have been firmly of the opinion that most contract boilerplate was inflicted by lawyers on unwitting clients who not only did not need those terms, but who were actually disadvantaged by them. For Llewellyn, "the evil to be avoided was the practice of business lawyers who 'tend to draft to the edge of the possible,' insisting on 'having all kinds of things that their clients don't want at all.'"[102] But there is very little evidence that "clients don't want" the terms their lawyers have included. Some of the most famous contract law cases of the last few decades involve companies spending large amounts of time, effort, and money to enforce boilerplate terms that their buyers claimed did not become part of the contract.[103]

Llewellyn seems to have thought that because business people often resolve disputes informally without recourse to the contract terms, the terms are unimportant to them. But this does not follow. Most international disputes, for example, are solved without recourse to armed forces, but that does not mean that armed forces are irrelevant or that it does not matter to diplomats what forces are available.

Lisa Bernstein and others have shown that there is a difference between what one is *willing* to do, and what one is *willing to be legally bound* to do, and recent studies have shown that business people, when they create their own dispute resolution mechanisms, put much more stress on boilerplate terms than most lawyers would expect.[104] As Llewellyn learned when he

---

[101] One that is still routinely cited is Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), which reflects interviews with only forty-three Wisconsin-connected manufacturers and six law firms during the Kennedy Administration. A recent review of the literature suggests that not much has happened since Macaulay wrote. *See* Russell B. Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033.

[102] John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 887–88 n.86 (2002) (quoting 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT: HEARINGS ON THE UNIFORM COMMERCIAL CODE 49, 113 (1954)). This particular passage actually refers to the unconscionability provision in the proposed section 2-302, but Llewellyn viewed sections 2-302 and 2-207 as different approaches to dealing with a single problem. *See* Murray, *supra* note 49, at 1321–22.

[103] *See, e.g.*, Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585 (1991) (involving choice of forum provision printed on cruise ship ticket); *Hill*, 105 F.3d at 1147 (involving arbitration clause contained in booklet that was delivered to the buyer with a computer); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (involving a software license enclosed within a box of off-the-shelf software).

[104] *See* Bernstein, *supra* note 70, at 1791–92; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L.

tried to foist a rule of "substantial performance" on merchants in lieu of the perfect tender rule,[105] there is a difference between a merchant's willingness *to accept* a defective shipment and a merchant's willingness to be *forced to accept* a defective shipment.

With respect to the second possible reason, what exactly is the policy reason for imposing a contract in a situation where neither party has yet performed and they do not agree on their terms? After all, if boilerplate terms are unimportant, merchants who lose a few sales when the other party backs out will soon stop putting them on their forms. Why is society better off by imposing legal liability instead of letting the parties go their own ways? Why are scarce public resources devoted to solving a problem the parties could have solved easily themselves? If this is a specific normative choice, we ought to be able to see clearly what the reason is, but the literature is remarkably scant on this issue.

The third reason seems to imply that the agreement of the parties is something other than what the parties have, themselves, actually expressed. The Code refers to this curious concept as the "bargain in fact."[106] John Murray—certainly the leading authority on section 2-207—explains it this way:

> Llewellyn was concerned with the "bargain-in-fact" of the parties and believed that the identification of the factual bargain (the agreement) of the parties should not be fettered with technical rules of pre-Code classical contract law, because the application of these technical rules might well lead to a failure to recognize the true agreement or understanding of the parties. Article 2 can be appreciated only with an understanding of this underlying philosophy.[107]

There is something eerily metaphysical about this explanation. Floating somewhere out there, independent of what the parties themselves have said, there is some "true agreement" of the parties. A wise judge, like any good tribal shaman, can discover the "true agreement" hidden in the hearts of the parties, despite what the parties themselves have actually said. In the world of the "bargain in fact," a seller who has disclaimed a warranty in the clearest possible language has nevertheless managed to "agree" to give the buyer a warranty.

This "bargain in fact" is a fiction. It is, moreover, a fiction that masks what is actually happening: contractual liability is being imposed on a party in the complete absence of that party's agreement. There may be good

---

REV. 710, 713 n.13 (1999).

[105] Wiseman, *supra* note 18, at 526–27.

[106] U.C.C. § 1-201(3) (2002).

[107] JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 10 at 23 (4th ed. 2001).

reasons for doing this. There may be situations where it is unavoidable. But we are not saying clearly what we are doing. Instead of saying forthrightly, "for the following good and sufficient reasons we are going to impose contractual liability on you even though you have not agreed to it," we pretend that on some astral plane you have actually agreed to the imposition.

3. *Reality and Rhetoric*

Why this resort to subterfuge? I suspect that it is because if it were necessary to spell out the "good and sufficient reasons" why liability should be imposed, the drafters would have been hard-pressed to come up with reasons that would have impressed the ostensible consumers of their new Code, the merchant community. Indeed, the drafters would have been hard pressed to come up with any plausible reasons why a first-shot rule is superior to a last-shot rule, or why a knock-out rule, sticking parties with terms neither wanted, might be superior to either.[108] By acting as if we are somehow not imposing terms on the parties, but rather carrying out their own secret desires, we can avoid these troublesome questions.

Let us take a conventional explanation for why the mirror-image rule had to be discarded. This is Murray again, in one of his justifiably well-known and influential articles on section 2-207:

> The *Poel* case exemplified the "battle of the forms" problem, which Karl Llewellyn "dearly loved." During the New York Law Revision Commission's study of the Uniform Commercial Code, Llewellyn stated: "Those unhappy cases which find a condition where no businessman would find one are carefully disapproved." A reasonable seller in the *Poel* situation would not have discovered any condition to the buyer's acceptance expressed in the purchase order response to the seller's offer. A technical bar to finding a contract led the court of appeals to find that no contract had been made. The parties' factual bargain was ignored. The buyer was permitted to operate in bad faith, and the result unfairly surprised and oppressed the seller.[109]

When we read this passage closely, however, it boils down to a series of conclusions and adjectives.[110] There seems to be some underlying and

---

[108] It has been argued that section 2-207 does not even do a better job at dealing with the welsher problem than did the old mirror-image rule. *See* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1223 (1982).

[109] Murray, *supra* note 49, at 1318.

[110] Note the use of the value-loaded phrases "technical bar," "factual bargain," and "oppressed." It is unusual to think of New York commodity dealers as a group particularly subject to oppression.

unstated normative view here, but it is not out in the open. At issue in *Poel* were the buyer's prominently labeled "CONDITIONS" on its form.[111] The form noted that it was not clear that firm delivery dates had been agreed to, and one of the conditions demanded prompt acknowledgment of the order as a guarantee that delivery dates could be met.[112] These provisions were included on the very purchase order the buyer had submitted to the seller. Why would a "reasonable seller" not be aware of them? Given the doubt expressed by the buyer, what was the "factual bargain" as to when the rubber would be delivered, the dates previously mentioned or some others? Would a seller have been bound even if it had said in response to the inquiry that it could not deliver on those dates? If a buyer had not received the prompt acknowledgment and decided to buy its rubber elsewhere, would it still be on the hook?

> Thus, [continues Murray] the holding in *Poel* was diametrically opposed to the underlying philosophy of what was to become Article 2, and the case provided an excellent illustration of why classical contract law needed to be modified substantially in the new contract law Llewellyn contemplated. This new contract law would insist upon recognizing the contract as reflecting the "commercial understanding" of the parties. If the parties reasonably believed that their deal "has in fact been closed," it would be treated as having been legally closed, regardless of classical contract law's technical shackles. The paradigm would be an offeree's response that, to a reasonable merchant, appeared to be an acceptance even though the response contained terms that varied the terms of the offer. Notwithstanding such variant terms, if a reasonable offeror would view the response as an acceptance, it would be an acceptance.[113]

Note here the use of "commercial understanding," as if it has some obvious and ascertainable independent meaning, and "the parties reasonably believed their deal 'has in fact been closed,'" as if we have some method of reading their minds apart from their exchange of correspondence. And why have we decided that the key is what the *offeror* thinks? Why isn't the test whether the *offeree* thinks it has accepted the offer? Is there some particular reason to privilege the offeror in these circumstances? What reason is there to decide that offeree *A* is bound simply because offeror *B* reasonably thinks *A* is bound?

This passage illustrates the problem with the Realist rhetoric. Under section 2-207 we are, for *some* reason, going to impose liability on the buyer in *Poel*. But talking about "commercial understandings" and the "reasonable

---

[111] Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619, 621 (N.Y. 1915).

[112] *Id.*

[113] Murray, *supra* note 49, at 1318–19.

beliefs" of two parties who have said different things does not help us to understand why we are doing so.

B. *Uncertainty and Default Terms*

A second major innovation of Article 2 is its abandonment—or at least its minimization—of the common law requirements of certainty.

1. *The Common Law and the Uniform Sales Act*

At common law, the rule was that for a contract to be enforceable its terms had to be reasonably definite. Where the parties themselves had not agreed, a court could not in most cases supply a term. As the New York Court of Appeals put it:

> It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to.[114]

Thus, common law courts regularly denied effect to contracts where it was not clear exactly what the parties had agreed to. In *United Press v. New York Press Co.*, for example, the contract was to provide news services for eight years at a monthly price "not exceeding $300 a week," but the court found the clause too indefinite even though the buyer had paid exactly $300 a week for nearly two years before backing out of the deal.[115] In *Fairplay School Township v. O'Neal*, a contract between a school board and a teacher that the latter would work for one year for "good wages" was held unenforceable on the ground that no one could tell exactly what "good wages" were, the court noting in passing that even "fair wages" would have been insufficiently certain.[116] In *Dayton v. Stone*, a contract to sell all the goods and fixtures of a store was held too indefinite because the parties could not agree on the price to be paid for certain damaged merchandise.[117] The result was similar in *Bluemner v. Garvin*,[118] which involved an agreement to "fairly share" a building commission with the architect who designed the building.[119] In situations where performance had been rendered, such as in

---

[114] United Press v. N.Y. Press Co., 58 N.E. 527, 528 (N.Y. 1900).

[115] *Id.* at 527, 529.

[116] Fairplay Sch. Twp. v. O'Neal, 26 N.E. 686, 686–87 (Ind. 1891).

[117] Dayton v. Stone, 69 N.W. 515, 516 (Mich. 1896).

[118] 104 N.Y.S. 1009 (N.Y. App. Div. 1907).

[119] *Id.* at 1010.

Bluemner, these common law courts would grant a quantum meruit recovery. Where the agreement was still executory, as in *United Press* and *Fairplay*, the court would leave the parties to go their own ways.

Certainly the common law and the prior statutes relating to sales of goods did not require absolute certainty. As noted above, the "outdated" Uniform Sales Act actually had a number of default provisions, many similar to those in the Code, that courts would supply if the parties did not. Thus, if no time for a particular act was fixed, courts would assume that it must be done "within a reasonable time."[120] If the parties did not specify a place for delivery, it was the seller's place of business.[121] If the parties did not specify a price, courts could supply it through prior course of dealing or even, in some circumstances, "a reasonable price" found by the court as "a question of fact."[122]

2. *The Article 2 Approach*

Such default rules seem to have been used relatively sparingly. It was one of the goals of the Code's drafters to avoid the results of cases like those above, in which parties escaped liability on the grounds of indefiniteness. Why? The most likely reason is concern about the same welsher problem that motivated the drafting of section 2-207. As with section 2-207, there seems to be no evidence that the commercial world was seriously troubled by this situation. The kinds of cases where the contract was held to be unenforceable for indefiniteness tended to be either those like *Dayton*[123] and *Wittkowsky & Rintels v. Wasson*,[124] where it was unclear that the parties had reached a definitive deal, or those like *United Press*[125] or *Fairplay*,[126] where the parties themselves could have easily avoided the problem by simply naming the price or providing a formula instead of using phrases like "good wages"[127] or "not exceeding."[128]

---

[120] U.S.A., *supra* note 65, §§ 19(3), 44(2), 48 (1906).

[121] *Id.* § 43(1).

[122] *Id.* § 9(4).

[123] Dayton v. Stone, 69 N.W. 515 (Mich. 1896).

[124] 71 N.C. 451, 456 (1874) (holding that where parties had specified neither a price nor a means by which a price could be computed, there was no contract).

[125] United Press v. N.Y. Press Co., 58 N.E. 527, 528 (N.Y. 1900).

[126] Fairplay Sch. Twp. v. O'Neal, 26 N.E. 686, 687 (Ind. 1897).

[127] *Id.* at 686.

[128] *United Press*, 58 N.E. at 527. If the parties resorted to such terms because they could not agree on an appropriate figure, there is even less reason for a court to pick one for them, since there was never any agreement on the subject at all.

Allowing defendants in these cases to escape liability may certainly have allowed some parties to renege on their own commitments. The potential for bad faith is nicely illustrated by that contracts casebook staple, *Varney v. Ditmars*,[129] in which an employer induced a worker to stay with him through the holidays by promising him a "fair share" of the profits.[130] The employer later fired the employee and refused to pay any profits, and the court held that the agreement was too indefinite to be enforced.[131] But the potential for bad faith was, in practice, seriously undercut by the availability of quantum meruit recovery in cases like *Varney*[132] and *Bluemner*[133] where services had actually been performed.

Despite the lack of any groundswell of commercial need, Article 2's solution to the problem is the formation provision in section 2-204. The provision says: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[134] It goes on to state in subsection 3: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[135] A later provision makes it very clear that, contrary to cases like *United Press*, the contract is not too indefinite merely because the parties have not agreed on either a price or a method for calculating it.[136]

Let's look at this more closely. A contract for sale, it says, does not fail for indefiniteness if "the parties have intended to make a contract."[137] What does that mean? It seems to suggest that the intent of the parties—*both* parties—is to play some significant role in the process. But a "contract," says the Code, "as distinguished from 'agreement' means the total legal obligation that results from the parties' agreement as determined by [the U.C.C.] as supplemented by any other applicable laws."[138] It sounds like the parties' "agreement" is only a part of the "contract." What does it mean for parties to have intended a "total legal obligation" that is greater than their agreement?

That depends on what the Code means by "agreement." An "agreement, as distinguished from 'contract,' means the bargain of the parties in fact, as

---

[129] 111 N.E. 822 (N.Y. 1916).

[130] *Id.* at 823.

[131] *Id.* at 825.

[132] Varney v. Ditmars, 111 N.E. 822 (N.Y. 1916).

[133] Bluemner v. Garvin, 104 N.Y.S. 1009 (N.Y. App. Div. 1907).

[134] U.C.C. § 2-204 (2002).

[135] *Id.*

[136] *Id.* § 2-305.

[137] *Id.* § 2-204.

[138] *Id.* § 1-201(12).

found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade."[139] The parties have "intended to make a contract" for purposes of section 2-204 if they have intended to enter into a "total legal obligation" that results from some kind of bargain in fact, as found by the court in their language or inferred by the court from other circumstances, as determined by the Uniform Commercial Code or "any other applicable law."

Boiled down to its essence, this means that the parties have "intended to make a contract" if the court decides that they have actually entered into a relationship that the court concludes is a contract, even if they each believe they have agreed to something different, and even if one or both do not believe they have a deal at all.[140] As noted above, it is hard to see how sellers who believe they have sold goods "as is," disclaiming all warranties, can be said to have "intended" to enter into a contract in which they provided a warranty of merchantability. Under section 2-204, the seller's actual intent to assume any part of this "total legal obligation" turns out to be irrelevant. The parties have made a contract if the court concludes that they have made a contract.

The second part of section 2-204(3) also has problems. It says that a court can enforce a contract if there is a reasonably certain basis for giving an "appropriate remedy."[141] But exactly what remedy is "appropriate"? Does it depend on what the parties have agreed to? If so, then finding that a seller has given a warranty when the seller plainly tried to disclaim it would be inappropriate. If not, then we ought to admit that we are not looking at the actual agreement of the parties at all—certainly not to some fictional "bargain in fact"—but to some general norms that we have decided for some reason to impose by legislation on parties. It may be a good thing to impose warranty obligations on sellers who disclaim them, or to deny warranties to buyers who think they have them, but it has nothing to do with the "intent" of the parties.

One obvious reason for imposing obligations on unwilling parties might be that in some cases it is impossible for the parties to walk away from the deal. If a buyer of grain thinks it got a warranty of merchantability and the seller thinks it did not give one, and the grain has already been baked into bread that is not saleable, one party will inevitably be stuck with a contract term it did not agree to. Some policy other than the intent of the parties needs to be resorted to. But the policy issues in cases like that are very different

---

[139] *Id.* § 1-201(3).

[140] At the time the negotiations are underway, at any event. After the fact, a party may have reason to claim a deal had in fact been struck when subsequent events make it advantageous to do so.

[141] U.C.C. § 2-204 (2002).

from those in a case like *Nora Beverages, Inc. v. Perrier Group of America, Inc.*[142] *Nora Beverages* involved an entirely executory undertaking in which draft contracts were circulated but never signed, no goods were ever delivered, and the parties had not even agreed on the duration of a proposed multi-year contract or the quantities that would be supplied each year.[143] Yet the court managed to find an enforceable contract that bound the buyer.[144] There may be good reason for courts to create contracts for parties who have not themselves agreed to them, but the reasons for such decisions ought to sing out, not lie hidden in pretense about the "intent" of the parties.

C. *Good Faith*

One of the major innovations of the Code is the creation of a standard of merchant "good faith" in contracting. Merchant "good faith," for purposes of Article 2, means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[145]

1. *Common Law*

At common law there is generally no obligation to deal with another in good faith, at least insofar as there is no dishonesty or deliberate intent to harm the other party, and no fiduciary relationship between the parties. Under classic contract law, a party was free to break off negotiations for any reason, including getting a better price from someone else. A party was also free to take actions under a contract in the party's own economic interest without regard to the effects on the other party, so long as it complied exactly with what it promised to do.

Obviously, the law of fraud and various equitable doctrines like estoppel provided some limitations on this doctrine, but by and large the only duties parties owed each other were those that were reflected in their contract.[146] If a party carried out its contractual obligations to the letter, then it had no other duties to the other party. And it was irrelevant if the party breached its agreement, its good faith, or lack thereof. The extreme version of this idea is

---

[142] 164 F.3d 736 (2d Cir. 1998).

[143] *Id.* at 747–48.

[144] *Id.* at 752.

[145] U.C.C. § 2-103(1)(b) (2002).

[146] There were also a small number of cases where a good-faith duty was imposed as the means of finding consideration and making a deal enforceable at all. The most famous example is *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917).

reflected in Holmes's observation that a contract was, in effect, an option, and that the party could choose either to perform or to pay damages.[147]

2. *Good Faith in Article 2*

One of Llewellyn's most cherished goals in enacting the Code was to create a duty of good faith that would apply among merchants. Consistent with his views about the welsher (and his concept of Jimmy Stewart in *It's a Wonderful Life* as the prototypical business person), Llewellyn was deeply concerned with what he considered to be predatory business people who would abuse the rules of contract to gain unfair advantages over others. He wanted to promote "mercantile decency" and to protect merchants against "mercantile injustice"[148]

Again, the question is why? After all, there are a great many areas of life in our society where there is no enforceable duty of good faith. My wife need not act in good faith in deciding to abandon me for another man. I am not legally bound to act in good faith in refusing to pay private school tuition for my son. My mother need not act reasonably or in good faith when she decides to leave her property to my brother, or St. Jude's Hospital, or her cat. The politician for whom I vote has no enforceable obligation to act in good faith, nor does the newspaper reporter who attacks the politician, so long as he or she sticks scrupulously to the truth. I have no good faith obligation to refuse a better offer from my employer's competitor—no matter how much harm my departure will cause—nor, in most jurisdictions, does my employer have a good faith duty to keep me if it finds a better or cheaper replacement.[149] Since I am not a merchant, I have no duty of good faith (beyond mere "honesty in fact") to my best friend when I sell him my lemon of a car. Of all of these various social situations, the one in which we are *least* likely to expect one party to act in good faith to protect the interests of the other party is an arm's length commercial sale of goods transaction between sophisticated firms. Yet this is precisely the area where Llewellyn wanted to impose a duty of good faith.

Why do we have such a rule for merchants? Had those involved in commerce discovered any pressing need for it? Were victimized merchants clamoring for legal protection from competitors who act in bad faith? No. In fact, so far as there is evidence from the time, they were adamantly opposed to any such idea:

---

[147] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

[148] Wiseman, *supra* note 18, at 510.

[149] Unless, of course, the quitting violates a specific term of the agreement, or the firing violates the agreement or some statutory protection.

> Bernard Broeker, who represented Bethlehem Steel, expressed the hard-bargaining mood of business: "I see no reason why I should not be allowed to make an unreasonable contract . . . . Quite often I know each party to a contract thinks there are some unreasonable provisions in it, but it is the best deal he can make." As to the good faith requirement, the American Bar Association's response was "Why should the Code draftsman tell us to be good?" Business did not want any increase in potential liability, created . . . by an objective good faith requirement . . . .
>
> Business expressed its desires positively by positing the goal of freedom of contract. Any proposed regulatory legislation was judged by whether or not it restricted business's freedom to operate.[150]

The lack of enthusiasm among businesses may be due to the knowledge that claims of bad faith are not always brought by the just against the unjust.[151]

Nevertheless, Llewellyn fought for and ultimately got his "good faith" standard. "Every contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance and enforcement."[152] Merchants were now required to act not only honestly, but in accord with "reasonable commercial standards of fair dealing in the trade."[153] This obligation, moreover, is mandatory. It cannot be waived even by the voluntary agreement of sophisticated parties bargaining at arms'-length.[154] Such parties will, it is true, have some flexibility to adjust the duties of good faith, but only if their agreement is not "manifestly unreasonable."[155] Thus Mr. Broeker of Bethlehem Steel *might* be able to agree to an "unreasonable" contract, but not a "manifestly unreasonable" one. Article 2 provides little guidance on the difference between the two.

3. *The Realism of Good Faith*

Given the lack of evidence that any provision like this was needed to protect merchants, and the opposition of the merchants themselves, this provision plainly has to be based on something else. What is that basis? Perhaps there was some feeling that a commercial system with an enforceable good faith obligation would be more economically efficient and

---

[150] Kamp, *supra* note 17, at 374 (footnotes omitted).

[151] The amorphous and fact-bound nature of the "good faith" inquiry makes it difficult to dispose of on summary judgment, which makes it a perfect tool for those who want to raise non-meritorious claims and defenses.

[152] U.C.C. § 1-304 (2004).

[153] *Id.* § 2-103(1)(b) (2002).

[154] It is one of the few Article 2 obligations that cannot be disclaimed. *See id.* § 1-302(b).

[155] *Id.*

better for merchants in general than one without. But given the strong opposition of merchants themselves, we would need some actual evidence to override their own views, and we have none.

Some kind of good-faith obligation to consumers by merchants would make sense as a consumer-protection provision. But that is not what this is. This applies—and was obviously intended specifically to apply—to arm's length transactions between merchants.

We might try to justify it on the ground that there is a general, legally enforceable norm that people must act in good faith toward each other, but there obviously is not. Even if we narrow it to a claim that people ought to act in good faith in business transactions, there is again no such norm. Non-merchants (like you, me, and Llewellyn himself) have no similar obligations, even when dealing with consumers. We need only show "honesty in fact," an obligation already covered by the fraud rules. The lack of this particular social norm is nicely illustrated by the fate of Revised Article 1, which sought to impose the good faith requirement on non-merchants through its new section 1-302. The storm over imposing such an amorphous and potentially hazardous obligation on ordinary voting human beings was impressive; and several states that have enacted Revised Article 1 have refused to apply the good faith standard to non-merchants.[156]

One possible explanation is that Llewellyn regarded this "good faith" obligation as already part of the law, although applied *sub rosa*.[157] But even in the unlikely event that Llewellyn's view was accurate (and it is clear that his merchant critics did not agree) we would still need a singing reason for the rule. Llewellyn would have been the last person to conclude that a rule was desirable because it was already a rule.

So we have to have some explanation as to why Bethlehem Steel must, under penalty of legal compulsion, act in good faith when it deals with General Motors, but I do not have a similar obligation to act in good faith when I sell my car to my neighbor or decide how to educate my children.[158] The reason for the rule does not merely fail to sing out clearly—it is keeping its mouth tightly shut.

---

[156] *See* Posting of Keith Rowley to ContractsProf Blog, http://lawprofessors.typepad.com/contractsprof_blog (July 7, 2006).

[157] Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1935 (2005).

[158] There certainly are legal obligations that I must satisfy with respect to my children. But there is a considerable difference between those obligations and a general duty to act in good faith toward them. Similarly, there are explicit legal obligations that apply to the way Bethlehem Steel conducts many aspects of its business. The question is why an additional over-arching "good faith" requirement—independent of any specific obligations—applies to Bethlehem but not me.

D. *Trade Usage, etc.*

A fourth major innovation in the Code is its explicit emphasis on looking at the specific commercial setting of a given transaction. Under the Code, evidence of "course of performance" (how the parties have behaved in performing the contract at issue), "course of dealing" (how the parties performed on prior contracts between them), and "trade usage" (how other parties perform on similar contracts) play a different and more important role than they did under the common law. For convenience, I will generally refer to this as "usage" evidence.

1. *Common Law*

At common law, usage evidence was regularly introduced to prove or explain the terms of a contract. All contracts, after all, are struck against a background not only of the local legal system, but of the parties' past relationship and the ways in which business is conducted in the locality. Common law courts were, and are, generally favorable to such evidence:

> When there is such an established usage, it becomes the law of the trade, and applies to the dealings of the parties, controlling them in the same manner as the statute or common law in ordinary cases. It must, however, have been continued for such length of time as to have become generally known to those engaged in the trade and so general as to have become the settled rule of commercial intercourse, in the absence of any special agreement or particular course of dealing between individuals which form exceptions to the general rule prescribed by usage. The usage and custom of any particular trade is the law by which it is to be regulated.[159]

Thus, for example, local custom supplied the rule whether grain could be shipped on deck or had to be stowed in the hold under a bill of lading that was silent on the subject;[160] the meaning of policy provisions in a maritime insurance policy might depend on the usages of a particular ship's port;[161] and the customs of local carriers were admissible to decide whether a shipboard fire was a "danger of the river" that allowed a carrier to escape liability.[162]

---

[159] York v. Wistar, 30 F. Cas. 821, 822 (C.C.E.D. Pa. 1834) (No. 18,141).

[160] *See* Chubb v. Seven Thousand Eight Hundred Bushels of Oats, 5 F. Cas. 663 (S.D.N.Y. 1864) (No. 2709).

[161] *See* Hazard's Adm'r v. New England Marine Ins. Co., 33 U.S. (8 Pet.) 557, 580–81 (1834).

[162] *See* Sampson & Lindsay v. Gazzam, 6 Port. 123, 133 (Ala. 1837).

At common law, such evidence was much more restricted when the parties had reduced their agreement to writing. Under this "parol evidence rule," courts believed that where the parties had taken the time and effort to express themselves in writing, the writing was the best evidence of what they actually intended. Other forms of evidence would thus be barred to supplement or contradict an integrated written contract. Parol evidence of such things as trade usage might still be relevant, but on much narrower issues, such as the meaning of a particular term. Where the parties had expressed themselves in writing, trade usage was no longer the "law" by which the parties' deal would be regulated, but merely an aid to construction of the written agreement. Here is Justice Story's take on the issue:

> [Usage evidence] may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter, to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, a fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would . . . allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties.[163]

Thus, this evidence under the pre-Code law functioned as a kind of backstop when a written contract was at issue, filling obvious gaps and interpreting particular terms. This was its role under the Uniform Sales Act, which permitted "course of dealing" or "custom" to vary the ordinary legal rules that would apply to the contract, but not to vary the express language of the agreement.[164]

This still left a good deal of room for such evidence, though. In the 1937 case of *Hurst v. W. J. Lake & Co.*,[165] for example, a contract term allowed a buyer of horse meat scrap a discount of $5 per ton for any scrap that "analyzes less than 50% of protein."[166] The buyer claimed the discount for

---

[163] The Reeside, 20 F. Cas. 458, 459 (C.C.D. Mass. 1837) (No. 11,657) (involving delivery of oil by ship under a bill of lading).

[164] U.S.A., *supra* note 65, § 71.

[165] 16 P.2d 627 (Or. 1937).

[166] *Id.* at 628.

scrap that analyzed between 49.53 and 49.96 percent.[167] The seller successfully argued to the court that a local trade usage specified that when horse meat dealers wrote "50 percent," they actually meant "49.5 percent."[168]

2. *Usage in the U.C.C.*

Llewellyn and the other drafters rejected this relatively modest use of usage evidence as an adjunct to contract interpretation. Instead, they preferred a system that gave it much more importance, allowing it even to trump the plain language of the parties' agreement. Under the U.C.C., usage evidence is always admissible to supplement or vary the terms of a contract, no matter how detailed and explicit those terms are, and even if the written agreement disclaims such evidence.[169] The very definition of "contract," as noted above, includes not only the "agreement" of the parties but also the "course of dealing or usage of trade or course of performance."[170] These "must be given due consideration" in defining the obligations of the parties.[171] A merchant's description of goods must always be read against "the applicable trade usages."[172] An explicit promise may be varied by a showing of "commercial leeways in performance" derived from usage of trade.[173] Usage of trade may vary the Code's own default rules that would otherwise be applicable.[174] It may give rise to implied terms, such as warranties,[175] or exclude terms that would otherwise be implied.[176] It may restrict the rights of a seller to protect itself in the event of breach.[177] In short, under Article 2, courts must always take usage evidence into account.

The classic illustration of the role this evidence plays under Article 2 is the Ninth Circuit's well-known decision in *Nanakuli Paving & Rock Co. v. Shell Oil Co.*[178] In the case, the plaintiff had a long-term supply contract under which it agreed to buy its asphalt from Shell at Shell's regular "posted

---

[167] *Id.*

[168] *Id.* at 629.

[169] *See* U.C.C. § 2-202(a) (2002).

[170] *Id.* § 1-201(3).

[171] *Id.* § 2-301 cmt.

[172] *Id.* § 2-313 cmt. 5.

[173] *Id.* § 2-106 cmt. 2.

[174] *See, e.g., id.* § 2-308 cmt. 4 (treating trade usage as "agreement" of the parties to vary the default terms).

[175] *See* U.C.C. § 2-314(3) (2002).

[176] *See id.* § 2-316(3)(c).

[177] *See id.* § 2-706 cmt. 4 (explaining that U.C.C. section 2-703(2) enables the seller to use the remedy of resale "in accordance with reasonable commercial practices").

[178] 664 F.2d 772 (9th Cir. 1981).

price."[179] When Shell's posted price went up substantially in 1974—likely due to the crisis arising from the OPEC oil embargo—the plaintiff sued, claiming that a usage of trade among "material suppliers to the asphaltic paving trade in Hawaii"[180] required Shell to provide "price protection" to it, and thus in effect to sell it the asphalt at a price substantially less than the posted price at which it sold to everyone else. The court agreed, holding that evidence of what Nanakuli's other suppliers had done and of two prior occasions on which Shell had delayed a price increase amounted to usage of trade and course of dealing that added this particular term to the contract.[181] Interestingly, had Nanakuli not had an existing contract with Shell (which specifically required payment of the posted price) it would presumably have had to pay (like everyone else) Shell's posted price if Nanakuli wanted any asphalt.[182] On reading the case it is difficult to imagine any way that Shell could have insisted on its posted price, because evidence that other sellers of supplies to Nanakuli gave such discounts would have been admissible no matter how ironclad its language and how strict its prior insistence.

3. *The Realism of Usage*

What exactly is the justification for a decision like this?[183] Llewellyn would likely point out that there are plenty of situations in which people who enter into contracts use words in unconventional ways. The classic example is the trade usage that says a "two by four" piece of lumber will actually measure 3.5 x 1.5 inches.[184] There are other situations where this may be the case—a "pound" of caviar means 14 ounces, say, or an "ounce" of platinum means a "troy ounce," not an avoirdupois ounce.[185]

But the question is not whether people sometimes use terms in their agreements in a way different from their normal use. The question is rather

---

[179] *Id.* at 778.

[180] *Id.* Shell argued that asphalt was different than the other supplies used by paving companies, like crushed rock (presumably because petroleum prices fluctuate much more than do prices for rock), and thus that the relevant trade should be asphalt producers, not paving suppliers. The court disagreed.

[181] *Nanakuli*, 664 F.2d at 793.

[182] The "posted price" is the price at which the seller is generally willing to sell to all takers.

[183] Other than the fact that Nanakuli was a local outfit playing on its home turf, and no one likes giant international oil companies.

[184] *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 787 (2000).

[185] *See* Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 n.12 (3d Cir. 1980).

whether courts should give effect to such different meanings offered by only one of the parties after the fact when the term in the contract has an otherwise plain meaning. For Llewellyn and most modern commercial law scholars, the answer is obvious: yes. We are, after all, trying to carry out the parties' agreement, aren't we? The more evidence we have, the more likely we are to discover the truth. But from a Realist perspective, the question is not that simple.

First, there are considerable costs involved. If we rely on the plain language of the agreement, we run the risk that the result will not be what the parties intended. But if we pick some other meaning or some other term based on the evidence of one of the parties, we run precisely the same risk. The parties in *Nanakuli* might have intended to include price protection as a term of the agreement, or they might not. A decision whether it makes sense to allow usage to trump explicit language means that we have to be confident not only that the judge and jury will be right more often than not, but that they will be right significantly more often than not, given the increased costs of litigating that come from trying to prove such things. Llewellyn had no evidence that this is the case, nor do we.

Second, the ability of parties to contradict plain language itself imposes costs on those who are outsiders to the contract. Take the *Hurst* case, for example.[186] It would have been easy for the contracting parties in *Hurst* to have written "49.5 percent" instead of "50 percent" if that had, in fact, been their understanding. Suppose that there really was such an existing usage, but the case had gone the other way. In this one case, one of the parties would have been treated unfairly. But what would happen next? Presumably all the horse meat scrap dealers in this locality would change their correspondence or their forms to say "not less than 49.5 percent protein." There would be no more disputes about whether 49.5 means 50, and if by chance one surfaced (some dealer, say, did not get the news and changed its terms) its lawyers would realize that going to litigation was a waste of time. By giving effect to the claimed usage between these two parties, on the other hand, the court ensured that this would remain a lively subject of future litigation. After all, if a future claimant wants to come up with evidence that 50 percent really means 45 percent, it will be free to do so. And a future party will be free to argue that there really is no such usage, and that 50 percent means 50 percent.[187]

---

[186] Hurst v. W. J. Lake & Co., 16 P.2d 627 (1937).

[187] Another effect on third parties is shown by the decision in *Nanakuli*. Shell had twice delayed price increases to the plaintiff, allowing it to buy at lower than the posted price for brief periods. The court found that this practice was not simply a nice thing for Shell to have done, but constituted a course of performance that justified imposing the price protection term. *See* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 793 (9th Cir. 1981). If Shell wants to avoid such liability in the future, it will have to stop

Or take the *Nanakuli* case. Assume that there really was such an existing usage that everyone understood, but that Shell nevertheless won. In that case, asphalt users in Hawaii would merely have had to put the price protection term into their contracts. If this really was a widespread and well-understood practice, there should be little difficulty in fixing the forms.[188]

Third, and perhaps most fundamentally, it is doubtful that commercial customs and trade usages are anywhere near as widespread as the Code's drafters believed. How often do business people knowingly enter contracts containing terms that mean something different than what they appear to say on their face? Certainly in consumer transactions, merchants spell out their terms. If they expect twenty-four percent interest and payment by the tenth of the month, they say so, and do not expect that they will have much luck later in court arguing that "twelve percent" really means "twenty-four percent." Are these same merchants less careful when entering into much larger and potentially more costly agreements? How often do the lawyers paid by the merchants knowingly draft terms whose meanings are different than those that would be assigned by an ordinary judge or jury? Why aren't the lawyers reducing litigation risk by using terms that are not open to future litigation? There certainly are plenty of cases where, after the fact, one party *claims* that some trade usage should be read as varying the terms of the deal that the parties appear to have struck. But people who are trying to get out of a contractual obligation have been known to dissemble.

In fact, we know very little about the prevalence of such trade practices. The drafters engaged in no research. The best recent study suggests that the kind of real, well-accepted trade usages that parties invariably rely on are much less common than Llewellyn thought.[189] Lisa Bernstein looked at the historical development of the hay, grain, textile, and silk industries—all of them precisely the sorts of close-knit industries where trade custom would be expected to develop—and found little evidence of the kind of industry-wide norms that Llewellyn imagined.[190] Merchant associations began writing up trade rules, definitions, and standard form contracts *because* there was often no agreement as to the simplest matters.[191] When they tried to draft those

---

giving such breaks to its customers.

[188] Shell, of course, would probably refuse to put the term into its agreement, and the asphalt users would probably lack the bargaining power to insist. But that raises the question of why a party that could not have gotten its term as part of the written agreement ought to be able to get it through the back door as trade usage—other than the fact that we don't like giant international oil companies, of course.

[189] *See* Bernstein, *supra* note 104, at 713 n.13.

[190] *Id.* at 719–39.

[191] *Id.*

rules, they ran into problems because there was, in fact, no general agreement as to which practices were best.[192]

In sum, we do not know how widespread such practices are, we do not know whether the results we get are more accurate when we allow such evidence than when we do not, and we are imposing significant costs on business.

V. "REALISM ABOUT REALISM"[193]

None of these four major changes in commercial law can be justified as noticeably Realist whether we are talking descriptively or normatively. They were not derived from commercial practice, they were not desired by their putative beneficiaries, and their purposes are obscure. Whatever reasons they may have do not "sing out." On the contrary, they lie deep beneath the cloudbank of Realist rhetoric. To determine the real reasons for these rules, we have to dispel the clouds. Let's look at what each of these four changes has in common, and at who benefits from each.

Contract formation.[194] By telling courts to find contracts where offer and acceptance do not match in even purely executory deals, the Code's formation rules ensure that many more transactions will be subject to legal enforcement than was the case under the common law. By replacing the arbitrary but relatively certain last-shot rule with the equally arbitrary but much less certain first-shot rule,[195] they ensure that lawyers will be less able to predict the outcome of litigation and hence will increase the number of disputes likely to end up in court. Under section 2-207 it is widely acknowledged that it is virtually impossible for sellers to ever ensure that they get their own terms on a deal, which breeds more uncertainty and litigation. Who gains from this? Not sellers or buyers—their liability will be contingent on which form a judge chooses to consider the "offer" and which

---

[192] *Id.*

[193] *See* Llewellyn, *Some Realism About Realism*, *supra* note 9.

[194] *See supra* Part IV.A.

[195] Under the last-shot rule, it is generally easy to tell which form governs—the last one sent before performance. It is more difficult in the first-shot situation, because the analysis turns on which form we decide to consider the "offer." Take the situation in which the buyer sends a request for a quote to seller, seller sends a quote form stating that it will sell at a particular price, buyer sends a purchase order, and seller sends an order acknowledgment. If the seller's first form is viewed as the offer, buyer's purchase order is the acceptance, and seller's acknowledgment is redundant. Buyer will get seller's terms because it accepted seller's original offer. If, on the other hand, we view seller's first form as a mere price quote, or "offer to deal," then buyer's purchase order is the offer and seller's acknowledgment is the acceptance, and seller gets buyer's terms. Because the question of which form is offer and which is acceptance is a question of fact, the litigation possibilities are endless.

the "acceptance." The big winners are the state, which gains more control over contracting parties, and lawyers, who get to enjoy more litigation. Judges, who get to pick which form they consider to be the offer, get a big boost in discretion to impose terms on parties.

Certainty.[196] The relaxation of the certainty requirements and the Code's freer use of default terms, have similar effects. Courts will more often supply contract terms where the intent of the parties is doubtful. In situations where the common law would have let the parties go their own ways, the Code provides for enforceable legal obligations. Parties are much more likely to be stuck with deals that they did not want to make, and the change greatly increases the number of business transactions in which parties will be subject to judicial control.

Good faith.[197] The mandatory good faith standard is even broader, creating new realms of potential liability for contracting parties who have complied with the explicit letter of their agreements and potential enforceable obligations to others even before a contract is reached.[198] This means that it is impossible for business people to control the extent of their liabilities in contractual matters. No agreement, however explicit, can entirely eliminate the risk that a party will be found contractually liable for damages even where it has done precisely what it promised.

Usage.[199] Reliance on usage evidence also increases the number of contract disputes that will go to litigation, and decreases the ability of parties to define their obligations with certainty. Every term in an agreement, no matter how plain it seemed to the drafters, is open to future litigation. This is true even where the parties have defined the term in their agreement, since usage evidence comes in as a matter of law in every agreement under Article 2.[200] Moreover, courts have the power to rely on usage evidence to find terms that impose additional obligations not spelled out in the agreement. What is better, from the judge's point of view, is that the judge is always free to reject the usage evidence if he or she prefers the term the parties wrote in the agreement.

What do all these things have in common? Each of them decreases the power of contracting parties to control the obligations to which they are

---

[196] *See supra* Part IV.B.

[197] *See supra* Part IV.C.

[198] *See, e.g.*, Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736 (2d Cir. 1998).

[199] *See supra* Part IV.D.

[200] True, if the term is clearly defined in the dickered terms of an agreement, the odds are that the judge or jury will decide that the parties deliberately overrode the prior usage. But there is no guarantee that this will be the case. And if the term is included in the boilerplate of a form agreement, even if signed by both parties, the likelihood increases that the fact-finder will ignore it.

subject, and each increases the power of the courts—and thus the state—*vis-à-vis* the parties. Each makes it more likely that the state can impose on a party an obligation it did not agree to. Each makes it less likely that a party can, by careful planning and scrupulous attention to detail, avoid liability. Each increases the power of judges. Each increases the need for business counseling and the likelihood of litigation, and thus the fees that lawyers make.

The point is not that any of these social and political choices are bad. Perhaps we really do believe that judges could make better contracts for the parties than the parties could make themselves, at least in some cases. Perhaps we believe that free contracting should be replaced, or at least heavily supplemented, by status-based norms enforced by judges. The point is that aversion to laissez-faire contracting is a social and political view, and one that his highly contested within this society. It is based not on the "realities of the marketplace"—odds are that Mr. Broeker of Bethlehem Steel had a much clearer view of commercial reality than any of the Realist academics who worked on the Code[201]—but on the Progressive politics of the New Deal. Where they differed was not that Broeker and Bethlehem were mesmerized by legal theory while the law professors were taking a hard look at reality. No, they differed because Broeker and Bethelehem wanted freedom to do business as they liked, while Llewellyn and his colleagues wanted them to do business like Jimmy Stewart. They just disagreed:

> The academic reformers . . . wanted a "business commonwealth," a regulated system of commerce, in which a modern, efficient commercial law based on good business practices and judicial oversight would replace antiquated formal laws and unregulated private agreement. The commercial world . . . did want the efficiency of a modern statute, but did not want regulation. It wanted autonomy and freedom from oversight by trade groups, statutes, and judges.[202]

Llewellyn's first version of the Code was a much more explicitly regulatory effort than the version later enacted. It contained many of the limitations on free contract that would later come to be generally adopted by statute or common law, including consumer protection provisions, requirements for disclosure in loan agreements, and elimination of privity requirements for breach of warranty. None of these had any particular Realist underpinnings. People disagreed about whether such things were desirable for an economy, but that disagreement had nothing to do with the fact that they could not be deduced from Langdellian legal science. A rule that benefits consumers at the expense of producers is no more or less Realistic

---

[201] *See supra* text accompanying note 158.

[202] Kamp, *supra* note 17, at 371.

than one that benefits producers at the expense of consumers. The question is merely which group you want to burden and which you want to benefit. Long before the Realists, legislatures were routinely regulating commercial transactions. Llewellyn just wanted to go further than they had in the same direction. If Realist rhetoric was useful in getting to his collectivist vision, Llewellyn the *bricoleur* would use it. If not, he would use something else.

Llewellyn's views were fairly mainstream ones among people of his class in the 1930s. Under the Hoover Administration, led by the first engineer to become President, the Commerce Department saw its mission as helping to eliminate the "wasteful competition" of naked capitalism.[203] The New Deal that followed was even more emphatic about "coordinating" business under government control. Like many of his Realist colleagues,[204] Llewellyn was a thoroughgoing New Dealer, sharing the New Deal faith that supervision by smart and disinterested government experts could make a capitalist economy run much more efficiently. Moreover, in the years leading up to and following Llewellyn's initial draft of Article 2, he was writing against the background of a general public belief that the Soviet economic miracle proved that production worked much better—or at least as well—when sordid, competitive capitalists were removed,[205] followed by the experience of government-controlled wartime production which similarly managed to limit "wasteful competition."[206]

Regulation of private business transactions among large firms was a natural step for people who shared Llewellyn's views. The New Deal had brought vast new areas of American life under government control and supervision, and the results looked good. What reason would there be to treat commercial contractual relationships differently than employment

---

[203] OTIS L. GRAHAM, JR., THE GREAT CAMPAIGNS: REFORM AND WAR IN AMERICA, 1900–1928, at 134 (1971).

[204] Many of the prominent Realists held important positions in the FDR Administration, among them Jerome Frank, Felix Frankfurter, William O. Douglas, and Thurman Arnold. TWINING, *supra* note 7, at 58.

[205] Soviet workers were said to labor only seven hours a day, were paid for all holidays, got the best social welfare system in world history, faced no unemployment, and enjoyed rapidly rising wages that put them not far below skilled workers in Britain and the United States. *See, e.g.*, JOHN STRACHEY, HOPE IN AMERICA 163–70 (1938).

[206] *See* JEFFERY M. DORWART, EBERSTADT AND FORRESTAL: A NATIONAL SECURITY PARTNERSHIP, 1909–1949, at 30–68 (1991). This, as noted previously, was Llewellyn's view. But wartime production during World War II was, though very effective in achieving victory, extraordinarily wasteful in the routine sense of consuming vastly more resources, human and material, per unit of production than could possibly be tolerated in a civilian firm. *See* ROBERT A. LEVINE, PUBLIC PLANNING: FAILURE AND REDIRECTION 104–31 (1972).

relationships,[207] sales of securities,[208] bank deposits,[209] utility services,[210] and all the other areas brought under government supervision by expert agencies? Contractual relationships can, after all, be at least as dangerous as a good many criminal activities. The amount of money that can be lost in a business deal dwarfs the amount that any given employee, even a CEO, can embezzle.[211]

By the 1950s, though, collectivist social legislation had gone out of fashion with the heating up of the Cold War. Anything that smacked of socialism—as some critics suggested that Llewellyn's Code did[212]—was on the defensive. Business plainly recognized Llewellyn's game and wanted little part of it. "One of the recurring criticisms of the Code," writes Allen Kamp, "was that it was 'reform,' 'paternalist,' 'leftist,' or 'social' legislation," which to American merchants were "not good things."[213]

Thus, the explicitly regulatory portions of Llewellyn's Article 2 had to be scrapped to get it past the practicing lawyers and their clients who dominated the ALI.[214] Those innovations that finally worked their way through the uniform law process were justified not on grounds that they limited the ability of firms to do business as they chose, but that they were actually *helping* them to do so. Grant Gilmore stopped talking openly about replacing the laissez-faire system, at least until after the Code became widely adopted.[215] The Realist myth of the Code was born in the battles with the ALI and in the struggle for adoption.

---

[207] *See* National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2000).

[208] *See* Securities Act of 1933, 15 U.S.C. §§ 77a–77bbbb (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000).

[209] *See* Banking Act of 1933, 12 U.S.C. § 227 (2000).

[210] *See* Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a–79z-6 (2000) (repealed 2005).

[211] An obvious case in point is the litigation surrounding Westinghouse's disastrous long-term uranium supply contracts during the 1970s. *See In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440 (E.D. Va. 1981). The economics of the case are discussed in Donald Vandegrift, *Decision Costs, Contract Excuse, and the* Westinghouse *Commercial Impracticability Case*, 4 EUR. J.L. & ECON. 41 (1997); Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977).

[212] Some business critics viewed the proposed Code as "communist-inspired." Kamp, *supra* note 12, at 383.

[213] *See* Kamp, *supra* note 17, at 395.

[214] The travails of Llewellyn's statute are traced in Allen Kamp's two articles on the history of the Code. *See* Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275 (1998); Kamp, *supra* note 17.

[215] He would make his case for replacing laissez-faire contract with tort law a few years after the Code's triumph in the state legislatures. *See generally* GILMORE, *supra* note 21.

We no longer have to fight those particular battles. Consumer protection legislation, disclosure laws, the vast expansion of tort liability, have remade commercial law in ways at least as far-reaching as Llewellyn's original Code. The laissez-faire ideal, while still defended in some quarters, has largely gone by the board as a practical matter. There is no more constitutional right to contract, and the public is perfectly willing to tolerate extensive controls over how people do business with each other. Llewellyn may have needed to camouflage his reform agenda with a cloud of Realist rhetoric. We do not.

VI. CONCLUSION

Commercial law is a complex field. This is because the market economy it tries to promote and regulate is itself impossibly complex, and because people disagree strenuously on fundamental economic and social issues. The task of writing good commercial legislation and making good decisions in commercial cases is difficult enough even when we fully comprehend our current situation and have clear a purpose in mind for the decisions we make. It is much harder—perhaps impossible—if we allow ourselves to be blinded by clouds of rhetoric.

So let's stop talking about the "bargain in fact" of the parties. Let's get rid of the fictional "commercial understanding" and admit that when we impose an obligation on an unwilling party, we are doing so in spite of that party's wishes, not in furtherance of them. Let's stop talking about the Realist origins of Article 2.