



1966

Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law

Eugene F. Mooney

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Commercial Law Commons](#), [Contracts Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Legislation Commons](#)

Recommended Citation

Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 Vill. L. Rev. 213 (1966).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol11/iss2/1>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

Villanova Law Review

VOLUME 11

WINTER 1966

NUMBER 2

OLD KONTRACT PRINCIPLES AND KARL'S NEW KODE: AN ESSAY ON THE JURISPRUDENCE OF OUR NEW COMMERCIAL LAW

By EUGENE F. MOONEY†

THE CONTRACT PARABLE*

WHEN THE WORLD was very young and long before society reached its present state of perfection people began making contracts. Freud's *Oedipus Legend* recites that the Primeval Father and the Primeval Mother had an exclusive dealing arrangement. The Brother Clan by mutual agreement killed the Father and appropriated the Mother for their own use. Thereafter to keep peace among themselves they entered into the Social Contract. This was the first Bilateral Contract. Despite good intentions, however, the parties constantly bickered over this unwritten contract and it became apparent the entire venture needed to be reconstituted.

When God opened negotiations with the Children of Israel they promptly demanded a firm written offer which would satisfy the Statute of Frauds, so Moses was sent back up Mount Sinai to draft the stone tablets. The essence of the offer was that if the Children of Israel would act a certain way then God would do thus and so. This was the first Unilateral Contract. Early construction of the contract was in strict compliance with the Parol Evidence Rule, but subsequent liberal interpretation discovered it was open-ended so Gentiles could be in-

† A.B., 1957, LL.B., 1958, University of Arkansas; LL.M., 1963, Yale University; Associate Professor of Law, University of Kentucky.

* Inspiration for this parable summing up all the author has been able to learn about the law of contract, and, indeed for this entire article is traceable directly to D. J. Swift Teufelsdröckh, *Jurisprudence, The Crown of Civilization — Being Also The Principles of Writing Jurisprudence Made Clear To Neophytes*, 5 U. CHI. L. REV. 171 (1938). Most of the principles set forth in that article have been here employed: it was impossible to capture the style but hopefully some of the overtones of that article also appear here.

cluded and Subcontracting was permitted. This should have been a sufficient arrangement for everyone. The Farmers were reasonably satisfied with it but the Merchants were not. Moreover, despite a considerable interpretive gloss a number of loopholes were uncovered and the terms were too harsh because the Contract required that all Subcontracts be fully performed.

So the next attempt took up the problem of what agreements should be enforced. Both the Romans and Early Church Fathers were inclined to enforce all agreements if there was *causa*. But foreign merchants were notoriously Godless men who would take one's money and give him nothing so we let them make up their own law. Thus two or three different approaches developed over the centuries: 1) The Romans simply required fair dealing in Good Faith and enforced every agreement except a *nudum pactum*, 2) Other Europeans were more realistic and required the posting of hostages as security for performance of the undertaking, 3) The English were the most realistic and required the *assumpsit* to be sworn out twice, put in writing, a hostage be posted and a *quid pro quo* be given. This was the beginning of the Common Law of Contract. The Foreign Merchant Problem was solved when Lord Mansfield began to let them sue on their contracts in his Common Law Court in order to keep them out of Equity.

Things moved swiftly after that and within a few centuries we dropped the purely ceremonial requirements of the English system. When Slade's case broke in 1606 no one was outraged that only a single sworn *assumpsit* was required and if supported by a peppercorn it was binding. We discovered that good faith actually had nothing to do with contract, which was an omnipotent expression of human will binding on the courts, society and God in that order. The English Sale of Goods Act was the final expression of a matchless state of contract perfection, embodying the true meaning of contract as a legal obligation arising out of a promise supported by consideration.

So you see when we all came over to America the whole matter had settled into black-letter rules: 1) Contracts must be covered by a writing and supported by consideration, for it would be immoral to allow them out in public nude and without visible means of support, 2) Foreign merchants have their own law which is too devious for common lawyers, 3) Mutual assent to a contract embodies Omnipotent Human Will and is the only obligation binding anyone to do anything for anyone else so it should be strictly construed, and 4) God can revoke His offer at any time before it is accepted by the requested act; but if He defaults no decree for specific performance will issue although He may have to answer to a writ of *indebitatus assumpsit*.

I.

INTRODUCTION

IS THERE A CONTRACT? WHAT THE HELL!¹

The subject is almost as insane as the parable. One recalls with horror his first semester in law school and the course in Contracts I. The whole matter of offer, acceptance and consideration is deliciously painful, like "possession" in Personal Property, "seizin" in Real Property, and "duty" in Torts. Struggling through cases deliberately chosen by the case book editor to bewilder, one sought guidance from Williston, Corbin, and the Restatement of Contracts. Yet they all seemed to say the same thing in much the same words with only nitpicking differences, and in desperation one committed to memory the miniscule distinctions in dogma drawn by Williston and Corbin and struck the balance where he thought the Restatement dictated. All this frantic mental juggling took place without for a moment understanding what it was all about, if anything. One thing *was* clear, however: The traditional contract construct was the key to Paradise and one learned it or flunked.

Actually, the construct was quite simple and easy to understand once it had been mentally assimilated. This was accomplished through hours of unbelievable monotony in the library relieved by brief moments of stark terror socratically superinduced in the classroom. We learned that there are certain expressions of mutual assent to which the law appends an obligation arising from the express or plainly implied "promises" of the parties. The legal obligation is strictly limited to the promises. These promises are discovered in *the* unvarying method by which human beings contract with each other, namely, by means of "offers" embodying "promises" directed by "offerors" to particular "offerees" who "accept" by manifesting assent either by tendering a promise or an act. The agreement thus made is enforceable at law or in equity if and only if the promises involved "detriment to the promisor." Otherwise the agreement was not supported by "consideration" and was a bare nudum pactum. Case variations were hung on the construct like ornaments on a Christmas tree, glittering but essentially useless.

One visualized the whole thing as if it were a door hasp into which the lock of consideration was snapped, or a hinge with the linchpin of consideration fitting smoothly into the aligned holes. It was all so professionally neat that one commentator was prompted to remark:

1. The subtitle is taken from the delightful "Ballade Of The Class in Contracts" by Professor Karl N. Llewellyn which appears in LLEWELLYN, *PUT IN HIS THUMB* 39-40 (1931), and which begins: "Is there a contract? What the hell!"

The Langdell School's amazing theory of consideration and unilateral contract is not only the most familiar American example [of 'the vigorous, almost rigid German theories of construction and dogmatics'], but the most clean of line, most bald of eye-deflecting cover: the consideration needed to support a promise must be bargained for; it must be the precise something bargained for; the something bargained for must be precise. Acceptance and the provision of consideration coincide like equal triangles, superimposed, and, superposed, exclude all variant dimensions of 'conditions.' If 'an act' is called for by an offer, that very 'act' complete, and nothing else or less, though by a hair, is what is needed; only the other party to the bargain can accept; only 'he' can give consideration; only 'he' acquire rights. Nothing could be more simply stated, more rigorously thought, more tightly integrated, more fascinatingly absurd to teach, more easy to 'apply'.²

Such mental pictures were irresistible, and more than one lawyer upon first discovering that the contract law of many other nations requires neither "consideration" nor any functional equivalent has been heard to remark querulously, "But what holds the contract together?"

From this simplistic construct of obligation-based-on-promise derived all those conceptualistic torments of Contracts I. The concept of "offer" brought forth problems involving "illusory" offers, agreements to contract and bilateral-or-unilateralness, all of which stem inexorably from the conceptual necessity for discovering in the particular fact-transaction the precise "power" created in the offeree. The notion of "acceptance" spawned terrible classroom conundrums involving communication of the acceptance and the absolute absurdity of the "ribbon-matching" cases, culminating in the ever-fruitful offer-to-make-a-unilateral-contract if the offeree will climb a flagpole (mow the lawn, chop the wood, walk across a bridge, and so forth ad nauseum) which is revoked at the last instant. Revocability also generated those hairy problems concerning withdrawal of options and the burning question whether revocation of the reward offered for Lincoln's assassin should have been in a local, regional or national newspaper. Such technicalities are absolute requisites when one believes that the promisor is in complete control of his "offer" in every conceivable respect and is entitled to receive from the promisee exactly what his offer demands in precisely the manner it prescribes. The doctrine of consideration gave us intellectual peppercorns. One grappled with such awe-inspiring problems as benefit-to-the-promisee versus detriment-to-the-promisor, whether a promise could be consideration for a promise, and whether void, voidable, barred, redundant, economically valueless or silly promises could be consideration for anything. The comfortable arti-

2. LLEWELLYN, JURISPRUDENCE 172 (1962).

ficialities of the traditional contract construct led Professor Llewellyn to note with delicious irony that:

The rules of Offer and Acceptance have been worked over; they have been written over; they have been shaped and rubbed smooth with pumice, they wear the rich deep polish of a thousand class rooms; they have a grip on the vision and indeed on the affections held by no other rules 'of law,' real or pseudo. For it was Offer and Acceptance which first led each of us out of laydom into The Law. Puzzled, befogged, adrift in the strange words and technique of cases, with only our sane feeling of what was decent for a compass, we felt the warm sun suddenly, we knew that we were arriving, we knew we too could 'think like a lawyer': That was when we learned to down seasickness as *A* revoked when *B* was almost up the flag-pole. Within the first October, we had achieved a technical glee in justifying judgment then for *A*; and succulent memory lingers, of the way our dumber brethren were pilloried as Laymen still.³

This is a serious charge but the indictment is well-grounded. A formidable bill of particulars was drawn up long ago by a distinguished group of legal realists which is devastating and persuasive even today.⁴ Particular aspects of the construct have been successfully challenged from time to time virtually since its inception by such luminaries as Whittier, Ballantine, Oliphant, Ferson, Corbin and other giants of contract law. Their assaults on the Langdell-Williston construct were based mainly on specific manifestations of its illogic or inconsistency.⁵ But for forty years the most careful, persistent and

3. Llewellyn, *On Our Case-Law of Contract: Offer And Acceptance, I*, 48 YALE L.J. 1, 32 (1938).

4. One is entitled to make up his own list on this particular subject and without inviting argument over jurisprudential labels the following men took scholarly issue with the orthodox theory of contract — as represented by the sequence Langdell, Williston, Restatement of Contracts — Walter Cook, Patterson, Restatement of Restitution (Keener, Woodward and Cook), Gardner, Oliphant, Underhill Moore, Corbin, Havighurst, Sharp, Fuller, Beutel, Franklin, Kessler, McGovney, Whittier, Ballantine, Costigan, Gilmore, Jones, Sharp and, of course, Llewellyn. This listing is suggested by Llewellyn, *The Rule of Law In Our Case-Law*, 47 YALE L.J. 1243, 1266-67 (1938); Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 748 (1931); Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 303 (1964). These men are here identified as most closely related to a realist movement in the field of contract, although they can properly be identified in a still larger context as was done in Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931), especially reflected in his massive bibliography appended to that article. Cf. Teufelsdröckh, *Jurisprudence — The Crown of Civilization*, *supra* note *, at 180.

5. The clearest-cut victory over Williston was scored by Professor Herman Oliphant concerning the requirement of mutuality of obligation. See Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law — I*, 25 COLUM. L. REV. 705 (1925); the reply by Williston, *The Effect Of One Void Promise In A Bilateral Agreement*, 25 COLUM. L. REV. 857 (1925); and the crusher by Oliphant, *Mutuality of Obligation in Bilateral Contracts At Law — II*, 28 COLUM. L. REV. 997 (1928). Another exchange carried on with genteel acrimony began with the publication of Goble, *Is An Offer A Promise?*, 22 ILL. L. REV. 567 (1928), answered in the same issue by Williston, *Is An Offer A Promise?*, 22 ILL. L. REV. 788 (1928), followed in the next quarterly issue by Green, *Is An Offer Always A Promise?*, 23 ILL. L. REV.

effective critic of the Langdell-Williston-Restatement construct was Professor Karl N. Llewellyn whose complaints pointed out the damagingly unrealistic nature of the whole orthodox offer-acceptance-consideration trichotomy and its progeny of meaningless technicalities. Admitting that in its symmetry the construct appeared a thing of intellectual beauty, Llewellyn could still pick out the flaw which made it fatally defective:

It is not the structure, however sweet of logic and of line, that is the essence. Langdell's construct points that moral: magnificent in conception, impeccable in workmanship, it yet would not *function*; men do not, and courts will not, work according to that pattern. And that, in things of law, bars beauty. The history of the Langdell conception is one of a delighted welcome by law-teachers, which continues still, while piece after piece of the integrated whole continues to be junked; the holes consume the structure.⁶

Time after time and through cumulating instances he emphasized that despite the doctrinal handcuffs the courts amazingly *did* justice, reached results reasonable under the circumstances, and were perceptive to the demands of a changing commercial society. Over and over he emphasized that business arrangements, not family transactions, are a more reasonable foundation upon which theories of contract should be based, because

[I]t is not safe to reason about business cases from cases in which an uncle became interested in having his nephew see Europe, go to Yale, abstain from nicotine, or christen his infant heir 'Alvardus Torrington, III.' And it may even be urged that safe conclusions as to business cases of the more ordinary variety cannot be derived from what courts or scholars rule about the idiosyncratic desires of one *A* to see one *B* climb a fifty-foot greased flag-pole or push a peanut across the Brooklyn Bridge.⁷

This is not only delightful criticism, it is trenchant good sense. The overwhelming majority of contracts are made in the course of business transactions, and of these the largest percentage are sale or sale-oriented

95 (1928), and the rejoinder by Williston, *An Offer Is A Promise*, 23 ILL. L. REV. 100 (1928), and surrejoinder by Green, *Is An Offer Always A Promise?*, 23 ILL. L. REV. 301 (1928). Painstakingly careful studies by Professor Arthur L. Corbin served to keep the exchange from breaking out into a fistfight. Braucher, *Offer and Acceptance In The Second Restatement*, *supra* note 4.

6. LLEWELLYN, *JURISPRUDENCE*, *supra* note 2, at 173. Frank admiration of the particular quality *utility* caused him to sing praises to Cheyenne decision-making. LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* 334-35 (1941). In his study of sales warranty law he was caused to note that "there is no less predictable body of law found on any books, or in any courts, any time or anywhere," supported by a tremendous footnote reference. Llewellyn, *On Warranty of Quality, And Society II*, 37 COLUM. L. REV. 341, 368-69 (1937).

7. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 YALE L.J. 779, 785 (1939).

contracts. Yet virtually the entire American Bar is composed of lawyers, judges and professors who were nurtured on the artificialities of peppercornism. We are all comfortably at home there:

This is therefore no area of 'rules' to be disturbed. It is an area where we want no disturbance, and will brook none. It is the Rabbit-Hole down which we fell into the Law, and to him who has gone down it, no queer phenomenon is strange; he has been magicked; the logic of Wonderland we then entered makes mere discrepant decision negligible. And it is not only hard, it is obnoxious, for any of us who have gone through that experience to even conceive of Offer and Acceptance as perhaps in need of re-examination.⁸

But re-examination was necessary and it could have been foreseen that Llewellyn would be the one to do it.

Many good and valuable compilations of the particular Restatement of Contracts rules changed by the Uniform Commercial Code have appeared in print over the past fifteen years.⁹ These new rules have almost uniformly been viewed by commentators as no more than sensible exceptions to particular unfortunate rules of contract law which had been negligently permitted to grow up unrelated to given business practices. Business patterns had changed slightly, it was generally supposed, and an old contract rule here and there needed updating; or, perhaps, a given rule needed "re-examination" with an eye toward creating still another narrow but necessary "exception" to the general theory of contract. Back in 1950 even Professor Williston could make his peace with most of the code rules on this basis, although he seemed to suspect something more profound was afoot.¹⁰ Professor

8. Llewellyn, *supra* note 3, at 32.

9. By 1954 the bibliography of legal articles on the Code was fourteen pages long. WYPSKIN, *THE UNIFORM COMMERCIAL CODE — A BIBLIOGRAPHY OF LEGAL ARTICLES AND PUBLICATIONS* (1954). Professor Robert Braucher for many years reported annually on the current crop in the New York University publication *Annual Survey of American Law*, until 1957; and for the past few years Professor Lawrence King has included a list of code articles in his annual survey article in that publication. For sheer quantity of legal writing nothing in modern legal history equals the output by commentators on the Uniform Commercial Code. Forty-two jurisdictions had adopted the Code by November 1965 and almost without fail a symposium issue of the local law review has examined the impact of the Code on that state's pre-existing law. In addition, an unknown number of official state publications sponsored by legislatures have similarly discussed section-by-section the Code impact. See: *Proposed Uniform Commercial Code: Its Effect Upon Cognate Missouri Statutes*, GENERAL ASSEMBLY OF THE STATE OF MISSOURI, COMMITTEE ON LEGISLATIVE RESEARCH, REPORT No. 15 (1954).

10. The thrust of Professor Williston's criticisms — confined as they were to Article 2 — rested primarily on the "needless" language changes in the Code. His original objection was grounded on his belief that any changes which were needed could be made by amending the existing uniform acts, and that, consequently, there was no necessity for a whole new statute. When the 1949 version was published, Williston renewed his objections and noted: "I did not . . . imagine a project to restate or to reform the law so radically as the proposed Code seeks to do." Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 565 (1950).

Beutel was more explicit and perhaps equally unsuspecting in his own way in 1952 when he complained of the Code that there seemed to be mere changes in language and it was "The Lawyers and Bankers Relief Act."¹¹ Professor Waite's criticism similarly proceeded on the ground that the Code amounted to no more than unnecessarily complex language changes.¹² Most of the published comment opines that basic contract principles remain unsullied despite drastic rule changes in sales and security law.

There is a completely different, iconoclastic view of the matter, one which ignores the slight modifications of particular rules and focuses on the major jurisprudential shift in the structure of the contract construct made by the Code. Commercial law in this country is or soon will be the Uniform Commercial Code and thus is firmly rooted in the rich soil of the "life-situation" of business agreements made in the context of the contemporary processes of the primary commercial activity in this country. This was done, insofar as statutory language *can* do so, by framing the entire Code so as to ground the contract obligation on good faith mercantile agreements embodying the parties' bargain within the functional economic structures relating to goods distribution in this country. No mere language change was contemplated. No mere piecemeal modification of Restatement rules was involved. Not only was the amelioration of particular legalistic hardships on business intended, nothing less than the substitution of a

11. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 363 (1952). Professor Beutel was not only outraged about the language changes which he considered "unnecessarily technical, new and erratic," but even more, he was positively apologetic over Article 4 dealing with bank collections, which he felt was "a piece of vicious class legislation." *Id.* at 337 and 357. He, too, firmly believed that the Code would "serve no purpose except by its complication and displacement of the law to create unnecessary business for the lawyers and the courts." The high-pitched tenor of these objections seems to have been induced by his belief that the 1952 Code was a product of a "sell-out" to the bankers. *Id.* at 359-62. His reaction to the 1949 Code was along the same general lines without the outraged tone. Beutel, *The Proposed Uniform Commercial Code As A Problem In Codification*, 16 LAW & CONTEMP. PROB. 141 (1951). See also Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364 (1952).

12. After studying the 1949 Draft of Article 2, Professor Waite came to the conclusion that it offered no fundamental changes and was thus indefensibly complex. He summarized his position thus:

[T]he proposal as it stands, though not a fundamental change in the existing law, is a complete restatement of it; a rearrangement in part of the now familiar Uniform Sales Act, a rephrasing of most of its provisions.

Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603, 604-05 (1950). He recommended against adoption of the Code because "the only net profit to the public in so doing would be an increase of business for the legal profession." *Id.* at 626.

An interesting reflection on the prediction that a "flood of litigation" would follow adoption of the Code is the fact that there are so few cases available that no casebook based solely on Code decisions has appeared by 1965. The net effect of Code adoption seems to have been the diminution of litigation on commercial transaction matters. Professor Savage writing in 1957 nowhere indicates that Pennsylvania experienced an upsurge of commercial law litigation as a result of the Code. Savage, *Commercial Law*, 1957 ANN. SURV. AM. L. 302.

dynamic and transactionally-oriented agreement construct for the old and static offer-acceptance-consideration model was attempted.

Viewed thus, Code rule changes cannot meaningfully be examined as mere isolated tailoring alterations. The old suit has been totally remodelled, the high peaked lapels were blunted, the coat cut down to be single-breasted, the padding excised from the shoulders and the pleats removed from the pants. An old suit cut from the cloth of the common law was turned into a modern set of threads. The new suit could be described by noting the precise details of alteration in terms such as freedom of contract, offer, acceptance, consideration, assignability, statute of frauds, anticipatory repudiation and remedies, but the true significance of the change in contract principles would be missed. The suit is now designed not for the portly buyer and seller of title to goods, but for the wiry, slender dealer in goods. One could similarly list the many changes in the law of negotiable instruments and in the law of secured transactions. But the former list would not clearly reflect the real change made by the Code, and the latter list would be so long and redundant that it would be buried under detail. Only by viewing the whole Code and its constituent parts ideographically can the full impact of the change be understood. Examination of these hundreds of changes by means of verbal-linear analysis could easily take longer than the sixteen years already spent drafting and revising the Code. Even if it *could* be done, the point of primary significance would escape notice again: the Uniform Commercial Code was conceived, drafted, and enacted into statutory law as a *code* and not a mere collection of statutory rules.¹³ As such it has unifying features, threads running across the cloth, repeating patterns of rules embodying concepts common to the whole, and legal "base lines"¹⁴ along

13. It has been called the "*lex Llewellyn*." Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951). A full analysis of the "code" aspects of the UCC is Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291.

14. The concept of a legal "baseline" used here is derived from Llewellyn's terminology, principally manifested in footnote 45 on page 722 of his article, *What Price Contract?*, *supra* note 4, where he is discussing the present disjunctions between legal rules of contract law and actual business practices and attempting some formulation of an approach to be taken to correct these defects. He notes: "Both ways and norms of business practice may be firm at the center, but they are hazy at the edge; they offer little sureness to guide in dealing with the outside and unusual case," and then follows the footnote discussion on the "baseline" concept as applied to non-legal and legal obligations in commercial contract contexts. Law should seek a baseline for behavior compelled by the laws, because:

One main business of law is to set, to *create*, norms for such cases of conflicting or uncertain expectation; equally so, whether it be the law of the state or the by-law of the group. But such norms can be created wisely only in the light of the standing practices to which the new norm will be added, or on which it places a limiting definition. Hence one huge value of the informed court-of-the-trade which knows and feels this background, *i.e.*, of the specialized as contrasted with the unspecialized arbitration tribunal. . . . Application of fixed rules of contract-at-large has sense only when the case is so far removed from the run of affairs that the decision cannot be regarded as having prospect of shaping

which the Code articles are laid out. Three of the most important of these base lines are:

- 1) The legal obligation of contract arises from the agreement-in-fact of the parties and not their 'promises';
- 2) The Code as a whole and each of its parts is predicated on a functional economic construct of goods distribution in this country and not on abstractions of the law of contracts;
- 3) The ultimate affirmative touchstone for judicial decision on commercial contract matters under the Code is mercantile good faith and fair dealing.

Copious quotations from Karl Llewellyn's writings are of greater significance than mere criticisms from the past of the traditional contract construct. They can be seen in retrospect as something more than professorial bombast or persnickety complaints destined never to be remembered. Because of the smashing legislative success of the Uniform Commercial Code the attitudes and opinions of Karl Llewellyn can be neither forgotten nor ignored.¹⁵ Those attitudes are built into the Code forever.

future deals; and then only when speed of judicial administration outweighs the chance of injustice to the litigants. And to conceive the application of such fixed rules to make for 'certainty' is to confuse certainty to the lawyer in litigation with approximate certainty in life to the people for whom law exists.

The proper function of "rules" thus conceived can only be effectively implemented by knowledgeable judges who sit in the proud tradition of our common law. This institution he undertook to describe in *THE COMMON LAW TRADITION*. But no less important as an element of the "baseline" concept is frank understanding of how our appellate judges behave, as distinguished from the role played in our law by *paper* rules. Indeed, his entire concept of law centered on the behavior of our judges:

At the very heart, I suspect, is the behavior of judges, peculiarly that part of their behavior which marks them as judges — those practices which establish the continuity of their office with their predecessors and successors, and which make official their contacts with other persons. . . . Close around it on the one hand lies the behavior of other government officials. On the other, the sets of accepted formulae which judges recite, seek light from, try to follow. . . . Close around these again, lie various persons' ideas of what the law is; and especially their views of what it or some part of it ought to accomplish. . . . Farther from the center lies legal and social philosophy — approaching the center more directly in proportion as the materials with which it deals are taken directly from the center. Part of law, in many aspects, is all of society, and all of man in society. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 *COLUM. L. REV.* 431, 464-65 (1930). Llewellyn read commercial law decisions not so much for their "legal doctrine" but for their facts, from whence he derived a broad understanding of the principal commercial patterns in this country, and in true legal realist fashion he insisted upon a narrow-issue formulation of problems. All these factors combined to form his concept of a "baseline" when time came to draft legislation. The Uniform Commercial Code can fairly be called a "common law code" in this context — a statute derived from the common law of commercial transactions by means of close factually-oriented analytical techniques incorporating insofar as possible an informed judgment about what our courts are actually doing in the field, as distinguished from what they may be "saying" in their opinions, all grounded ultimately on commercial patterns.

15. Whatever else one may say about the Code it is certainly "the law" effective in at least thirty jurisdictions: Alaska, Arkansas, California, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin and Wyoming.

Llewellyn had formed most of his ideas about contract law before he began drafting the Code. While in the midst of publishing a series of brilliant articles undertaking a fundamental re-examination of the law of commercial contracts, Llewellyn became the chairman of the Code committee of the Commission on Uniform State Laws. During the ensuing decade he worked unceasingly toward comprehensive codification of commercial law.

Although much of the actual drafting of the various articles was done by committees, Llewellyn was the coordinator and, as such, exercised both tremendous influence and practical control over the whole project. He and Professor Corbin served on the committee drafting the sales article and in great measure Llewellyn wrote that section of the Code to suit himself.¹⁶ The first version was published in 1949 and although there have been numerous and extensive revisions since then,¹⁷ the sales article and the all-important introductory article (Article 1) retain most of the characteristics built into them by Llewellyn.

These are facts both awesome and immense. Llewellyn's thought is central to the sales article. Sales law together with the laws of negotiable instruments and bank collections, documents of title, letters of credit and secured transactions most assuredly occupy much of the area we call commercial law. Commercial transactions account for an overwhelming number of contracts in any industrial nation.¹⁸ Outside

16. Llewellyn and Professor Soia Mentschikoff were the reporter and assistant reporter on the Uniform Revised Sales Act which was the first major subdivision of the proposed Code. Later they became chief reporter and associate chief reporter for the whole Code. Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958). Llewellyn's influence was particularly strong during the early drafting stages, and even after industry and government groups became pointedly interested in the project around 1952 and participated heavily in the actual drafting thereafter, Llewellyn was able to hold much of the alteration to language changes. The substructure of the Code as initially drafted under the guidance of Karl Llewellyn remains unchanged despite a certain destruction of its original "unity." Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962). Llewellyn himself did not make such claims for his part in the work on the Code. Llewellyn, *Why We Need The Uniform Commercial Code*, 10 U. FLA. L. REV. 376 (1957).

17. The version referred to in this essay as the current one is UNIFORM COMMERCIAL CODE, 1962 Official Text With Comments (1962), and at other places herein reference is made to UNIFORM COMMERCIAL CODE, May 1949 Draft (1949) as "the 1949 version." All the versions are officially cited in Braucher, *The Legislative History of the Uniform Commercial Code*, *supra* note 16, at 798 n.1.

18. One may assess the *jurisprudential significance* of the different types of contracts (including their number and dollar value) made annually in this country in any manner he chooses, but it would seem that any fair appraisal of the matter would have to acknowledge that the contract for sale of goods is clearly the predominant form of economic transfer in this country today. Of our Gross National Product for 1964 \$399.2 billions were exchanged as "personal consumption expenditures" and \$35.1 billions for "producer's durable equipment." We expended \$308.9 billions for "goods" and \$244.4 billions for "services" plus \$68.9 for "construction," most of it by means of sales contracts. Personal consumption expenditures of \$399.2 billions went for \$57 billions in "durable goods," \$177.1 billions in nondurable goods, and \$165.1 billions for "services." From another perspective — also encompassed in the Uniform Commercial Code — total sales in manufacturing and trade were \$72,634 millions plus \$107,995 millions in inventories. At the respective distributive levels in our economy there were \$37,100 millions in manufacturing sales, \$13,734 millions in sales by whole-

the Uniform Commercial Code there remains only sales of land, pure personal service contracts, insurance and sales of securities on the exchanges, plus a few other odds and ends of commercial contracting transactions.

Professor Williston seized the strategic ground of American contract law when he drafted the Uniform Sales Act and went on to publish his monumental Restatement of Contracts. Karl Llewellyn has now captured the high ground by means of the Uniform Commercial Code.

The burden of this monograph is that Professor Karl Llewellyn implemented his ideas on the law of contract by imbedding them into the Uniform Commercial Code in such manner that they are now virtually inextricable. More importantly, he built the Code so as to embody a commercial contract construct substantially different from the orthodox contract construct by statutorily substituting obligation-based-on-transaction for obligation-based-on-promise. This theory is fascinatingly persuasive for those like myself, who had long wondered what fine madness underlay the plethora of contract rule changes wrought by the Code.

II.

FROM PROMISE TO AGREEMENT AND A BIT BEYOND

The concept of "promise" was and is of critical importance to traditional contract law, but the word seldom appears in the Code. This alone marks a significant departure from the nomenclature of the law of contract. Relying completely on the mental picture of face-to-face dealing by means of personal "promises," the Restatement of Contracts repeatedly uses the term as virtually synonymous with "contract" or "undertaking," a combination of acts *and* "intangible duties" or "the moral duty" to perform. Since it is the ultimate fact in traditional contract law it cannot be defined in concrete terms because it signifies a mixture of fact and law.¹⁹

salers, and \$21,000 millions in retail trade — inventory values at each level were approximately the same as sales except that manufacturers had nearly twice as much value in inventories as they handled in sales. Economic Report of The President (1965). My point is that two-thirds of all contracting (measured in dollars) in this country in 1964 involved sales of goods or equipment. The law of sales is of obvious strategic importance to this tremendous amount of economic activity.

19. RESTATEMENT, CONTRACTS § 1 (1932), defines "contract" as "a promise or set of promises," and comment b advises:

As the term is used in the Restatement of this Subject, 'contract' includes not only the act of making a promise or promises but the intangible duties which arise. Similarly 'promise,' under the definition in § 2, includes not merely the act of speaking, but the continuous duty, whether moral or legal, which a promisor assumes when he makes a promise. The separation is not made in ordinary legal speech, and is not made in the Restatement of this Subject, between the physical act of speaking words of promise and the intangible duties which thereupon arise.

The validity of the entire Langdell-Williston–Restatement construct was briskly challenged by Llewellyn in 1937. Announcing his deliberate intention to recanvass the field of contract law in a series of studies, Llewellyn gave as his explanation for this monumental task he was undertaking that Orthodoxy's formulations were suspect. He threw down the gauntlet without equivocation:

The impulse and analysis of Langdell, the further development and clarification of Williston, the caseless Restatement of the Law of Contract: These seem to me at clear variance with both the decisions and with sense, on too many points for comfort. The five volumes of Williston and Thompson which I have thus far read contain, to my reading, a desperate, though often skillful, effort to make non-law look like law.²⁰

His grand design was to present *rules of law* instead of formulae of *superstition about law* and he proposed to rely heavily on the prior work of Professor Arthur Corbin, his father-in-law.

One can only suppose the virtual omission of "promise" from the Code was a deliberate and calculated effort to free contract from an indefensible image and an undefinable foundation word. The third episode of his projected recanvassing of the law of contract took up this precise point in a passage where he noted that "the traditional base-line of a century back" is that "the essential basis of contracting is *Agreement*." Our judges are prone to keep confused the difference between law and fact, he noted, but no matter what the particular word-formulation they used to describe "contract":

[T]he operative facts were to be facts of *agreement*. Into this line of thinking broke the line of thinking in terms of a contract as involving not agreement in first instance, but *promise* — or 'a set of promises.' This the Restatement accepts. But the Restatement still stands firm in further keeping law fused with fact: a contract 'is a promise (or a set of promises) legally enforceable.' Corbin's sounder and keener insight on this latter point the Restatement rejected.²¹

This complex formulation is continued in section 2 which defines "promise" as "an undertaking" and comment a notes that "just as 'contract' . . . means both physical manifestations by words or acts of assurance and the moral duty to make good the assurance by performance. . . ."

20. Llewellyn, *The Rule Of Law In Our Case-Law*, 47 YALE L.J. 1243, 1269 (1938). Corbin's basic definition of "promise" went thus: "A promise is an expression of intention that the promisor will conduct himself in a specified way in the future, with an invitation to the promisee to rely thereon." Corbin, *Offer And Acceptance and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 171 (1917); CORBIN, *CONTRACTS* § 13 (1952). Although in the latter publication he proposes that his definition and that used by the Restatement are "not substantially in conflict," there is clearly the difference between the two that Corbin is talking about physical facts while Williston is using the word "promise" to signify physical facts and "intangible duties" moral or legal.

21. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 YALE L.J. 779, 796-97 (1939).

The vice in the Restatement notion of "promise" as the cornerstone of a *general* theory of contract is that "when you see that there just has to be a contract . . . you will 'see' or 'find' a 'promise' where there is no promise . . . [and] if you still believe that you must find a second promise in order to establish a mutual contract . . . then even when you have a very clear and satisfactory expression of agreement you are likely not to see it."²²

For one who thinks in traditional contract images it would be virtually impossible to codify the immense body of contractual rules structuring commercial transactions without *some* reference to the key "operative act" of the Langdell-Williston-Restatement construct. But for one thinking in functional images, knowledgeable of the enormous diversity of commercial contracting practices, and impressed with the "life situations" of business *transactions* it would be unthinkable to ground contract *rules* on a spurious *fact* basis which seldom occurs in the manner suggested by the normal connotations of the word "promise."

Nor does the phrase "mutual assent" quite fill the bill. Crippled permanently by the legal theological battles over "subjective" versus "objective" tests, encrusted with the barnacles of "meeting of the minds" problems and rife with the promissory connotations of the word "assent," use of the mutual assent litany would augur confusion further compounded. The phrase has always carried the distressing implication that there was a *single* proposition to which the contracting parties humbly acquiesced, a proposition existing completely extraneous to the parties and their transactions, stemming, perhaps, from a *deus ex machina* who broadcast propositions to the cosmos at random to be examined and accepted by parties who were looking around for propositions to assent to. Something much more realistic, comprehensive and cleanly factual than either "promise" or "mutual assent" was required. The older history of contract law emphasizes "pact." Even the old English writ-word "assumpsit" was not quite so narrow as "promise" but instead was more accurately the act of "undertaking." Resort by the Code to the older word "agreement" was thus both a return to the original understanding of the essence of contract obligation and a more concrete reference to contemporary commercial transactions.

This substitution of terminology was certainly not inadvertent as evidenced by the following passage written by Llewellyn just before he began work on the Code:

The common experience observation that most business deals are initiated by various means of expressions of agreement, both

22. *Ibid.*

words and acts, gives power to the century-old approach of courts to contract as resting simply in overt agreement . . . [and] since it is true that expression of agreement is the normal and natural way of closing a deal, the legal mind is tempted to conclude that it may be the *only* way of closing one. Hence, even as doctrinal emphasis shifted from agreement to promise as being the essential subject-matter of Contract, agreement was yet dragged along, as a secondary essential attribute, and was called for in the requirement of 'mutual assent.' It will be noted that the change in term carries a change in flavor. 'Agreement' connotes active obligation; and connotes overt expression. 'Assent' need not; its actual flavor is satisfied by mere acquiescence, in silence. This leaves the obligation aspect of the agreement-idea free to center on, and to become obscured by, the term 'promise.'²³

Rereading these passages one is struck by the enormous implications of the ostensibly insignificant insistence in the Code on "agreement" rather than "promise." The burden of that entire law review article was that the great dichotomy drawn by orthodox contract law between bilateral and unilateral contracts was utterly meaningless when tested by the fact patterns of common experience. Grounding contract on agreement-in-fact, however manifested, the Code wipes out with one sweep the whole figment of promise-for-a-promise-or-promise-for-an-act. Llewellyn proposed at that point in his thinking not so much a massive conceptual shift *away* from something called "promise" to something called "agreement," but more nearly a broader conceptual base for contract, unified by removal of the false dichotomy between promises and acts of acceptance dictated by Orthodoxy's emphasis on "promise," and a more commonsense "single approach to acceptance for business deals" in meeting the functional problems arising from the initiation of business transactions. In other words, the making of business contracts should be viewed by the law as involving not only the exchange of factual promises or the tendering of un verbalized acquiescence, but, more realistically, as the commencement of a continuing process of agreement in the broader, more familiar sense.

That he still had this in mind when he fashioned the Code cannot be doubted when the introductory article itself is consulted. The 1949 version appeared almost exactly ten years after Llewellyn wrote the essay cited above, and it is both plausible and persuasive that in the meantime he had concluded that promise was a false god for the law of commercial contract. Section 1-201 (10) of the 1949 Code defines "contract" as "the total obligation in law which results from the parties' agreement. . . ." The key fact underlying the legal obliga-

23. *Id.* at 809.

tions of the contracting parties is their "agreement" which was defined in subsection (2) as "the bargain in fact as found in the language of the parties or in course of dealing or usage of trade or course of performance or by implication from other circumstances." These definitions and their comments are carried over unmodified in the 1962 Code, with the exception that the current version of "agreement" has rearranged the phrases of the crucial first sentence so as to alter the original formulation slightly. The 1962 definition provides:

- (3) 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. . . . (section 1-201 (3))

There is the implication that under the original definition of agreement a contract obligation could be founded upon: 1) language of the parties, or 2) course of dealing, or 3) usage of trade, or 4) course of performance, or 5) other circumstances; but that the 1962 definition eliminates the fifth basis and through phraseological rearrangement creates a series of possibilities for contract obligations arising from:

- 1) language of the parties, or
- 2) other circumstances provided in the act, including [but not limited to?]
 - a) course of dealing, or
 - b) usage of trade, or
 - c) course of performance.

This does not seem to modify the basic meaning of the original 1949 language. Even more importantly, this key definition substantially reflects Llewellyn's meaning of obligation-based-on-transaction and manifests his deliberate intention to effect the precise alterations in the contract construct he urged in 1939.

This point can be traced still further in the Code. Both the 1949 and the current versions of the Code irrevocably structure the agreement-in-fact idea into the law of sales contracts by providing in section 2-204 that "a contract for sale of goods may be made in any manner sufficient to show agreement," including conduct by the parties recognizing the existence of a contract. The secured transactions article provides that "a security interest cannot attach until there is agreement," citing specifically to the agreement definition of Article 1. This same "agreement" definition also is imported into the letters of credit

article where the issuer's obligation to its customer is set forth in section 5-109. The statutory text specifies that the issuer is ordinarily not responsible for the underlying contracts of the customer and beneficiary, nor for any act or omission by anyone else, nor for its own lack of knowledge of trade usages other than banking usage. But the more illuminating aspect of this section appears in comment 1, which states:

The extent of the issuer's obligation to its customer is based upon the agreement between the two. Like all agreements within the Code that agreement is the bargain of the parties in fact as defined in Section 1-201 (3) . . . and includes the obligation of good faith imposed by Section 1-203 and the observance of any course of dealing or usage of trade made applicable by Section 1-205.

A forward reference to Part IV of this essay serves to emphasize the essential unity of Llewellyn's thought as manifested in the Code, for in the Code section quoted above the two baselines of Agreement and Commercial Good Faith are explicitly linked.

These examples not only echo the theme of section 1-201 (3) that a broader jurisprudential base than promise has been laid for the law of sales, letters of credit, and secured transactions; but a more noticeable and more important fact is that the seeming multitude of changes in particular traditional rules of contract law gain new significance by reference to the Code emphasis on obligation-based-on-agreement-in-fact. Viewed in the polarized light of Llewellyn's attitudes concerning orthodox contract law, this return by the Code to older and more realistic ideas lends significance to the rule changes which loom forth from the dry-as-dust statutory language of our new commercial law.

III.

A TRANSACTIONAL CONSTRUCT

The salient feature of commercial law in this country is its necessary relationship to our goods distribution system. That economic system requires rules for the sale, shipment and storage of the goods themselves, and also demands rules for the necessary supporting activities — payment and financing. The English Sales of Goods Act and Bills of Exchange Act were formulated for a distribution system so rudimentary that by the time they were copied in our Uniform Sales Act and Negotiable Instruments Law the whole body of those laws was hopelessly uncorrelated with our economic distribution system.

The Code takes a fresh start and is framed around our present goods distribution system. This shows up clearly when the two are considered together. The "baseline" here being considered is a bit more difficult to describe although possibly even more significant than the agreement parameter. That Karl Llewellyn *was* concerned because the orthodox offer-acceptance-consideration construct was predicated on a static, unrealistic conception of 18th century face-to-face commercial exchanges, is manifested in many of his published expressions. The closing stanza of his monumental two-part study of the law of sales warranty in 1937 alludes to the increasing prevalence of the commercial phenomenon of the "continuing transaction" which our law of contract regards in helpless amazement. He noted:

Consider, for instance, the queer rules which courts indulge, severing *each* contract between two parties from each other contract — *e.g.*, in regard to whether buyer's default on one excuses seller's performance on '*another*.' No businessman or credit department could think that way: what they see is 'an account' in arrears, on certain 'items.' The law has, thus far, failed to come close to perception of these standing relations, and has failed to develop tools to pick them up or deal with them.²⁴

Attempting to summarize some of the legal aspects of this settled commercial practice, he noted the need for open terms in contracts, a commercial (substantial) performance doctrine in place of the legal (strict) performance standard in sales, a "less-than-full-contract-damage" sanction for binding going-relation arrangements, and frank recognition that what may be "good policy" in goods-distributing relations might be intolerable in labor-relations. Thirty years ago he noted, "that sales law is already being affected by going-relations, of one sort or another, in ways which flout old contract and sales theory."²⁵

He particularly criticized the Uniform Sales Act remedy of outright rescission for defects in quality, pointing out that real functional differences to dealers between "gradable goods," durable goods, heavy machinery, and soft goods could, without trauma, translate into legal differences concerning remedies for defects in quality. Following up that notion he noted that: "until our economy shifts its entire base, deals between merchants will be first of all deals, looking toward movement of goods and toward accounts in due course to be taken care of."²⁶

24. Llewellyn, *On Warranty of Quality, And Society: II*, 37 COLUM. L. REV. 341, 376-77 (1937).

25. *Id.* at 379.

26. *Id.* at 389.

Perhaps a fuller statement of the type of relationship he perceived between the legal notion of contract, goods distribution and the needs of our credit economy appeared in 1931 in an article prepared for the Encyclopedia of Social Sciences in which he said:

Bargain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U.S.S.R.) for apportionment of productive energy and of product. It is a machinery which like statute but in contrast to tort makes it easy to insist on positive affirmative action. *Contract* in the strict sense is the specifically legal machinery appropriate when such an economy moves into the phase of credit meaning or connoting thereby future dealings in general; in which aspect the mutual reliance of two dealers on their respective promises comes of course into major importance. This machinery of contract applies in general to the market for land, goods, services, credit, or for any combination of these. . . . Output and requirement contracts, maximum and minimum contracts, contracts with quality, quantity and kinds to be specified from month to month, and sliding scale price arrangements — these are symptomatic of an economy stabilizing itself along new lines.²⁷

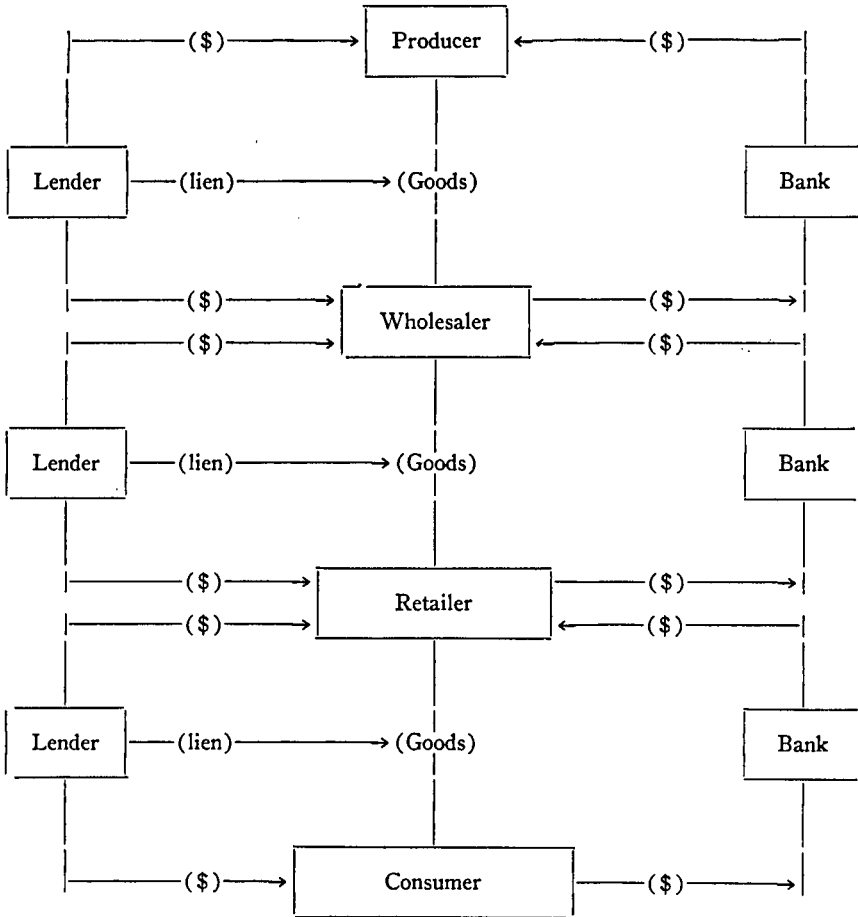
His primary points were well made: A modern commercial law of business contracts must be rooted in the actual fact patterns of our modern, credit-oriented, on-going transactional economic system which now distributes \$620 billion worth of goods and services annually. The Uniform Commercial Code has such vision, and in its very essence differs dramatically from the title-exchange construct against which orthodox contract law framed its principles governing the sale of goods. The Code sees an altogether different commercial world.

But the best evidence of the extent to which the Code is geared to dynamic, flowing, on-going commercial process is the fact that the very warp and woof of the Code itself testifies to the fact. For a point of beginning visualize the general goods distribution process in this country today by means of an ideograph symbolizing the essential economic functions together with the various articles of the Code. Mine looks something like this:

27. Llewellyn, *What Price Contract?*, 40 *YALE L.J.* 704, 717 (1931). The significance of the notion of the "credit economy" which appears in the quoted extract is further developed in the passage beginning on page 708 where he notes that contract begins "in a society in which bargains and promises are as rare as are some hundred other matters of our present daily life" and thus things to be regarded with suspicion, but "the other end of the development lies in a credit economy in which bargains and promises are so much the normal course of dealing that reliance on them is a matter of tacit presupposition . . . [and] the legal approach then is, fundamentally: a bargain or promise is enforceable unless reason appears to the contrary." *Id.* at 710.

SALE AND DISTRIBUTION PROCESS

- Sales Art. 2
- Investment Securities Art. 8
- Documents of Title Art. 7



FINANCING PROCESS

- Secured Transactions Art. 9
- Bulk Sales Art. 6
- Letters of Credit Art. 5

PAYMENT PROCESS

- Negotiable Instruments Art. 3
- Bank Collections Art. 4

Goods or choses in action flow downward from the producer through the wholesaler, retailer and ultimately to the consumer. The rules for sales in article 2 and those for documents of title in article 7 regulate this down-flowing pattern which is the basic distribution process in our economy. In any given transaction one or more of the two middle economic steps of distribution may not have yet fully developed into independent stages or may have been absorbed through corporate vertical integration but the respective economic functions must still be performed irrespective of who does it. Money in the payment process flows upward along the right hand margin of the diagram from each lower stage to a higher distributive stage through commercial banking channels. The whole process is covered by the negotiable instruments rules of article 3 and the bank collection rules of article 4. Our interim or short-to-medium term financing process is depicted along the left margin and consists of creditors who loan money to either party to the goods exchange by means of promissory notes covered by article 3 or issuance of letters of credit under article 5 and who obtain security interests in the goods themselves (or in documents representing the goods or instruments which have been exchanged for the goods) under the secured transactions provisions of article 9, or by means of inventory protection afforded some unsecured lenders under the fraudulent conveyances rules of article 6.

This diagram depicts the overall makeup of the Code. Internally, the various articles of the Code are correlated with the essential processes of the functional goods-distribution model which thus provides an essential unifying feature for the whole Code. There are millions of contractual "working parts" in the model. They mesh more or less smoothly, continuously, flexibly and adjustably to distribute many thousands of different products by means freely chosen and reasonably adapted to commercial needs. The Russians have nothing quite like it.²⁸

28. The R.S.F.S.R. CIVIL CODE of 1922 was drafted by Soviet jurists who were trained prior to the revolution and whose thinking reflected much of the German Civil Code which was both a model for the Soviets and many provisions of which were virtually copied. The black-letter law of Soviet contracts thus contained basic provisions dealing with the formation, performance and breach of a contract and resembled traditional European legal thinking. At the same time it also manifested the NEP policies against recognition of private rights. The new Fundamental Principles of Civil Legislation of the USSR and the Union Republics, adopted in 1961, proceeds upon the assumption that private contract plays a small role in a communist society. The emphasis is on regulating the relationships among public agencies and with private individuals. HAZARD & SHAPIRO, *THE SOVIET LEGAL SYSTEM, PARKER SCHOOL STUDIES IN FOREIGN AND COMPARATIVE LAW*, Part III, 28 (1962).

Perhaps a clearer indication of the precise role played by contract in a communist society is the following description of the centrally-developed economic "plan" mechanism:

The plan holds a central position in the East German economy. It expresses the governmental economic policy and fixes, with the help of binding directives, the

A similar analysis of the key articles themselves reveals a repetition of functional arrangement based closely upon the settled fact-patterns of commercial practice in the particular field of activity. These key articles cover sales, negotiable instruments, bank collections and secured transactions — articles 2, 3, 4 and 9. Only a sketchy discussion of the respective processes will be reproduced here in an attempt to minimize reader boredom. Yet it should be apparent immediately that upon the whited bones of these frames grow the living sinews of the Code rules. The basic parameter for each Code article is the typical chronological sequence of the particular commercial *process* involved.

A. *Sales Law*

The *Sales Construct* is a two-party model which embodies the basic sales processes of “contracting,” “delivery,” “acceptance,” “breach” and “remedies.” This feature has been elliptically noted by many commentators. Professor Mentschikoff, in her recent discussion of the Code, sketches through the arrangement of the parts in the sales article.²⁹ We are all familiar with the functional disorganization of the old Uniform Sales Act which was vaguely arranged along contract concept lines. The Code remedies that particular blemish in our commercial law and takes a functionally-oriented approach to do so by proceeding through the typical sales transaction systematically from contracting to performance to lawsuit. This is life.

Wedded to the functional sales construct are major changes relating to legal concepts of “contracting.” More than mere rules changes, these alterations signify a clear rejection of the traditional construct and reinforce the shift from promise to agreement.

Orthodoxy’s darling — the great contract dichotomy of bilaterals and unilaterals — has been deftly erased from the law of sales for all practical purposes by the provisions relating to offer and acceptance. The Code provides:

- 1) Unless otherwise unambiguously indicated by the language or circumstances

course of the country’s economic development. The function of contract, in turn, is to implement in detail the directives of governmental policy as expressed in the plan. The introduction of the system of contracts is designed to eliminate from the plan those specifications which are important only between a particular purchaser and a particular seller, as, for instance, the precise date of delivery, or the particular type, quality and packaging of the goods. Moreover, the contract serves as a means for disclosing mistakes and errors in the general planning and permitting their correction.

Grossfeld, *Money Sanctions For Breach of Contract In A Communist Economy*, 72 *YALE L.J.* 1326, 1327-28 (1963).

29. Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 *Mod. L. Rev.* 167, 172 (1964).

- a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
 - b) current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods but such a shipment of nonconforming goods does not constitute an acceptance if the seller reasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
- 2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance (section 2-206).

The comments to this section make clear that "any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear" that it will not, that *either* shipment *or* a promise by the offeree initiates the deal in law, and the *beginning* of performance plus *notice* thereof to the offeror makes the contract. The "Ribbon Matching" law of contract stems directly from the rigorous conceptualism of offer-acceptance, and Orthodoxy has always demanded that both the content and mode of the acceptance correlate one-to-one with the content and mode of the offer. This absurdity has now disappeared from commercial law. Moreover, comment 4 states that under subsection 1(b) a shipment of nonconforming goods may amount to an acceptance "intended to close the bargain, even though it proves to have been at the same time a breach." One schooled in Orthodoxy cannot imagine how such a thing could happen;³⁰ but to the functionally-oriented visionary it is all quite simple.

Inexorably eradicating old doctrine root and branch, the Code settles the "battle of the forms" by providing in section 2-207 that express acceptance varying the terms of the offer amounts not to a conceptual counteroffer but instead "operates as an acceptance," unless designated to be conditional upon assent by the offeror, whereupon any such additional terms will normally become a part of merchants' contracts unless the offer specifies otherwise, the additional terms materially alter the contract or express objection to them is promptly given. Comment 2 specifies that "a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

30. "How a nonconforming shipment can be both an acceptance and a breach I cannot imagine." Williston, *The Proposed Commercial Code*, 63 HARV. L. REV. 561, 577 (1950).

These two provisions substantially implement the "single approach to business contracting" advocated by Llewellyn in 1939 and wipe out Orthodoxy's great dichotomy in the field of sales contracts.³¹

The hoary old consideration doctrine is treated almost as harshly. Mercantile offers in writing may be irrevocable for ninety days without being "supported" by consideration because the business practice of contracting for goods both needs and utilizes the firm offer in writing identified as such.³² Llewellyn noted this many years ago. But a more graphic affront to the consideration doctrine is contained in the blunt statement of section 2-209(1) that "an agreement modifying a contract within this article needs no consideration to be binding," and subsection (4) will permit many abortive modification agreements to "operate as a waiver." The comments clearly indicate that a requirement of consideration for such modification agreements would be mere "technicality." Alas, once-mighty legal doctrine is humbled by mere business expediency!

Numerous other specific changes in the Restatement and sales rules are made throughout the body of article 2, some large and some small, but all significant. Perhaps the most dramatic change in the property aspect of sales law is the substantial elimination of the title concept from the Code. "When title passed, title passed, and we could all go home," is the wonderful statement coined by some unsung genius of the law which summarized most of the old law of sales.³³

31. The dichotomy is meaningful in some limited instances and thus is retained in the article 9 distinction between "account" and "contract right" in section 9-106. Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 ILL. L.F. 321, 329.

32. UNIFORM COMMERCIAL CODE § 2-205.

33. When I first wrote this sentence I had not the foggiest notion who coined that wonderful phrase nor where I first heard it. To my delight I later found that my colleague Professor Fred Whiteside is "that unsung genius of the law." Whiteside, *Uniform Commercial Code — Major Changes in Sales Law*, 49 KY. L.J. 165, 173 (1960). It has a true Llewellynesque flavor. Llewellyn made known his general views on the subject almost 30 years ago. Llewellyn, *Through Title To Contract And a Bit Beyond*, 15 N.Y.U.L. REV. 159 (1938), 3 LAW — A CENTURY OF PROGRESS 80 (1937). His recommendations on the subject were essentially pragmatic:

I do not suggest the elimination of the title-concept. It has its uses. But it should be made to serve merely as the general residuary clause.

Id. at 88. Each of the suggestions for change voiced in that essay were reproduced with fidelity in article 2. Section 2-401 provides:

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. . . . (1) . . . title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

The comment spells out that a new "step by step performance or non-performance" approach to legal consequences is substituted for the title-passage idea. Some specific examples are: risk of loss (§§ 2-509, 510), the seller's right to the price (§ 2-709), and buyer's right to the goods (§§ 2-502, 2-716) are determined independently of the location of "title"; and, section 2-401 is the "residuary clause" of which Llewellyn wrote in 1937. But see Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 457 (1950), for some complaints that title sneaked back into the Code in the "acceptance" provisions.

There are many other contract rule changes in the sales article.³⁴ Significant ones concern warranty,³⁵ remedies,³⁶ and quasi-reme-

34. A thorough recent survey of some of the many minor rule changes is Gilbride, *The UCC: Impact on the Law of Contracts*, 30 BROOKLYN L. REV. 177 (1964).

35. The contract doctrine of "privity" has been violated to the point where its continuing integrity is questionable. "Horizontal" extension of a buyer's substantive rights to enforce warranties has been widened to include "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods" by section 2-318. The section caption indicates a "third-party beneficiary contract" theory was adopted in order to abrogate the privity requirement as to persons in the designated class. See also comment 2. However, comment 3 invites judicial examination of further case-law extension of warranty protection "to other persons in the distributive chain." These different theories are not necessarily inconsistent with each other, but the former ties subsequent development of warranty extension to a traditional contract concept while the latter invites reformulation of the field along more functional lines. Quick reference to RESTATEMENT, CONTRACTS §§ 133 through 147, reveals that possible third-party beneficiaries must fall within the category of "donee," "creditor," "incidental" or a beneficiary of a public contract, duty depending upon the "intent" of the contracting parties. Consulting case law development since 1932, one discovers that the Restatement approach predominates. *Colonial Discount, Inc. v. Avon Motors, Inc.*, 137 Conn. 196, 75 A.2d 507 (1950); *Ridder v. Blethen*, 166 P.2d 834 (Wash. 1946). The decisions relating to construction contracts involving a bonding company, prime contractor and subcontractor contain no clearly enunciated third-party beneficiary contract theory which would permit extension of warranty protection under UCC § 2-318 to other persons in the distributive chain, for example, employees of the buyer. The bartender in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), was not entitled to recover for injuries from the exploding bottle because he was not a "subpurchaser," so abrogation of the strict privity requirement by previous Pennsylvania decisions did not aid him despite UCC § 2-318. The dishwasher in *Duart v. Axton-Cross Co.*, 199 Conn. Sup. 188, 110 A.2d 647 (1954), could not recover for her skin infection caused by defective soap because employees were not named as members of the statutory class to whom warranty protection was extended. *But see Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964), noted in 10 VILL. L. REV. 607 (1965).

"Vertical" problems of procedure raised by the privity requirement of traditional contract law invariably appear in cases involving attempts by consumers to sue manufacturers directly for breach of warranty.

These problems have been judicially approached on a number of different theories. BRAUCHER & SUTHERLAND, *COMMERCIAL TRANSACTIONS* 20 (3d ed. 1964) (enumerating six separate theories invoked to permit suit directly against the manufacturer); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962) (advancing a theory grounded on misrepresentation by advertising). The UCC mechanism for curing these problems does some violence to the privity concept. Under the vouching-in provisions of section 2-607(5), a buyer being sued for breach of warranty "for which his seller is answerable over" may notify his seller to "come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations."

Note, *A Comparison of Rights and Remedies of Buyers and Sellers Under the Uniform Commercial Code and the Uniform Sales Act*, 49 Ky. L.J. 270 (1960); Note, *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law*, 49 Ky. L.J. 240 (1960); Note, *Legislation*, 15 U. PRRT. L. REV. 331 (1954).

36. Two casualties are "rescission" of the contract and the doctrine of "election of remedies," both of which were grounded ultimately on principles of contract law. The latter concept is most explicitly rejected by the Code. Section 2-703 enumerates the seller's remedies and comment 1 states:

This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

Although election of remedies is neither a fundamental policy nor a millstone around the seller's neck, its ghost may still crop up in the context of the buyer's remedies. Section 2-711 enumerates the buyer's remedies and comment 1 states they are "available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance."

The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The remedies available

dies.³⁷ Arguably, the “quasi-remedies” represent the substantial performance and less-than-full-contract-damage principles Llewellyn cried out for many years ago.

Particular modifications in contract law are apparently miniscule but have enormous significance when viewed in the light of the suggested jurisprudential shift from contract back to (economic) status. Thus the “open terms” provisions of the Code strike at the heart of the orthodox indefiniteness doctrine of ancient vintage by expressly validating contracts which specify neither price, place of delivery, time of delivery nor time of performance. Only the total quantity must be definite although the assortment need not.³⁸ Section 2-204(3) sets

to a buyer for breach regarding accepted goods are cross-indexed as the right to demand “cure” under section 2-508, the right to accept and reject on a “commercial unit” basis under section 2-601(c), the right to revoke acceptance under section 2-608, the right to reject a non-conforming installment or cancel under section 2-612, and his right to recover damages under section 2-714. Thus the buyer “elects” among these two sets of “remedies” by accepting the goods under section 2-606.

The wondrous mysteries of “rescission” similarly are a thing of the past in sales law. There were three distinct meanings for “rescission” under prior sales law: 1) some breaches of installment contracts justified the seller refusing to continue performance and suing for damages for breach of the entire contract under section 45(2) of the Uniform Sales Act, which some courts called “rescission”; 2) section 61 permitted a seller to “rescind the transfer of title” and sue for damages; and 3) section 65 permitted a seller to “totally rescind the contract or the sale” whereupon he retained no rights “on the contract” under general contract law principles. BRAUCHER & SUTHERLAND, *COMMERCIAL TRANSACTIONS* 163 (3d ed. 1964). A buyer could “rescind” the contract of sale under section 69(1)(d) for a breach of warranty and occasionally for some other breach under general contract law. Note, *A Comparison of the Rights and Remedies of Buyers and Sellers Under the Uniform Commercial Code and the Uniform Sales Act*, *supra* note 34, at 285. The Code nowhere specifies that either party can “rescind” although they may “cancel.” Section 2-703(f) (seller) and section 2-711(1) (buyer). Cancellation merely discharges obligations of performance by either party. The only mention of “rescission” is in section 2-720 to the effect that any such expression by either party shall not be deemed to constitute renunciation or discharge of any claim for damages for antecedent breach.

The most exhaustive study of the Code changes in specific sales remedies is Peters, *Remedies for Breach of Contracts Relating to The Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 *YALE L.J.* 199 (1963).

37. The descriptive phrase “quasi remedies” is borrowed from my former colleague Professor Frederic Spies of the University of Arkansas School of Law. Intended to signify those sales article innovations which do not quite come within the fair meaning of the word “remedies” because they are not the traditional legal remedies of the law of sales, this phrase includes the provisions dealing with unconscionable contracts (section 2-302), modification without consideration (section 2-209), right to preserve goods in dispute (section 2-515), right to adequate assurance of performance (sections 2-609 to 2-619), anticipatory repudiation (sections 2-610 and 2-611), rights upon destruction of goods (section 2-613), substituted performance (section 2-614), excuse by failure of presupposed conditions (section 2-615), cure (section 2-508), and right to cash or to stop goods upon buyer’s insolvency (sections 2-702 and 2-502). The essence of this classification is that these rights, duties and liabilities accrue *in the absence* of full contract breach. Spies, *Sales: Article II*, 16 *ARK. L. REV.* 6, 26-29 (1961). “Cure” is particularly useful against “bad faith rejections of title” in certain situations and may compel re-examination of at least two hoary old sales law homilies. Hawkland, *Curing an Improper Tender to Title to Chattels: Past, Present and Commercial Code*, 46 *MINN. L. REV.* 697 (1962).

38. The “open terms” provisions are those designed to permit the court to fill the gaps in the contract left by the parties: price (section 2-305), delivery (sections 2-307 and 2-308), and time (section 2-309). The text statement that “the total quantity must be definite” is slightly exaggerated in one sense because the Statute of Frauds provision, section 2-201, does not flatly require the quantity to be stated but instead provides that “the contract is not enforceable under this paragraph beyond the

forth basic Code doctrine that such an open-term contract "does not fail for indefiniteness if the parties have intended to make a contract" and some appropriate remedy can be framed, and the comment to that provision notes that it "states the principle as to 'open terms' underlying later sections of the article." More to the point, the open price term provision rejects both the orthodox contract rule that "an agreement to agree is unenforceable" and the whole "indefiniteness" doctrine on grounds that ". . . where the dominant intention of the parties [is] to have the deal continue to be binding on both . . ." the contract is valid.³⁹

Functional approach to goods distribution, coupled with both major doctrinal modifications and minor rules changes all compel the conclusion that the sales article alterations are consistent with this conspiracy theory of the Code.

B. *Commercial Paper*

Orthodox contract law branches out in another direction to convert the personal contract into a "negotiable instrument." Emphasizing the essential oneness in law of all such transferable contracts, our traditional approach has been simply to specify the requisites of "negotiability," the rules for transferring these items and to construct rudimentary channels for these transfers by means of status-creating concepts such as "holder," "holder in due course," "holder not in due course," and "bona fide purchaser." That was our negotiable instruments law: fragmentary, vague and depressingly ritualistic. One memorized the elements of negotiability, types of endorsements and the stately patterns of British banking — presentment, acceptance, dishonor — in order to pass the bar exam. Generation after generation of law students has been thoroughly drilled in the abstractions of "value," "notice," "endorsement or assignment," "real versus personal defenses," and the unanswerable complexities arising from the impersonation cases.⁴⁰ The whole of the commercial banking process was

quantity of goods shown in such writing." Another dimension to this matter is the validation in section 2-306 of output, requirements and exclusive dealing contracts, the orthodox objections to which have included their "indefiniteness" concerning quantity and other standards of performance. Section 2-306 provides that an output or requirements term means "such actual output or requirements as may occur in good faith" and not "unreasonably disproportionate" to stated amounts or estimates of normal or prior output or requirements; and, an exclusive dealing agreement obligates the parties to "use best efforts" in performing, or, as comment 5 states it: "to use reasonable diligence as well as good faith in their performance of the contract."

39. UNIFORM COMMERCIAL CODE § 2-305, comment 1.

40. Most of these classroom patients are cured by particular provisions in article 3. That great conundrum arising from whether a restrictive endorsement impaired subsequent negotiability and the whole matter is restructured in sections 3-204, 3-205 and 3-206 (negotiability is not destroyed, a subsequent indorsee is not on "notice"

subsumed in a few ancient English cases on bills of exchange plus an occasional lawsuit arising by virtue of fortuitous bank failures. *Price v. Neal* served all comers. That all this was hopelessly uncorrelated with commercial realities seemed to bother no one.

But for at least fifty years the commercial world has made a clear and vital functional division of commercial paper into credit instruments, secured debt instruments and securities. Whole industries have grown up around these divisions, and completely different institutional practices have been created in order to accommodate the economic-use distinctions between the payment, financing and investment processes in our economy.

The Code changes few black-letter rules of the Negotiable Instruments Law. These rule changes have been often described and discussed but the most succinct description comes from Llewellyn himself:

On the side of Commercial Paper, the many case-law conflicts have been cleared up, proceedings on dishonor simplified, obsolete material like acceptance and payment 'for honor' eliminated, and current paper separated from investment securities, with bonds, share certificates and the like dealt with in a separate article. Bank collection has, however, been included in Commercial Paper, with new statutory regulation of the item-by-item collection typified by the documentary draft, and with the float of 'cash items' (which have long come to be handled in bulk) dealt with by new law. . . . Warehouse receipts and bills of lading are drawn together into a separate article, with slightly expanded coverage; As a corollary to coverage of the overseas sales transaction, there has been coverage of its complements in banking practice, the letter of credit and the foreign remittance. . . .⁴¹

These seemingly random changes not only tidy-up but also unmistakably alter the conceptual underpinnings of our law of commercial

merely because of the restrictive endorsement and may qualify as a holder in due course). Section 3-305 clarifies much of the confusion of "real versus personal defenses" by specifying which particular defenses are unavailable as against a holder in due course (infancy, duress or illegality in the transaction, misrepresentation in the inducement, discharge from insolvency proceedings, and any discharge of which the holder has notice when he takes the instrument), and the comments further specify that "all defenses" includes nondelivery, conditional delivery or delivery for a special purpose (comments 2, 3 and 5). Comment 7 expressly accepts the case law distinction between fraud in the inducement and fraud in the factum. Impersonation problems and "payroll padding" situations are covered in section 3-405 which tends to put the loss in both instances on the drawer, thus permitting continued use of those particular traumatic situations in the classroom to generate discussion about the "equities" of the situation. Material alteration problems and the doctrine of *Price v. Neal*, 3 Burr. 1354; 97 Eng. R. 871 (1762), are covered in sections 3-406, 3-407 and 3-418 which define "material alteration" and provide for its legal consequences as to a mere holder and a holder in due course, including the effect of negligence by a party. Payment over stop orders is also affected by section 4-407 which subrogates a paying bank to the drawer's rights on the original transaction.

41. Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROB. 687, 693 (1948).

paper by functionally reframing the whole edifice to fit with current socio-economic practices.

Where the Negotiable Instruments Law utilized contract principles and a brand of commercial equity, the Code builds on an underlying concept of the "market" for the various kinds of commercial paper. Professor Mentschikoff describes the idea thus:

The underlying notion of this demarcation [of payment from investment paper] is that commercial paper such as bills of exchange, notes, cheques, and the like should again become couriers without luggage, and the classification of these pieces of paper as negotiable instruments should be dependent on commercial use and the nature of the current markets to be protected. One obvious difference between investment and commercial paper markets is the effect of maturity or default upon such paper and the purchasers of such paper. Commercial paper under such circumstances is no longer 'current.' It has no market to protect. Investment paper, on the other hand, continues to have a market which warrants protection.⁴²

Drafting the Code in light of this pragmatic view, articles 3 and 4 were framed against the actual and typical payment process and thus specify the basic legal elements of the "items" (drafts and notes) and their flow-system (the banking process of collection). Separated out from this system altogether by articles 8 and 9 are the investment process items, which can be described as "promissory" paper of a long-term nature (securities) and short-term investment or "financing" paper ("chattel paper" in article 9). Other points of distinction involve bifurcation of the "negotiability" concept, typically differing modes of transfer and protection of the basically different expectations of purchasers of payment paper and purchasers of investment paper.

The commercial paper construct of the Code is thus predicated largely on the typical payment process, and since drafts are today the primary vehicle for transmission of payment values throughout our economy that construct is most meaningfully revealed by tracing through the check-payment provisions of articles 3 and 4. The resulting ideograph manifests the functional bent of the Code concerning the vital process of payment in our goods distribution system.

C. Secured Transactions

Article 9 is designed to set forth "a comprehensive scheme for the regulation of security interests" to supplant the wide variety of chattel security devices and fill the gaps between them. The basic motivation was to cope with "the growing complexity of financing

⁴² Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 *Mod. L. Rev.* 167, 176 (1964).

transactions" which cannot be effectively accommodated by our "complicated nineteenth-century structure of security law."⁴³ The comprehensiveness of article 9 generates complexity.

The secured transaction construct of the Code is a complex model. Not only are there typically three chronological steps in the normal security arrangement and four primary legal characteristics notable in the process; but to make matters incomparably worse there are ten different types of possible "collateral" with a galaxy of statutory provisions applicable to some of the collateral all of the time and all the collateral some of the time, but not to all the collateral all the time.

The three basic chronological steps common to all non-possessory security arrangements (and to some possessory arrangements) are: 1) contracting or "attachment," 2) filing or "perfection"; and 3) enforcement or "remedies." The ten different types of collateral can be grouped into three classes: 1) consumer goods, farm products, equipment and inventory can be called "goods"; 2) negotiable instruments, documents of title and chattel paper can be called "paper"; and 3) accounts, contract rights and general intangibles can be called "choses in action." Each of the three groups contains types of collateral subject generally to common sets of rules concerning priorities and remedies. The construct can be most easily assimilated by diagramming it in the form of a crossword puzzle.⁴⁴

The outstanding doctrinal change characteristic of the article 9 impact on traditional contract law is the unitary approach to chattel security. Contractual manipulation of title so as to effect legal consequences has been as rigorously exorcised from article 9 as it has from the sales article. Security-based-on-title has been replaced by security-based-on-filed-contract for some collateral and security-based-on-possession for the remainder. The primary device for effecting security under the Code is by means of the *contractual* creation of a single type of security interest embodied in a single type of document filed under a unified filing procedure. Differences in financing arrangements now depend upon the nature of the collateral's use by the borrower and not at all upon the conceptual type of title-manipulation-contract chosen by the secured lender. Eradication of old legal nomenclature and the coining of new and functionally-derived terminology serves to consolidate this drive to revamp the entire chattel security financing process.⁴⁵

43. UNIFORM COMMERCIAL CODE § 9-101 comment.

44. Two attempts at simplification through diagramming are: Mooney, *The Old and the New — Article IX*, 16 ARK. L. REV. 145, 160 (1961); and Goodwin, *Secured Transactions: Article IX*, 16 ARK. L. REV. 131, 182-89 (1961), which presents an altogether different diagrammatic approach.

45. No elaboration on the detailed rule changes, new concepts and terminology is set forth here not only because it has been done elsewhere by others many times and much better, but also because I have already done it elsewhere and do not wish to

This marks a traumatic departure from traditional law in which legalistic contract form was pre-eminent.

Another significant doctrinal change is signalled by the article 9 provisions permitting free use of accounts, contract rights and general intangibles as security.⁴⁶ The common law experienced great difficulty even conceiving a present transfer of choses in action and the transfer of an inchoate chose in action was intellectually impossible. Conceptually, traditional contract law could only bring itself to recognize such transfers in Equity in the form of certain so-called "equitable assignments." As students in Contracts I we all duly learned the English Rule, the New York rule, and the Restatement or "hybrid" rule reflecting the various attempts by contract law to work out the rights of assignor, assignee and third parties. Notification statutes in response to the *Klauder* case⁴⁷ engrafted yet another set of problems onto the matter; and *Benedict v. Ratner*⁴⁸ complicated the whole field of accounts receivable financing with almost insuperable legal and practical problems.⁴⁹ Moreover, the conceptual inhibitions of assignment of accounts was buttressed by the prevalence in many contracts of express prohibitions against assignment. Article 9 cuts free from all this conceptualistic underbrush by expressly incorporating into its scheme this kind of collateral. To complete the whole doctrinal shift section 9-318 provides:

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective.

Comment 4 notes that for a hundred years our law has recognized assignments of choses in action but there were still traces of the absolute common law prohibition, and such cases as *Allhusen v. Caristo Const. Corp.*⁵⁰ continued to arise despite their affront to common-sense, commercial needs and current decisions. The comment begins and ends with the following remarks:

go through it again. Mooney, *The Old and New: Article IX*, 16 ARK. L. REV. 145 (1961). The secured transactions article makes "the most radical departure from prior law." Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27 (1951).

46. Problems of financing on short-term receivables have been thoroughly explored in the many expositions on the Code which have appeared in the law reviews. Only recently, however, have the problems of financing on long-term receivables begun to be analyzed. Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 YALE L.J. 217 (1964). And only a beginning has been made on the matter of "general intangibles" as security. Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997 (1964).

47. *Corn Exchange Nat'l Bank & Trust Co. v. Klauder*, 318 U.S. 434 (1943).

48. 268 U.S. 353 (1925).

49. Gilmore, *supra* note 45, contains a brilliant and entertaining discussion of these conceptual problems in what he calls "clearing away some underbrush." *Id.* at 221.

50. 303 N.Y. 446, 103 N.E.2d 891 (1952).

Subsection (4) breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of accounts and contract rights . . . it can be regarded as a revolutionary departure only by those who still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.

Further establishing that such a doctrinal break has occurred is the provision in section 9-318 which permits the original parties to a contract which has been assigned for security purposes to effect a good faith modification of its terms, which "may do some violence to accepted doctrines of contract law" but is deemed necessary "in view of the realities of large scale procurement."⁵¹

Code changes in the old law of chattel security are so sweeping and drastic, and so well-documented by now, that no extended discussion is required. The only meaningful way to view many of these rule changes is transactionally, because article 9 was so obviously drafted in light of the functional structure of modern financing practices. Professor Mentschikoff identifies this theme by reference to the emphasis in article 9 on "current course financing" and the "on-going nature of the transaction."⁵²

Many different aspects of the article attest to these characteristics. Deliberate ruptures of old contract doctrine in order to permit accounts receivable financing, assignment of contract rights and the "floating lien on a shifting stock of goods," manifest it. Policy choices clearly favoring the new loan, the incoming money and the facilitation of the movement of goods and paper in ordinary course of trade, all reflect the dynamic transactional construct upon which article 9 is based.

IV.

COURTS IN LEAGUE WITH COMMERCIAL DECENCY

Karl Llewellyn's first thoughts on the problem of implementing a general obligation of good faith in commercial transactions was to restore Lord Mansfield's merchant jury. The virtues of this device were that the triers of fact would themselves be imbued with and have the best understanding of what types of commercial conduct met the prevailing standards of commercial good faith and fair dealing. By means of this device, plus the fortuitous ascendance of strong common law commercial judges, the law merchant first became incorporated into the common law. Such a decision-making mechanism

51. UNIFORM COMMERCIAL CODE § 9-318, comment 2.

52. Mentschikoff, *supra* note 42, at 185.

has the added feature of a built-in pipeline straight to the vital source of commercial law, namely, the customs, practices and institutions of the business society. Commercial law could thereby remain current, alive and in contact with the world of commerce. This idea never bore fruit, however, and does not appear in any of the published versions of the Code.

His next approach was to impose the general obligation of good faith performance on every contracting party and define good faith as both "honesty-in-fact" and "observance of the reasonable commercial standards of any business or trade in which he is engaged." The latter element was excised by the American Bar Association's Section on Corporation, Banking and Business Law by 1952, thereby destroying the unitary concept of good faith performance applicable throughout the Code.⁵³

Perhaps in desperation, the present elaborate and fragmented scheme embodying the good faith obligation was re-introduced into the Code piecemeal. That pattern appears as a phrase in the text here, an expanded comment there, and surreptitious cross-referencing back and forth between definitions, substantive provisions and sections addressed primarily to courts. Sadly enough it is problematical whether Llewellyn was able to restore to health the fatally crippled general obligation of good faith and commercial fair dealing.⁵⁴ The courts may be able to find one. Spelling out precisely how such an assertion may be established by reference to the Code provisions themselves is a most difficult exercise in Code-dialing. Yet it can be demonstrated to a fair degree of persuasiveness that one more factor evidencing the massive jurisprudential shift by the Code away from traditional contract principles is its emphasis on a commercial good faith ground for judicial decision.

The general theory of contract grew up at Law and not in Equity. Orthodox contract doctrine makes no meaningful differentiation among contracting parties in terms of the roles they play in the economy. Merchants are treated like everyone else. Generally speaking, our law requires courts to enforce contracts as drawn by the parties absent mental incompetence, fraud, deceit, mistake or when something called "public policy" intervenes. In some circumstances the law will decline to enforce a contract for a party who has disqualified himself from receiving the aid of a court of Equity. Little leeway for "interpretation" is provided a court by the offer-acceptance-consideration construct

53. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 673 (1963).

54. This seems to be generally accepted as the unfortunate truth by both Mentchikoff, *supra* note 42, and Farnsworth, *supra* note 53, and is probably true as far as it goes. The assertion being made herein, however, is not quite the same. Technically speaking no general *duty* exists — jurisprudentially, good faith is a *baseline*.

because it places maximum emphasis upon the express or fairly implied-in-fact promises of the parties. Although frequently cited in judicial opinions as makeweight, the notion of good faith and fair dealing is almost never an explicit ground for decision in commercial contracts cases. Decision is normally grounded explicitly on the orthodox construct. The parol evidence rule, plain meaning rule and traditional maxims of construction employed by courts to interpret contracts all reinforce the notion of a rigorous doctrine of *pacta sunt servanda*. For the most part only a rudimentary procedural mechanism is available for general use by courts expressly to introduce into particular decisions elements of good faith, minimum standards of fair dealing or equitable considerations. These considerations come to prominence only in cases calling for granting or administration of certain equitable remedies, normally decrees for specific performance, injunction, restitution, reformation and the like. Even then latitude for judicial maneuver normally is restricted to *withholding* a particular form of relief from a disqualified party, as distinguished from *granting* affirmative relief in favor of a disadvantaged party. The net result is that the main body of traditional contract law is heavily weighted toward "legal" factors rather than "equitable" ones.

The universal appeal to good morals sounded by the phrase "good faith," has led our contract law to assimilate only one limited version of that notion in the form of the good faith purchase, and only then "to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan."⁵⁵ The good faith purchaser is a familiar legal figure. On the other hand, the older Roman concept of a general obligation of good faith in the performance of contracts has not fared so well in English or American law and

[B]y the time of the promulgation of the Uniform Commercial Code, good faith performance had, in spite of its ancient lineage, become a poor and neglected relation of good faith purchase. The Code revives it and uses good faith in both senses — good faith purchase and good faith performance.⁵⁶

Thus another one of Karl Llewellyn's legal "base lines" came to be expressly incorporated in the Code. There may be no effective general obligation of good faith in the law of contract, but in the law of commercial contracts there is an obligation of commercial good faith.

55. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

56. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, *supra* note 53, at 671.

The Code concept of commercial good faith is complex, has substance and judicial weight. The "good faith" of family relations can provide little or no guidance in judicial decision-making because the notion is rooted in "good morals" and thus has the legal characteristics of the chancellor's foot. Nor is the Code concept merely the rather cynical "good faith" of the "layman" which is roughly equated to any-conduct-this-side-of-crime. The Code concept of good faith commercial dealing is inextricably linked with commercial customs and usages and consigned for implementation to the judiciary.

A. *Commercial Good Faith Concept*

Any fair appraisal of the "good faith" requirements imposed by the Uniform Commercial Code will reveal a significant jurisprudential shift toward obligation-based-on-transactional fair dealing. The Code imposes on every contracting party the general "obligation of good faith in its performance or enforcement," and throughout the Code specific provisions in every article impose an explicit good faith requirement in several contexts. Professor Farnsworth has stated that "good faith" is mentioned at least fifty times in the 400 sections of the Code. The phrase also must appear at least fifty times in the comments, and cross-referencing multiplies the impact. No accurate count is available reflecting the total number of times "good faith" or its synonyms appear in all the Code provisions *and* comments. But the sheer number of references does not alone establish that the good faith obligation is "a basic principle running throughout this Act." Nor would mere proof of that assertion thereby establish its juridical significance without further reference to the substantive *content* of the good faith principle including the legal mechanism with which the Code proposes to implement any such vague principle.

The Code definition of "good faith" is "honesty in fact in the conduct or transaction concerned."⁵⁷ This is a subjective quality in "good faith purchase" and normally an objective one in "good faith performance."⁵⁸ But a more meaningful statement of the commercial good faith *principle* appears in the comment to the section which imposes the general obligation of good faith:

57. UNIFORM COMMERCIAL CODE § 1-201(19).

58. Farnsworth notes that an objective "good faith" must be intended in the good faith performance aspects of the Code because:

Would a test based on the individual's actual state of mind with no appeal to common practices make any sense in these cases? Surely the test is not whether one party actually believed that he was acting decently, fairly or reasonably. Surely he must do more than form an honest judgment. Otherwise no more than knowing and deliberate unfairness, maliciousness, trickery and deceit would be forbidden.

Farnsworth, *supra* note 53, at 672.

The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties . . . [and] is further implemented by section 1-205 on course of dealing and usage of trade . . . [and concerning sales] contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (section 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.⁵⁹

This "principle" is called "central to the entire Code," and together with express reliance on "current course" aspects of commercial activity and "custom, usage and agreement of the parties," hopefully will "give freedom to individual action while preventing surprise and traps for the unwary."⁶⁰ The jurisprudential essence of the commercial good faith concept promulgated in the Code is "the linking of the good faith obligation of performance with reasonable commercial standards" which runs throughout the entire Code, although "its formulation . . . [in particular articles] reflects a functional difference in situation."⁶¹

Five particular types of commercial good faith have been identified in the Code: 1) the general obligation of good faith performance of contracts, 2) mercantile good faith performance, 3) good faith purchase (of goods or paper), 4) good faith enforcement of legal remedies, most often explicitly accompanied by the recurring phrase "commercially reasonable," and, 5) good faith diligence.⁶² The most persuasive categorization of these many faces of good faith is that the particular substantive content of a given good faith provision depends upon its functional context. Thus, the theme of good faith performance which runs through the sales article presupposes that *either* party to the sales contract may be, and *both* are likely to be, professionals and so "the linking of honesty and commercial reasonableness is made general"; on the other hand, the "professional," in the case of negotiable instruments questions, is more likely to be the purchaser of the paper; while in secured transactions matters the "professional tends to be the lender" and the good faith enforcement requirement is only meaningful if im-

59. UNIFORM COMMERCIAL CODE § 1-203, comment 19.

60. Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 Mod. L. Rev. 167, 168 (1964). This theme is echoed by the Code in section 2-302, the unconscionable contract or clause provision, which comment 1 states is designed for "the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948))" and is to be implemented by application of a "basic test" whether the contract or clause is "so one-sided as to be unconscionable" in light of commercial circumstances.

61. Mentschikoff, *supra* note 60, at 168.

62. Good faith purchase, good faith performance and mercantile good faith are identified by Professor Farnsworth, *supra* note 53, in addition, good faith diligence is identified in Note, *Good Faith Under The Uniform Commercial Code*, 23 U. Prrr. L. Rev. 754 (1962). Good faith enforcement of legal duties is identified in Mooney, *The Old and The New: Article IX*, 16 ARK. L. Rev. 145 (1961).

posed on him instead of the borrower.⁶³ The key figure is that *dramatis personae*, the "professional," who may appear in many guises. Playing the role of good faith performer of contracts he appears as the "merchant" in the sales article who may be either a buyer or seller of goods.⁶⁴ Appearing as the good faith purchaser he becomes the holder in due course in the negotiable instruments article,⁶⁵ the bona fide purchaser of a security under article 8,⁶⁶ and the acquirer of a document of title by "due negotiation" under article 7.⁶⁷ Finally, performing the role of a secured lender, the "professional" may be the commercially reasonable secured party under article 9,⁶⁸ the bank issuer of a letter of credit in article 5,⁶⁹ or the good faith bailee under article 7.⁷⁰ Our professional not only projects the superlative human quality of "honesty in fact" but also must display the peculiar characteristics of "mercantile good faith and fair dealing" prevalent in the particular trade in which he may be engaged when discovered.

Technically speaking, it may be impossible for even the most diligent dialer of Code provisions to spell out the precise legalistic path through the trackless forest of text, comments and cross-references whereby one starts with the general obligation of good faith performance, converts into honesty-in-fact plus observance-of-reasonable-commercial-standards-of-fair-dealing-in-the-trade and arrives at automatic construction of the statutory phrase "good faith" to include both criteria. Llewellyn may have failed to restore in effect the original general obligation of good faith excised in 1952, as Professor Farnsworth speculates,⁷¹ but there would seem to be little doubt that he succeeded in several respects. The Code clearly imposes on all Code contracting parties the duty of subjective honesty in fact and obligates sales merchant parties also to observe commercial standards of fair dealing in their trade. In addition, depending upon the particular context, a professional will be explicitly bound by his trade standards of fair dealing or, at the bare minimum, will be subject to trade customs including those relating to fair dealing. This scheme touches most Code parties. Moreover, perhaps the tortuous manual and mental dexterity suggested above is unnecessary because of the Code provisions specifically directed to courts and which set up rules for interpreting all agreements under the Code.

63. Mentschikoff, *supra* note 60, at 168-69.
 64. UNIFORM COMMERCIAL CODE § 2-104(1).
 65. UNIFORM COMMERCIAL CODE § 3-302(1).
 66. UNIFORM COMMERCIAL CODE § 8-302.
 67. UNIFORM COMMERCIAL CODE § 7-501(4).
 68. UNIFORM COMMERCIAL CODE § 9-504.
 69. UNIFORM COMMERCIAL CODE § 5-109.
 70. UNIFORM COMMERCIAL CODE § 7-407.
 71. Farnsworth, *supra* note 53, at 676-77.

B. *Mechanism for Implementation*

I suppose everyone would agree that whatever else one may pump into the magic phrase “commercial standards of fair dealing,” at rock-bottom its content rests on the particular commercial context to which the provision embodying it or its synonym applies. This suggests that courts are to find the precise content of the mercantile good faith standard in the facts of the case and not in the words of the Code.⁷²

Specific rules for the guidance of courts interpreting contracts under the Code comes from several points. There is, of course, the admonition expressly directed to courts by the first section in the Code that :

This Act shall be liberally construed and applied to promote its underlying purposes and policies . . . [which are] (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties ;

and the final paragraph of comment 1 notes that “the text of each section should be read in light of the purpose and policy of the rule or principle in question, as also of the Act as a whole. . . .” For whatever such precatory words are worth, these statements addressed specifically to courts faced with contract controversies arising under the Code seem to counsel them to ground their rulings whenever possible on commercial practices and trade usages. But the Code does more than admonish in general terms; it provides generally for the superimposition of commercial fair dealing in good faith by means of express statutory language in innumerable sections and comments, and, more importantly, the introductory article which is applicable to the entire

72. This assertion in no way conflicts with the Code interpretation methodology advocated by Professor Hawkland. Asserting the proposition that the Uniform Commercial Code is a true “code” in the Roman sense, albeit a form of “common-law code,” Professor Hawkland points out that the key elements of a true code are pre-emption, system, and comprehension:

This requires: (1) That its provisions be logically presented and coordinated and stated in language employing a chosen and consistent terminology; (2) that means be made available to handle competing and conflicting rules; (3) that means be provided to fill the gaps; and (4) that supereminent provisions be present to mitigate harshness which might otherwise flow from rigid rules. . . . The Uniform Commercial Code meets these requirements. . . . [Therefore] courts construing it should make three changes in their standard legal method. They should: (1) use analogy, rather than ‘outside’ law, to fill code gaps; (2) rely somewhat more heavily on the decisions of other code states in making their own decisions; and (3) give their own decisions somewhat less permanent precedential value.

Hawkland, *Uniform Commercial “Code” Methodology*, 1962 U. ILL. L.F. 291, 299–300, 313. A most felicitous example of judicial construction of the Code by analogy to other Code provisions as far as was intellectually possible, then resort to “outside” law in order to extend the unpaid seller’s lien to cover proceeds from the resale of the goods is the opinion by Justice Palmore in *Greater Louisville Auto Auction v. Ogle Buick Co.*, 387 S.W.2d 17 (Ky. 1965).

Code, provides a mechanism for courts to open the contract and pour into its language the Roman wine of good faith.

This all-important mechanism is structured into section 1-205 which is concerned with course of dealing and usage of trade. These are defined:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.

The succeeding four subsections specify the legal effect to be given by a court to these facts. Subsection (3) provides:

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

Courts are thereby required to take cognizance of any course of dealing between the parties or usage of trade in their vocation in any controversy over the meaning of their agreement. The clear import of these provisions is that standards of commercial fair dealing, either established by the parties or by the customs of their trade, are implicit in their agreement. The comments also bear out this construction of the section. Comment 5 notes that this provision permits "full recognition . . . [to] usages currently observed by the great majority of decent dealers, even though dissenters ready to cut corners do not agree." Even more pointedly, comment 6 notes that

the policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade . . . the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

Specific citation to section 1-203 links up the general obligation of good faith, commercial customs and usages, unconscionable contracts and judicial interpretation of *all* agreements under the Code in what Llewellyn was wont to call an "iron section" because the duty cannot be avoided by contract. (Section 1-102(3) — "the obligations of good faith . . . may not be disclaimed by agreement," and comment 2 cites specifically to section 1-205.)

These all link up and section 1-205(4) prescribes the rules for judicial interpretation of Code agreements in light of applicable trade custom and usage:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Comment 1 sets forth the general purpose of the entire provision and further tends to establish that the intended function of section 1-205 is to serve as the general judicial interpretation guidance provision for the Code:

This Act rejects both the 'lay-dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

To close out the matter subsection (6) explicitly provides that evidence of a relevant usage of trade may be introduced by either party upon notice to the other.

Combination of these provisions into a meaningful judicial interpretation system culminates in the following grounds for interpretation of commercial agreements under the Code in the order of preference:

- 1) The express terms; and
- 2) Course of dealing or usage of trade; or,
- 3) Course of performance under section 2-208

Essential to any such determination of meaning is trade custom concerning commercial standards of fair dealing in the parties' vocation or fairly implied by their prior course of dealing. In addition, the court is to take such factors into account where the good faith and commercial fair dealing criteria are explicitly imposed by the particular Code provision applicable to the precise point in controversy.

The syllogism cast at the beginning of this monograph closes smoothly by calling attention to the uncanny parallelism displayed by the judicial interpretation mechanism in section 1-205 and the definition of agreement which marks the substantive beginning of the Code. Agreement is the bargain of the parties in fact manifested by their language or other circumstances "including course of dealing or usage

of trade or course of performance" under sections 1-205 and 2-208 (section 1-201(3)). Courts are to give meaning to commercial agreements by reference to the parties' language "and by their action, read and interpreted in light of commercial practices and other surrounding circumstances" (section 1-205, comment 3). This entire operation should be judicially conducted by means of a liberal construction and application of the Code so as to promote the expansion of commercial practices (section 1-101).

One may call this jurisprudential theme whatever he chooses but it seems clear that it is a baseline.⁷³ It is here called "commercial good faith" to distinguish it from the many different technical kinds of specific and general duties of good faith. Grounding judicial interpretation of commercial agreements on trade custom and usage, including general and special duties of good faith, is a far cry from the emphasis by traditional contract law on "contract" concepts and it permits courts to continue doing what they have been doing all along, namely, seeking meaning from trade custom, without having to manipulate contract concepts in order to reach a reasonable result.

V.

THE PEDAGOGICAL VALUES OF BOOKBURNING

Our general theory of contract has been mortally wounded by the Uniform Commercial Code. Not killed outright by the blow, its grip on the law is greatly weakened. It will surely suffer most pitifully under the combined effects of the Code and our increasing awareness of the unbridgeable gap between contract theology and the realities of the socio-economic workings of our industrial democracy. Thirty-five years ago Karl Llewellyn gave warning of what was to come when he looked down the years and sounded the trumpet-call for reform in his characteristic legal-romantic prose:

Marginal cases, Hospital cases, most of our cases well may be. Much doctrine, however sweetly spun, serves chiefly to grow grey with dust against the rafters. Overwhelming is the certainty that any synthesis which is to match with the meaning of the law in Life must expand beyond the futile limits set by present legal theory to include great blocks of what we know as property, and equity, and remedies, to cover as well the most significant parts of business associations, and who knows what besides. Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-

73. Professor Patterson has referred to this feature as a "supereminent principle." Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, REPORT OF THE LAW REVISION COMMISSION FOR 1955 — STUDY OF THE UNIFORM COMMERCIAL CODE, N.Y. LEG. DOC. (1955) No. 65.

production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.⁷⁴

The Code may not accomplish that in one fell swoop. But it rests at a threshold between old doctrine and new jurisprudence and represents the flower of the legal realist movement in American law. The Code is a "fresh start" in more ways than one.

There is increasing evidence that rotting old contract doctrine has been supporting a law of contract which, at least since the Civil War, has been utterly irrelevant to commercial life in this country. Durkheim's intuitive study of the non-legal elements in business⁷⁵ is even now in the process of being validated by empirically based studies of current business contracting practices. Tentative returns from a comprehensive study being conducted by Professor Stewart Macaulay indicate that the business world seldom uses our contract law, fears and distrusts both contract law and lawyers and is unlikely to change in the future.⁷⁶

His tentative conclusions are that in making contracts: 1) businessmen prefer to rely on a man's word in a brief letter, a handshake, or "common honesty and decency," even when the transaction involves "legally enforceable contracts"; 2) "commitments are to be honored in almost all situations" because "one does not welsh on a deal" and, as for quality disputes, "one ought to produce a good product and stand behind it." Should controversy arise over a contract, businessmen believe "you can settle any dispute if you keep the lawyers and accountants out of it" because "they just do not understand the give-and-take needed in business," and legalistic contracts impair the necessary "flexibility" in dispute settlement. Nothing makes a businessman more irate than the invocation of legalism at him. The plain, sad truth of the matter is that our contract law is unnecessary in most business situations, not only because non-legal devices function better to serve the needs of the parties but, even more importantly, because its use normally leads to such highly undesirable results as the "divorce ending the 'marriage' between two businesses" and severe business interruptions which make the litigation game not worth the candle. Only when all is lost do businessmen invoke the law of contract.

The only valuable commercial function to which the law of contract arguably lends any support is the record-keeping function.⁷⁷ Modern

74. Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 751 (1931).

75. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 227 (1964).

76. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 1963 AMER. SOC. REV. 55.

77. Note, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1064 (1957).

business enterprises have a prodigious record-keeping burden for accounting purposes, and to some undefined degree contract law and its handmaiden, the Statute of Frauds, may reinforce the hands of the corporate accounting division and house counsel in their internal struggle against the sales division over the necessity for keeping records. This is a sad commentary on the once-proud law of contract. It has fallen into a social desuetude from whence it will likely never arise.

But there is also evidence of the ineffectuality of orthodox contract law from within the body of law itself. Gradually evolving from a blend of tort and contract is the modern law of products liability. Responding to the needs of our consumer economy, this growing body of law eschews the crippling doctrinal limitations imposed by orthodox contract doctrine, side-steps privity and blasts through procedural barricades to ground liability on a theory of "enterprise liability."⁷⁸ Many of the institutions, norms and practices of the whole field of government contracting stand in stark contrast to classical contract theory.⁷⁹ Collective bargaining agreements,⁸⁰ pension and retirement "plans,"⁸¹ adhesion contracts,⁸² the securities marketing system,⁸³ and the whole sweep of "private law-making" by contract,⁸⁴ none of these can be meaningfully accommodated within the traditional offer-acceptance-consideration model. A theory of contract which substantially ignores the significance of \$80 billion in pension funds, intimate regulation of day-to-day industrial conduct of seven million people and several thousand corporations, over \$40 billion in government procurement purchases annually and the realities of a corporate equities distribution and exchange system made up of the contracting activities of 20 million people involving millions of dollars daily, simply cannot be taken seriously. Especially not when *all* the evidence currently in the record indicates that in fact our law of contract is not only unnecessary, except in pedestrian mercantile situations, but is positively dysfunctional. The mind boggles at the enormity of its pretensions.

78. The early role of contract in this evolution appears in Llewellyn, *On Warranty of Quality and Society — I*, 36 COLUM. L. REV. 699 (1936), and its current contributions are explored in Kessler, *The Protection of the Consumer Under Modern Sales Law, Part I*, 74 YALE L.J. 262 (1964).

79. The two-part study which appears as *Government Contracts*, 29 LAW & CONTEMP. PROB. 1 (1964), fully documents the many ways in which "a government contract is quite distinct from its private counterpart" as the foreword warns.

80. Friedman, *Changing Functions of Contract in the Common Law*, 15 U. TORONTO L.J. 15, 25 (1951).

81. Note, *Some Legal and Economic Aspects of Group Insurance Policies*, 36 COLUM. L. REV. 89 (1936). For an attempt to use contract concepts to analyze a three-party group annuity funded union pension plan see *Hudson v. John Hancock Mut. L. Ins. Co.*, 314 F.2d 16 (8th Cir. 1963).

82. Kessler, *Contracts of Adhesion — Some Economic and Legal Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

83. *U.S. v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); II REPORT OF THE SPECIAL STUDY OF THE SECURITIES MARKET, chapters IV and V (1963).

84. FRIEDMAN, *LAW IN A CHANGING SOCIETY* (1959).

“Pretensions” is the correct word to use. In the final analysis it can fairly be said that commerce has survived despite the artificialities of contract theology, survived and prospered. The businessman simply does not waste his time on the legalistic requirements of contract law and will not go to court if he can possibly avoid it. Macaulay notes :

[O]nly 2,779 out of 58,293 civil actions filed in the United States District Court in fiscal year 1961 involved private contracts. During the same period only 3,447 of the 61,138 civil cases filed in the principal trial courts of New York State involved private contracts.⁸⁵

How useful is a law of contract to a society whose members refuse to pay any attention to it in making their contracts, who avoid it whenever possible in settling contract disputes and whose conduct is not affected by it in any demonstrable way?

But the greatest disservice of all is re-inculcation by the law schools of each succeeding generation of lawyers and judges. Contracts I may well be the jurisprudential Typhoid Mary of the law. Once the law student is exposed to this high art of obfuscation there may be no hope for the patient. Consider the following passage written in 1939 and still true today :

The student, and especially the neophyte, is entitled to as simple, as understandable, as horse-sense, and as easily approachable body of legal doctrine as the cases can be made to yield. Yet it is my

85. Macaulay, *supra* note 76, at 62. Footnote 9 to the text at that point is especially interesting in light of the particular point in time when our contract construct was developed by Langdell and Williston. Macaulay notes :

My colleague Lawrence M. Friedman has studied the work of the Supreme Court of Wisconsin in contracts cases. He has found that contracts cases reaching that court tend to involve economically-marginal-business and family-economic disputes rather than important commercial transactions. This has been the situation since above the turn of the century. Only during the Civil War period did the court deal with significant numbers of important contracts cases, but this happened against the background of a much simpler and different economic system.

Tentative survey by letter of the current contracting practices of General Electric, Alcoa, Reynolds Metals, Inland Steel, Armco Steel, American Motors Sales Corporation, Ford Motor Company, Jantzen, Phillips-Van Heusen Corporation, and General Mills, Inc., indicates that these organizations have instituted some changes in form language as a result of the Uniform Commercial Code. For the most part this change is a result of section 2-207 in the context of the “battle of the forms” problem when the company is acting as a seller, and it takes the form of a provision in the “offer” requiring acceptance without qualification or addition of terms. For example, Inland Steel Company uses an “acknowledgment” form which provides :

The terms and conditions set forth herein shall constitute the sole terms and conditions of this contract. No terms or conditions, other than those stated herein, whether contained in your confirmation, your purchase or shipping release forms, or elsewhere, shall be binding upon us. All proposals, negotiations, and representations, if any, made prior to the date of this acknowledgment are merged herein. . . . This acknowledgment is expressly conditioned upon your assent to the terms expressed herein. Acceptance of the goods shall constitute final acceptance of these terms. If these terms are not acceptable, you must so notify us at once at our General Office at Chicago, Illinois.

This is an elaborate example; Jantzen simply inserts into their offer the statement that “this order is subject to the conditions on the face and reverse of this form.”

belief that the *classroom* lags in this matter of offer and acceptance materially behind the more advanced state of present orthodox theory. It is my belief that the beginning *student* meets the Langdellian unilateral in materially balder form, as one of his two basic contracts concepts, than one finds in convenient fat type, for instance, in the Restatement . . . if the world of law is thus at its very creation in a student's mind *created* in divisions and in concepts which falsify the facts of law, the student is helpless. The false concepts give him his only eyes to see that legal world, his only words to describe it. All later effort at qualification leaves it permanently distorted to him.⁸⁶

Shortly after he wrote that passage Karl Llewellyn began drafting the sales article of the Uniform Commercial Code. Many of the changes this Code made in the rules of contract law have been already mentioned and the doctrinal shifts are quite apparent. One is free to see the Code as a loose arrangement of rules or an arrangement of loose rules — however it may appear to him. But anyone who looks back over the economic and social changes of the past 50 years to the time of Langdell cannot help but note in utter amazement that the current crop of contracts casebooks is not substantially different from those in use then.⁸⁷ Here stands the world on the threshold of space travel — and there stands the law of contract in an Elizabethan garden.

The perspicacious have begun to sense the jurisprudential earthquake, however, and Professor Edward J. Murphy, himself a budding contracts casebook producer, has recently noted the profound impact of Code concepts on such hardy perennials as Williston on Contracts, and has pointed the direction the Dutch Elm Blight of the Code will take through the forest of old contract doctrine.⁸⁸ Even more significant is the fact that the Second Restatement of Contracts has capitulated many strategic positions to Karl Llewellyn under the doctrinal pressures generated by the Code. Professor Robert Braucher notes candidly that in the Second Restatement “particular effort has been made to reconcile both black letter and comment . . . with such statutory formulations

86. Llewellyn, *Our Case Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 783 (1939).

87. An obvious exception is *KESSLER & SHARP, CONTRACTS* (1953).

88. Murphy, reviewing *WILLISTON, CONTRACTS* (3d ed. 1960), 37 NOTRE DAME LAW. 465 (1962), suggests that the Code may provide a basis for counsel to argue in analogous cases, viz., leases now held invalid because they are an “agreement to agree” and unenforceable under traditional contracts rules, or employment contracts now too “indefinite” to be enforced. Of these types of situations he notes:

Will not the Code help force at least a reappraisal of similar decisions? It takes no crystal ball, in my opinion, to foresee a trend toward greater judicial enforcement of many heretofore ‘vague and indefinite’ promises. Similarly, may we not expect the number of so-called ‘illusory promises’ to decline sharply, since the Code imposes a fundamental obligation upon all parties to act in good faith?

as the Uniform Commercial Code."⁸⁹ He first tacitly acknowledges the impact of the legal realists of the 1930's, especially Karl Llewellyn, upon the Restatement theory of contract, and then notes that the great dichotomy between unilateral and bilateral contract, which Llewellyn castigated so adroitly, has been dropped; and, finally, he lists some areas of doctrinal change attributable to Llewellyn's Code: mutual assent, option contracts, revocability, indefiniteness, and acceptance. All in all, Llewellyn nearly swept the board clean. Yet at a recent workshop on the Uniform Commercial Code an overwhelming number of the contracts and commercial law professors present indicated that commercial law is still being taught from the same old cases in the same old way. Offer-acceptance-consideration and *Slade's* case still rule in the classroom.

A thousand old professorial notes may have to burn and ten thousand pounds of dusty hornbooks may be lost in the conflagration, but a more realistic theory of contract will have to be formulated in order to accommodate this Code. It will not fit into the general theory of contract taught today. Reformation will have to be undertaken if the law schools expect to educate young men who are not technologically unemployable the day they graduate. The Code offers the first and best baseline for that better theory.

So goes *this* contract parable.

89. Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964).