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David Ray Papke

Indiana University/Purdue University at Indianapolis

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How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code

DAVID RAY PAPKE†

INTRODUCTION

Discussions of the theory behind Article 2 of the Uniform Commercial Code and modern sales law invariably involve scholar Karl Llewellyn and the school of American jurisprudence known as “legal realism.” While a professor at the Columbia University Law School in 1930, Llewellyn coined the phrase “legal realism.”¹ He then engaged in an early and influential debate with Roscoe Pound concerning the merits of legal realism,² and he also provided the legendary list of the twenty men who made up legal realism’s pantheon.³ After launching legal realism, Llewellyn turned to the drafting of Article 2, a tracking horse for the entire Uniform Commercial Code, and commentators have understandably assumed legal realism influenced this great law reform project.⁴

† R. Bruce Townsend Professor of Law and Professor of Liberal Arts, Indiana University/Purdue University at Indianapolis. The author delivered earlier versions of this article to the Law and Anthropology Section of the Association of American Law Schools and to a faculty symposium at the Marquette University Law School. Craig Nard, James Nehf, Elise Papke, and June Starr provided valuable commentaries on earlier drafts of the article.

1. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

2. Pound responded to Llewellyn, in *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), and Llewellyn answered Pound, in *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

3. See Pound, *supra* note 2, at 1226 n.18.

4. Professor John L. Gedid has declared that the Uniform Commercial Code “is the first legal realist statute. Legal realism, through Llewellyn, produced the most distinctive feature of the Code: a new, utterly unique methodology.” *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 343 (1988) (emphasis in original). Professor Julian B. McDonnell concurs, explaining that Llewellyn and his colleagues “produced a Code

One problem with this tale of cause and effect, of theory invigorating and directing law reform, is that legal realism is a notoriously amorphous theory. Llewellyn himself rejected efforts to cast legal realism as a jurisprudence. "Realism," Llewellyn asserted in *The Common Law Tradition*, "was never a philosophy, nor did any group of realists as such ever attempt to present any rounded view, or *whole* approach."⁵ "What realism was, and is," he continued, "is a method . . . Realism is not a philosophy but a technology."⁶ How did the "method" or "technology" work? Llewellyn suggested simply that it involved looking at law and life from new perspectives. "See it fresh, 'See it as it works' . . . The fresh look is always the fresh hope. The fresh inquiry into results is always the needed check-up."⁷

Given such imprecise and anti-philosophical ebullience from legal realism's founding figure, it is hardly surprising that later commentators have been hard pressed to locate either a core or coherence for the legal realism movement. The distinguished legal historian Morton J. Horwitz has said:

Legal realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.⁸

In her study of the jurisprudence of both Pound and Llewellyn, N.E.H. Hull casts their efforts as "a grand exercise in bricolage,"⁹ that is, a makeshift assembly of bits and pieces from different sources. Jack Balkin, reviewing another scholar's study of legal realism, asserts that, when all is said and done, legal realism is something of a

structured by the orientations of the jurisprudential movement known as American legal realism." Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 797 (1978).

5. KARL LLEWELLYN, *THE COMMON LAW TRADITION* 509-10 (1960) (emphasis in original).

6. *Id.* at 510.

7. *Id.*

8. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 169 (1992).

9. N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* 340 (1997).

Rorschach test, an ambiguous image into which legal theorists and practitioners can and do project their own preferences and presumptions.¹⁰

A Rorschach test, obviously, is not particularly useful as a theoretical foundation for Article 2, and, by extension, for the Uniform Commercial Code. Instead of citing legal realism or any other particular jurisprudence as *the* true progenitor, it might be better simply to indicate the most important theories and perspectives that influence Article 2. One largely overlooked source of influence is the discipline of cultural anthropology and, more specifically, the study of the Cheyennes and Cheyenne law that Llewellyn undertook with anthropologist E. Adamson Hoebel.

Llewellyn and Hoebel completed their study in the late-1930s, just as Llewellyn turned to his work on what became Article 2.¹¹ The Cheyenne Indians, and what Llewellyn perceived to be their way of life, are arguably more crucial in the genesis of modern sales law than are the jurisprudes and empiricists who called themselves legal realists. Establishing this overlooked relationship is important in and of itself, and it also takes on added significance in the context of current efforts to revise sales law. We should fully appreciate the intellectual engine of Article 2 before we decide to replace it.

I. LLEWELLYN AND THE ANTHROPOLOGISTS

From the beginning of his career in legal academics, Karl Llewellyn was interested in the ways law fit into social and cultural contexts. One of his very first academic offerings was "Law in Society," a course he mounted in Yale's Department of Anthropology and Sociology immediately after World War I.¹² In the 1920s Llewellyn became enamored with the work of Bronislaw Malinowski, especially the latter's *Crime and Custom in Savage*

10. See Jack Balkin, *John Henry Schlegel's American Realism and Empirical Social Science*, 16 LAW AND HIST. REV. 199, 201 (1998) (book review). Other important books concerning legal realism include LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986) and WILFRED RUMBLE, *AMERICAN LEGAL REALISM* (1968).

11. See David Ray Papke, *Karl Nickerson Llewellyn*, 13 AMER. NAT. BIOGRAPHY 782 (1999).

12. See *id.* at 781.

Society.¹³ Malinowski was one of the first anthropologists to actually live with the people he was studying, and thereby gauge the lived as opposed to the claimed practices of the people.¹⁴ Indeed, Llewellyn's later suggestion that law be studied in action rather than on the written page¹⁵ is in its own way a variety of Malinowski's anthropological premise.

At Columbia University, where Llewellyn joined the law faculty in 1924, he came to know and respect Franz Boas, the great founding figure of cultural anthropology in the United States.¹⁶ Llewellyn had studied in a German gymnasium in Mecklenberg after completing his American secondary education at Boys' High School in Brooklyn, and he was completely fluent in German.¹⁷ This contributed to his rapport with the German-born Boas, as did their shared commitment to tolerance and admiration for different peoples and cultures.¹⁸ Then, too, both Llewellyn and Boas were, almost by instinct, critical thinkers and reconceptualizers. Both were unsatisfied with the paradigms and preferences of their disciplines and inclined to reshape them.

Llewellyn watched as Boas, Ruth Benedict, Margaret Mead, and others made Columbia a center for the anthropological study of culture. Llewellyn was pleased when, in 1932, Boas and Benedict introduced him to E. Adamson Hoebel, one of their most promising students.¹⁹ Hoebel had studied in Wisconsin and Cologne, and at Columbia he was working on a doctoral dissertation concerning the Comanches. The dissertation work was difficult because, accurately or not, the tribe was taken to be especially conniving and anarchic. Could it even be said that such a tribal group had a system of laws? Llewellyn thought so, and he suggested to Hoebel a type of case method he could use to capture Comanche law.

13. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). Llewellyn's fondness extended beyond the book to anthropology as a discipline. See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 352-60 (1995).

14. See WILLIAM A. HAVILAND, *CULTURAL ANTHROPOLOGY* 40 (1993).

15. See Llewellyn, *A Realistic Jurisprudence*, *supra* note 1, at 459, 464.

16. See Papke, *supra* note 11, at 782.

17. See *id.* at 781.

18. N.E.H. Hull says Boas and his colleagues "tutored a generation of social scientists in tolerance." HULL, *supra* note 9, at 287.

19. See *id.*

In 1935, Hoebel approached Llewellyn with an idea for a collaborative project. He proposed they study the Cheyennes rather than the complicated Comanches.²⁰ Llewellyn had come to like Hoebel, and he also was intrigued by the idea, particularly because of its projected emphasis not so much on written or even spoken law, but rather on what Llewellyn liked to think of as "law-ways," the manner in which law worked in daily life.²¹

The Cheyennes themselves had lived originally in the Upper Mississippi Valley, but facing pressure from westward-bound whites and also other migrating tribal groups, they moved to the Great Plains at the beginning of the nineteenth century.²² They shared a horse culture and buffalo-hunting economy with other tribes of the area. After 1833, the Cheyennes concentrated in two major areas: what are today western Oklahoma and southeastern Montana.²³

In the summer of 1935, Llewellyn, Hoebel, Llewellyn's second wife Emma Corstvet (herself a sociologist), and Hoebel's wife Frances Gore Hoebel journeyed to the Tongue River Reservation near Lame Deer, Montana, to study the Northern Cheyennes.²⁴ As surprising as it might be, the Cheyennes took to Llewellyn, an animated, heavy-drinking law professor from New York City. They welcomed him into their homes and took him to a ritualized peyote meeting.²⁵ The Cheyennes even changed the name they thought appropriate for Llewellyn. Instead of "Stump Horn," a comment on Llewellyn's small, but stocky physique, the Cheyennes began to call him "Shimmering, Falling as Glass,"²⁶ a reference to the brilliant thoughts and ideas that seemed always to come from Llewellyn. The Cheyennes in fact seemed to like Llewellyn more than Hoebel, and the latter, with good-spirited jealousy, said he would bow

20. *See id.*

21. WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 154-55 (1973).

22. *See* JOHN STANDS IN TIMBER & MARGOT LIBERTY, *CHEYENNE MEMORIES* (1967; revised edited Yale Univ. P. 1998) (providing a respected oral history of the Cheyennes); *see also* JOHN H. MOORE, *THE CHEYENNE* (1996) (providing a more recent study on the oral history of the Cheyennes).

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

24. *See* HULL, *supra* note 9, at 288.

25. *See id.*

26. *Id.*

"before a greater chief."²⁷

The study continued through the subsequent year, although only Hoebel returned to the field.²⁸ The two men corresponded frequently, with Hoebel generally providing the field observations, while Llewellyn theorized about them.²⁹ It was a congenial and invigorating scholarly relationship for both men. While both before and after the Cheyenne research, Llewellyn made enemies among would-be collaborators, he worked well with Hoebel.

The only serious wrench in the machine occurred when a severe drought devastated the Cheyenne grasslands and forced them to begin relocating.³⁰ In one of the most unusual collisions of the pre-modern and late-modern eras, the situation and the "research subjects" were saved by the arrival of a Hollywood film crew to shoot "The Plainsman," starring Gary Cooper. The studio hired 250 Cheyenne at \$5.00 per day; this allowed them to survive the drought and stay put while Hoebel interviewed them about their "law-ways."³¹

II. THE CHEYENNE WAY

Llewellyn and Hoebel continued to discuss the Cheyennes and their "law-ways" for several years and then they wrote and published *The Cheyenne Way*.³² For the most part, the authors divided the writing of the book in the same way they had divided the field work and research.³³ Llewellyn composed the beginning and end of the book—the sections which were more theoretical and jurisprudential.³⁴ Hoebel composed the more descriptive and narrative sections which made up the bulk of the book.³⁵ Although the authors read and critiqued each other's sections, primary authorship of the sections is easy to assign primarily because of Llewellyn's distinctively lumbering prose.

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.* at 289.

31. *See id.*

32. LLEWELLYN & HOEBEL, *THE CHEYENNE WAY*, *supra* note 23, at vii-x.

33. *See id.*

34. *See id.*

35. *See id.*

Hoebel's prose was much crisper and more direct.³⁶

Almost all readers spoke highly of the work. Roscoe Pound, who a decade earlier had sparred with Llewellyn about the merits and demerits of legal realism, praised the book,³⁷ as did Malinowski, Boas, the young Claude Levi-Strauss, and other anthropologists.³⁸ One of the few who discussed the book was law professor, then judge and self-styled legal realist Jerome Frank. Llewellyn and Hoebel, Frank said in a later book, would have been better off studying the "Indians" of Tammany Hall.³⁹

What distinguished *The Cheyenne Way*? What led most to consider it an important work? It was not so much what Llewellyn and Hoebel had to say about Cheyenne culture. In fact, questions might be posed regarding the study's command of cultural anthropology as a discipline. Llewellyn and Hoebel relied on the memories and anecdotes of eleven senior tribal "informants," in particular, High Forehead, Calf Woman, Black Wolf, and Stump Horn (the same name ultimately deemed inappropriate for Llewellyn).⁴⁰ Each Cheyenne was invited to speak at length and give detailed accounts of episodes from Cheyenne life.⁴¹ From these "informants"—men and women Llewellyn and Hoebel had met in the 1930s—the authors constructed a picture of Cheyenne culture from the middle of the nineteenth century. Their proffered cultural anthropology, in other words, was also an oral history. Yet none of the Cheyennes interviewed witnessed any of the episodes described, and no formal records existed.⁴² One may respect an oral tradition's ability to provide "truth" and meaning in its own cultural

36. *See id.*

37. Writing in an article about the sociology of law, Pound said of THE CHEYENNE WAY:

That book deserves a paper by itself. It is written by a jurist of the first rank in collaboration with an anthropologist and is in the American tradition of proceeding upon concrete research. It is written in full consciousness of the problems of the science of law and of what that science is called on to achieve.

Roscoe Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. TORONTO L.J. 1, 6 (1943).

38. *See* TWINING, *supra* note 21, at 166-68 (summarizing anthropologists' reviews of the book).

39. JEROME FRANK, COURTS ON TRIAL 77 (1949; 1963 edition).

40. *See* LLEWELLYN & HOEBEL, *supra* note 23, at 30-32.

41. *See id.* at 30-40.

42. *See id.*

context, but from the perspective of modern anthropology the Llewellyn and Hoebel approach is methodologically suspect.

Llewellyn and Hoebel acknowledged these problems, but they also defended their approach. They explained that oral tales get embellished and reshaped as they are passed on; descriptions and histories become mythic. "There are gaps," Llewellyn and Hoebel said, "there are ambiguities, there are borderlands of dubious reliability."⁴³ But still, they argued, early memories are often "vivid in the aged," and among non-literate peoples "the daily wash of headline and sensation" does not interfere as much with memories.⁴⁴ "In sum, on the matter of validity, the evidence is accurate and solid enough to warrant not only attention, but careful study."⁴⁵

A second problem with *The Cheyenne Way* involves bias. Llewellyn and Hoebel are so detectably enamored with the Cheyennes that one wonders about their objectivity. The authors gush repeatedly about the Cheyennes' "legal poetry," "legal genius," and "juristic ingenuity."⁴⁶ At one point they compare the Cheyenne "law-ways" with those of the Romans.⁴⁷

Llewellyn and Hoebel anticipated complaints that they had become unduly enamored with the Cheyennes. They recognized that some would see them "romanticizing" an "aboriginal" people.⁴⁸ But as was the case with challenges to their anthropological research, Llewellyn and Hoebel did not back down. They did indeed think that "among primitives" the Cheyennes were special when it came to "law-ways."⁴⁹ The very last sentence of *The Cheyenne Way*, and one which is set off from the text for emphasis, reads, "Cheyenne law leaped to glory as it set."⁵⁰

What is uncontroversial and, indeed, impressive about *The Cheyenne Way* are the ways the authors conceptualized law and the normative prescriptions about coordinating law and social life that they offer. Llewellyn and Hoebel set out

43. *Id.* at 36-37.

44. *Id.* at 33.

45. *Id.* at 38.

46. *Id.* at 313.

47. *See id.*

48. *Id.* at 310.

49. *Id.* at 313.

50. *Id.* at 340.

three core ways that law could be understood: (1) as ideological rules proper for channeling and controlling behavior, (2) as patterned behavior, and (3) as something that can and does clean up "social messes."⁵¹ These three understandings are interrelated and flow into each other, but those determined to understand a culture's law are well advised to emphasize the third. Look into what law does with a hitch, a dispute, a grievance, Llewellyn and Hoebel said.⁵² Inquire into trouble and what law does about it. The trouble-cases, sought out and examined with care, are thus the safest road into discovery of law. Their data are most certain. Their yield is richest. They are the most revealing.⁵³

Later in time, Llewellyn would continue to emphasize cases in his legal writings, and Hoebel as well made "trouble-cases" a distinctive feature of his legal anthropology.⁵⁴ Writing in *The Cheyenne Way*, Hoebel said:

[I]f there be a portion of a society's life in which tensions of the culture come to expression, in which the play of variant urges can be felt and seen, in which emergent power-patterns, ancient security drives, religion, politics, personality and cross-purposed views of justice tangle in the open, that portion of the life will concentrate in the case of trouble or disturbance.⁵⁵

"Not only the making of new law and the effect of old," Hoebel added, "but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict."⁵⁶

Bringing their preferred understanding of law to bear on the Cheyennes, Llewellyn and Hoebel focused on and discussed in detail fifty-three of the tribe's "trouble-cases."⁵⁷ Here one could see the "living law." The Cheyennes and other tribal groups may not have written down their laws; they may not even have had written languages. But by looking at cases and disputes, one could see how law worked in a given society.

Indeed, many of the so-called "trouble-cases" are

51. *Id.* at 20-21.

52. *See id.* at 21.

53. *See id.* at 36.

54. *Id.* at 29.

55. *Id.*

56. *Id.*

57. *Id.* at 29, 40.

absolutely fascinating. When two warriors cannot resolve priority claims concerning the ownership of stray horses, "Bull Kills Him," one of the warriors, simply slays the horses.⁵⁸ When "Red Owl" so severely berates her daughter for an undesirable elopement that the daughter kills herself, the tribe exiles "Red Owl."⁵⁹ When "Comes In Sight" kills her father, who is attempting to rape her, the tribe decides that neither the customary banishment for murder nor death for patricide is appropriate.⁶⁰ When an aborted fetus is found near camp, the breasts of women are examined for lactation enlargement, and one girl is identified, found guilty, and banished.⁶¹ Each case is intriguing, and each shows the Cheyenne "law-ways."⁶²

Extending from the cases, Llewellyn and Hoebel also offer a normative prescription as to how law should work in society. They express concern with any society in which law's results do not match what the citizenry thinks should be the case. It is a problem if the "self-contained world of authoritative legal doctrine [is] a sort of unchartable fourth-dimensional space."⁶³

If we think about the Cheyennes, the authors say, we can see that law should not tell us what we should know but rather reveal that which we already know. Yes, you may need a legally trained and identified person to articulate correctly the bases for a decision, but you should not need a legally trained and identified person to recognize a sound decision. Good law, in other words, remains in touch with the norms and values of the culture all around it. "This the Cheyennes had," Llewellyn and Hoebel state, "rather than a regime of letter or of rule or of form."⁶⁴

In addition, the authors insisted, law should be able to remodel itself if need be. It should be able to readjust as new norms emerge and establish themselves.⁶⁵ For the Cheyennes, "all patterns retained around their normative or imperative cores a joyous range of flexible adaptability, called on repeatedly—a regime of implicit principle and

58. *Id.* at 224-25.

59. *Id.* at 160-61.

60. *Id.* at 179.

61. *See id.* at 118-19.

62. *Id.* at 29.

63. *Id.* at 41.

64. *Id.* at 323.

65. *See id.*

case work, both attuned to the net dynamic need of the people.”⁶⁶ Respect for the “net dynamic need of the people” through law and through other ways as well gave the Cheyenne “a living order in which the individual life was urged into expansion and fulfillment, and thereby furthering the social good, rather than being thwarted in the interest of the social good, or repressed thereby.”⁶⁷

Llewellyn and Hoebel did not argue that Cheyenne “law-ways” were infallible; the tribe’s “law-ways” did sometimes fail to balance the drives and tensions of the culture.⁶⁸ But the authors did suggest that through their understanding of law the Cheyennes had remarkably addressed the relationship between law and justice, the issue the authors took to be the central problem of legal philosophy.⁶⁹ Modern societies could learn from the Cheyennes to rely on “neither ritualization of procedure nor fixed wording of legal rules.”⁷⁰ Contemporary legalists and government officials should strive instead for “law-ways” that were “persuasive” to the people, that let the people be comfortable with “law-ways’” results.⁷¹

III. ARTICLE 2

While Llewellyn and Hoebel attempted to analyze their Cheyenne materials in the late 1930s—a period the authors described as “three years of puzzlement”⁷²—Llewellyn simultaneously launched his work on what would become Article 2 of the Uniform Commercial Code. The Cheyenne project reached completion just as Llewellyn’s sales drafting took off. It would have been surprising if the former had no impact on the latter. No scholar, even one as confident and competent as Llewellyn, can fully segregate scholarly projects undertaken at roughly the same time. Ideas and concerns inevitably make their way from one project to the other.

Llewellyn’s interest in sales law and in commercial law in general was not new. He had taught commercial law

66. *Id.*

67. *Id.*

68. *Id.* at 327.

69. *See id.* at 331.

70. *Id.* at 334.

71. *Id.* at 337.

72. *Id.* at ix.

from virtually the beginning of his career, and in 1930 he had published *Cases and Materials on The Law of Sales*,⁷³ a sprawling 1081-page text including 801 case excerpts and notes, all of which Llewellyn numbered as if to make a point. In his introduction Llewellyn suggested that the immense doctrinal synthesis of sales law worked out by Samuel Williston and others suffered from "academic abstraction and remoteness from life."⁷⁴ It was necessary, Llewellyn thought, "to widen and fructify the field of study."⁷⁵ It was time for the modern sales law teacher "to cut loose from using antiquated concepts and approaches as the basis for organization."⁷⁶ "To sum up," Llewellyn said:

[T]he endeavor has been to do full justice to doctrine, but to illuminate its growth and meaning by stressing the facts of cases and the policy considerations; to reanalyze the field in terms of present trends and present needs, using history and historical categories so far and so far only as they help the law student of today see his work and do his work. If such a reanalysis were not necessary, it would be well nigh a miracle.⁷⁷

Llewellyn's self-consciously revisionist text established his place in the circle of commercial law professors and positioned him for further work in the sales area in the late 1930s.⁷⁸ Criticism of the existing Uniform Sales Act had mounted, and proposals had surfaced for a new federal sales act.⁷⁹ Influential groups such as the American Bar Association and the Merchants' Association of New York supported the idea of national legislation, and in January, 1937, Congressman Walter Chandler of Tennessee introduced a federal sales act bill in the United States House of Representatives.⁸⁰ Llewellyn contacted Chandler to voice support for the bill but then watched in disappointment as the bill died in Congressional

73. KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930).

74. *Id.* at ix.

75. *Id.*

76. *Id.* at xiii (emphasis in original).

77. *Id.* at xvi.

78. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 84 (1977). The book itself, meanwhile, was thought to be "unteachable" except when Llewellyn was doing the teaching. *Id.* at 140, n.36.

79. See TWINING, *supra* note 21, at 277-78.

80. See *id.* at 278.

committee.⁸¹

But while reform efforts failed in the Congress, they continued elsewhere, particularly in the Conference of Commissioners on Uniform State Laws.⁸² The Conference had been established in 1892, largely at the initiative of the American Bar Association, and it counted the unification, simplification, and improvement of American law among its major goals.⁸³ The Conference worked not so much in the Congress as in the various state legislatures, where it proposed and lobbied for model state statutes which would be uniform from state to state.⁸⁴ In October, 1937, at an annual meeting in Kansas, the Conference chose Llewellyn to head its Commercial Acts Section and, in particular, to develop and promote a new uniform state sales law.⁸⁵

Llewellyn energetically pursued his project. By September, 1940, Llewellyn had produced a full draft of the new uniform statute, as well as a long report explaining the thinking behind its many new features.⁸⁶ During the 1940-41 academic year, Llewellyn used the draft as the basis for his sales course at Columbia, and Professor George Bogert did the same at the University of Chicago.⁸⁷ The Conference of Commissioners on Uniform State Laws weighed in with assorted suggestions.⁸⁸ During the summer of 1941 Llewellyn worked exclusively on a second draft.⁸⁹ Along with another lengthy supporting report, the second draft circulated in the fall of 1941.⁹⁰ It won lavish praise and was recognized as a remarkable feat.⁹¹ One trustee of Columbia University, who had previously called for Llewellyn's resignation because of an unrelated matter, was so impressed with the second draft that he retracted his call.⁹²

The draft and its positive reception contributed to the growing interest in a larger commercial code, one with

81. *See id.*

82. *See id.*

83. *See* KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 268 (1989).

84. *See id.*

85. *See* TWINING, *supra* note 21, at 278.

86. *See id.* at 280.

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

uniform laws not merely in sales but rather in all commercial law areas. The Falk Foundation provided \$150,000 to support the undertaking,⁹³ and in 1942 the American Law Institute joined the Conference of Commissioners on Uniform State Laws as an official sponsor of the project.⁹⁴ Like the Conference, the American Law Institute was committed to tidying up the laws, but rather than developing uniform state laws, the Institute concentrated on publishing authoritative restatements of common law areas.⁹⁵ Prominent professors and jurists researched and wrote the restatements. In the words of legal historian Lawrence M. Friedman, the scholars "took fields of living law, scalded their flesh, drained off the blood, and reduced them to bones. The bones were arrangements of principles and rules (the black-letter law), followed by a somewhat barren commentary."⁹⁶ In the 1940s, few had Friedman's cynicism about the American Law Institute's efforts, and, indeed, the Institute's involvement brought great prestige to the larger uniform commercial law project.

Llewellyn grasped what was developing and realized the uniform commercial code project would be much more significant than his revision of sales law. Without hesitation he folded his revised sales law into the bigger project. The American Law Institute approved the revised sales act as part of the new commercial code, and the Conference of Commissioners also provided its stamp of approval.⁹⁷ When the full commercial code took form during the subsequent decade, sales law became "Article 2" of the code.

Llewellyn also attempted to direct and control the whole Uniform Commercial Code project. He became the Chief Reporter. Soia Mentschikoff—his former student and, ultimately, his third wife after he was divorced from Emma Corstvet in 1946—served as an extremely active Assistant

93. *See id.* at 281.

94. *See* Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 17 *NEW ENG. L. REV.* 321, 327 (1982).

95. *See* HALL, *supra* note 83, at 268.

96. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 582 (1973).

97. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 *HARV. L. REV.* 798, 800 (1958). The Conference of Commissioners on Uniform State Laws approved the Uniform Revised Sales Act in 1943, and the American Law Institute followed suit in 1944. *See id.*

Chief Reporter.⁹⁸ Some found Llewellyn's stamp on every aspect of the Code, dubbing it "Llewellyn's Code," "Code Llewellyn," "Lex Llewellyn," and even "Karl's Kode."⁹⁹ In his obituary for Llewellyn in the *Yale Law Journal*, Grant Gilmore, himself instrumental in the conceptualizing and drafting of Article 9, said, "Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it."¹⁰⁰

All this praise and recognition for Llewellyn notwithstanding, he was frustrated by having to work with so many other drafters, commissioners, and interest groups.¹⁰¹ Reflecting on the Uniform Commercial Code in the 1950s, he said, "There are so many pieces that I could make a little better; there are so many beautiful ideas that I tried to get in that would have been good for the law, but I was voted down."¹⁰² In the end, he did not succeed as completely in leaving his mark on the Uniform Commercial Code as he left his mark on Article 2 concerning the sale of goods. The latter was truly his brainchild, and the enduring legal construct for which the discipline of cultural anthropology, the collaboration with E. Adamson Hoebel, and the Cheyenne "law-ways" played important roles.

IV. CHEYENNE SALES LAW

Where is the evidence that Karl Llewellyn's study of the Cheyenne Indians influenced Article 2? No one-to-one correspondence exists between specific features of Cheyenne law and individual sections of Article 2. Furthermore, Llewellyn was not a rigorous field worker, and as previously suggested, his research among the Northern Cheyennes in Montana may or may not have captured Cheyenne culture and its "law-ways." "Shimmering, Falling as Glass," as the Cheyennes dubbed him, may have projected as much onto the Cheyennes as he

98. See TWINING, *supra* note 21, at 271.

99. *Id.*

100. Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813, 814 (1962).

101. See HULL, *supra* note 9, at 298.

102. Karl Llewellyn, *Why a Commercial Code?*, 22 *TENN. L. REV.* 779, 784 (1953), quoted in Peter Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote"*, 31 *SW. L.J.* 843, 848 (1977).

actually found among them.

However, it is the understanding of law and the normative standards about law that Llewellyn developed while working with E. Adamson Hoebel on the Cheyennes that come to the fore in Article 2. These perspectives and prescriptions manifest in individual provisions of Article 2, in the large concept of "usage of trade" that runs throughout Article 2, and even in Llewellyn's sense of how Article 2 would develop.

A. *Individual Provisions of Article 2*

Many sections of Article 2 reflect the perspectives and prescriptions of *The Cheyenne Way*. The commentator must choose, but the overarching thrust is Llewellyn's attempt to coordinate sales law with standard commercial practice. This concern drove him much more so than fidelity to the established common law or to various existing statutory law. In one of the rambling, quirky law review articles Llewellyn generated in the late 1930s as he attempted to bring his study of the Cheyennes to a close and simultaneously launch his revision of sales law, he said:

What I do urge is that the time is overdue to make one more attempt to unhorse the law of wares, and to give open explicit form to the result, so that we see under the wordy cloud of rules about "Sales of Goods" the very different types of situation, with very different types of need, already—though covertly—blessed with largely very different types of governing rule, both in the Act and in the case-law.¹⁰³

Three selected examples of Llewellyn's efforts to "*unhorse the law of wares*" involve the formation of a sales contract, the modification of a sales contract, and the option of seeking adequate assurance when a sales contract goes awry.¹⁰⁴

In the area of contract formation, Llewellyn realized

103. K. N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 904 (1939). Llewellyn's other sales articles from the period include: *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936); *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341 (1937); and *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159 (1938).

104. See K.N. Llewellyn, *The First Struggle to Unhorse Sales*, *supra* note 103, at 904 (emphasis added).

that commercial parties formed contracts quickly in various ways. These parties did not want to worry about traditional contracts doctrine, assuming they even knew it in the first place. Hence, he tossed out the older notion of sealed instruments,¹⁰⁵ and in another section of Article 2 he made clear that a sales contract might be made in any manner sufficient to show agreement.¹⁰⁶ Contrary to one of the most venerable ideas of classic contracts law, the contracting parties' minds need not "meet" at any particular moment.¹⁰⁷ If one or more terms are left open in a sales contract, that contract does not fail for indefiniteness.¹⁰⁸ Section 2-206, titled "Offer and Acceptance in Formation of a Contract," disdains older notions that the mode of an acceptance had to match the mode of an offer and that the acceptance spoke to either an act or a promise.¹⁰⁹ The notorious section 2-207, titled "Additional Terms in Acceptance or Confirmation," which in later years emerged as something of a problem child in Article 2, allowed parties exchanging preprinted forms with different or additional terms to nevertheless contract.¹¹⁰

Perhaps in an effort to disguise the changes he was proposing in the area of contract formation, Llewellyn said modestly that the revised sales act "works slight, if any, changes in the better case-law."¹¹¹ Others saw through the ruse. James T. White and Robert S. Summers, the leading commercial law commentators, said Llewellyn's work "radically altered sales law."¹¹² Indeed, the changes affected contract law in general, as indicated by the subsequent influence they had on the *Restatement (Second) of Contracts*.¹¹³

In the area of contract modification as well, Llewellyn sought to bring the revised sales act in line with the normal

105. See U.C.C. § 2-203 (1991).

106. See *id.* at § 2-204(1).

107. *Id.* at § 2-204(2).

108. See *id.* at § 2-204(3).

109. *Id.* at § 2-206(1)(a).

110. *Id.* at § 2-207(1).

111. AMERICAN LAW INSTITUTE, UNIFORM REVISED SALES ACT 116 (Proposed Final Draft No. 1, 1944) [hereinafter Uniform Revised Sales Act].

112. JAMES T. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (4th ed. 1995).

113. See generally Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598 (1969) (discussing the extent to which freedom of contract is emphasized in the Second Restatement).

practices and expectations of commercial parties. Commerce includes more opportunities and demands for contract modification than one might think. Markets change or disappear. Businesses prosper or fail. Sales agreements which looked great one week might look disastrous the next. What's more, a party might be quite willing to modify a completely valid contract when the other party requests it. The party might modify with an eye to future deals, or the party might be sympathetic to and respectful of the other party's bind under the original contract.

Under the older common law a number of doctrinal features made contract modification more difficult than the parties wanted it to be. They had to fret about whether a change was indeed a contract modification or perhaps a rescission, that is, a tearing up and throwing out of the contract. Often crucial in these determinations was the consideration, the proverbial *quid pro quo* required for effective contract modification.

How silly, thought Llewellyn. Let the parties modify their contracts in the ways commercial practices and preferences dictated. He spoke with a degree of bluntness uncommon even in code language: "An agreement modifying a contract within this Article needs no consideration to be binding."¹¹⁴ This simple statement was designed to hoist contract modification from the doctrinal quagmire, and lest there be any doubt about the goal, the official comment accompanying the section stated, "This section seeks to protect and make effective all necessary and desirable modification of sales contracts without regard to the technicalities which at present hamper such adjustments."¹¹⁵

If later a party failed to live up to the terms of a contract, Llewellyn's revised law of sales included, of course, various remedy options for the aggrieved party.¹¹⁶ He also drafted and added an innovative statutory section which enabled the potentially aggrieved party to seek adequate assurance that a teetering contract might not fall completely. Llewellyn was sensitive to the fact that commercial parties bargain for more than a promise and

114. U.C.C. § 2-209 (1991).

115. *Id.*

116. *See id.* at § 2-701.

the right to win a lawsuit if the promise is broken; the parties want also to know that a promise will be kept and that a lawsuit will be unnecessary. In his commentary on the version of the revised sales law circulated in 1944, Llewellyn said:

[I]n an economy built as ours is on the institution of forward contracts, an important part of what is bargained for lies in a continued sense of reliance and security in the prospect that the promised performance will be forthcoming when due. If either the willingness or the ability of a promisor to perform drops materially below par between the time of contracting and the time for performance, the other party is threatened with loss of a substantial part of what he bargained for.¹¹⁷

Llewellyn thought “a seller whose buyer has become shaky” should be protected against having to procure goods or turn down other orders, and, in particular, such a seller should be able to act before the buyer’s full collapse causes untoward commercial hardships.¹¹⁸ By the same token, a buyer who has grown uncertain that a seller will carry through on a contract should not have to wait until all stock is depleted,¹¹⁹ thereby leaving the buyer unable to resell anything.¹¹⁹

Llewellyn’s innovative response to commercial parties’ special needs when contracts seem likely to fail ultimately became the right to adequate assurance of performance.¹²⁰ Article 2 allows a party with “reasonable grounds for insecurity” regarding the other’s performance under a sales contract to “demand adequate assurance of due performance.”¹²¹ This assurance could take the form of a simple affidavit, a bank statement, or a production report; assurance could also involve specific deliveries or payments. While awaiting assurance, the concerned party might suspend performance, and if after thirty days the assurance is not forthcoming, the failure to provide the assurance can be seen as repudiation of the contract.¹²² Thus repudiation in turn allows the aggrieved party to pursue any of the

117. UNIFORM REVISED SALES ACT, *supra* note 111, at 243.

118. *Id.*

119. *See id.*

120. *See* U.C.C. § 2-609 (1991).

121. *Id.* at § 2-609(1).

122. *See id.* at § 2-609(4).

standard remedies for breach.

Law students drilled in traditional contracts doctrine and even practitioners who may not have studied their sales law carefully enough are sometimes surprised by the right of adequate assurance. After all, the sales contract at the time of uncertainty has not technically been breached. But in this area as well as in the areas of contract formation and contract modification, Llewellyn drafted with an eye to what he considered the norms of the commercial sector.

Whether or not Llewellyn's perceptions of norms in the commercial sector were always accurate is an open question. When Llewellyn later turned his attention from the revised sales act, which had largely been his own work, to the shepherding of development of the larger Uniform Commercial Code, he frequently clashed with commercial groups.¹²³ Some of the latter accused Llewellyn of not deferring to their norms and preferences but rather of insisting that they accept what he wanted.¹²⁴ One scholar claimed in a 1985 article that Llewellyn's rules incorporated actual business practice "only to the extent that such practice comported with Llewellyn's view of sound and reasonable commercial conduct."¹²⁵

These charges undoubtedly have some truth to them, but be that as it may, Llewellyn did not operate disingenuously. He wanted sales law to be coordinated with commercial life in the same way he took Cheyenne law to be profoundly and beneficially coordinated with Cheyenne culture.¹²⁶ To him, laws which were not synchronized with cultural norms were bad laws.

123. See HULL, *supra* note 9, at 299, 335.

124. See *id.* at 297.

125. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1151 (1985).

126. When Llewellyn traveled around the country in the early 1950s promoting the uniform code before state legislatures, he stressed the way the existing law was strange and out of date for the commercial community. The ordinary businessman, Llewellyn said, "tends to keep away from this law as far as he dares because it seems to him to be queer stuff." Llewellyn, *Why a Commercial Code?*, *supra* note 102, at 780.

B. Usage of Trade

Beyond individual sections purportedly coordinated with norms of the commercial world, certain core concepts appear time and again in Article 2, and are relevant to contract formation, contract interpretation, contract performance, and dispute resolution. Perhaps no concept is more important in this regard than “usage of trade.” The scholar Allen R. Kamp even goes so far as to call “usage of trade” “the controlling concept of the Sales Article.”¹²⁷

When Llewellyn became chair of the Commercial Acts Section of the Conference of Commissioners on Uniform State Laws in 1937, “usage of trade” was one of the earliest reform notions he promoted. In particular, he thought it should supplant the extant notion of “custom.”¹²⁸ This change, it seemed to him, would actually strengthen the normative power of the commercial community and its various practices. “Usage of trade” could be looked to for explanation and clarification.

Who would be expected to articulate and apply “usage of trade?” Who would shine the guiding light? Llewellyn’s earliest drafts of what became Article 2 provided for a jury made up of merchants.¹²⁹ He thought not only that merchants would be best able to appreciate commercial practices but also that laypersons were incapable of such appreciation.¹³⁰

Llewellyn’s merchant-jury idea did not make its way into Article 2’s final version, but the powerful “usage of trade” notion did. It is defined not in Article 2 itself but rather in Article 1, a short article offering definitions and general directions presumably relevant to the entire Code. Section 1-205(2) of the Commercial Code states that:

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

127. Kamp, *supra* note 13, at 360. The author also points out that like social scientists of the 1930s, Llewellyn was more interested in groups than in individuals. *See id.* at 346. “The question then became ‘how do groups work’ which gave rise to the concept of ‘working rules,’ the rules by which institutions actually function.” *Id.*

128. *See* HULL, *supra* note 9, at 296-97.

129. *See* Kamp, *supra* note 13, at 340.

130. *See* Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 203, 208 n.229 (1989).

an expectation that it will be observed with respect to the transaction in question.¹³¹

Worth noting is that the "usage of trade" need not have risen to the level of consciousness and appreciation for either or both of the parties involved. It is enough if the "trade usage is such as to 'justify an exception' of its observance."¹³² Cultural norms are operational in the same way. People do not stop to think about them. They do not walk through life reflecting on their norms. However, people do act in conjunction with their norms, and Llewellyn thought something comparable should be honored in American commerce.

At many points Article 2 spells out important potential roles for "usage of trade." Most obviously, "usage of trade" might supplement or explain the terms of an agreement, making clear, for example, that in the steel industry a 36-inch beam could be 37 inches in length.¹³³ "Usage of trade" might add one or more terms to an agreement,¹³⁴ and in specialized situations "usage of trade" might also subtract one or more terms.¹³⁵ "Usage of trade" may supersede the so-called "gap fillers" which Article 2 makes available when agreements are incomplete,¹³⁶ and the concept may be central to the previously discussed modification and redrafting of a contract for the sale of goods. One of the few things "usage of trade" cannot do is create a new contract, although some litigants have attempted to argue for that proposition as well.¹³⁷

The "usage of trade" concept seems to be the analogue

131. U.C.C. § 1-205(2) (1991).

132. WHITE & SUMMERS, *supra* note 112, at 91. In *Gord Indust. Plastics, Inc. v. Aubrey Mfg. Inc.*, 469 N.E.2d 389, 392 (Ill. App. Ct. 1984), the court stated that while the defendant may have been unaware of a particular "usage of trade," "parties may be charged with knowledge of any usage or custom in the trade 'of which they are or should be aware.'"

133. *Decker Steel Co. v. Exchange National Bank*, 330 F.2d 82, 85 (7th Cir. 1964).

134. One court has ruled that a waiver of notice provision in an agreement does not apply in light of a well established "usage of trade." *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 24 Pa. D. & C2d. 720 (Phila. Co. 1961).

135. See WHITE & SUMMERS, *supra* note 112, at 93.

136. See *id.*

137. *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Const. Co., Inc.*, 792 P.2d 1043, 1049 (Kan. 1990).

of the cultural norms Llewellyn took to be so appealing and influential in the Cheyenne "law-ways." In the way that the Cheyennes could look to their culture to resolve their "trouble-cases," commercial parties could use "usage of trade" to create, interpret, and perform their contracts.

C. *Future Development of Article 2*

Beyond individual provisions and the pervasive "usage of trade" concept, Llewellyn also drew on his study of the Cheyennes to imagine how Article 2 would grow in the future. The point here is a more subtle one; it does not involve specific commercial practices that should be respected in the law or the way commercial practices in general might serve as a reference for the law. The point instead is that law must be expected to change and grow in the future. How should that happen? Llewellyn suggested simply that Article 2 could grow through cases and through articulated case-law.¹³⁸

The Cheyennes did not argue for this, but it was the focus Llewellyn and Hoebel used for studying Cheyenne "law-ways." "Trouble-cases" were the authors' windows on the Cheyennes' living law. The intelligence of the cases and their ability to accommodate change were also reasons Llewellyn and Hoebel so much admired Cheyenne law. The Cheyenne cases, Llewellyn even said later, taught him that law and justice need not be in conflict or even in tension.

I had to get to the Cheyennes in order to wake up to the fact that tension between form, or precedent, or other tradition and perceived need requires, in nature, to be a tension *only for the single crisis*. It does not have to be a continuing tension in the legal system as a whole, because an adequately resilient legal system can on occasion, or even almost regularly, absorb the particular trouble and resolve it each time into a new, usefully guiding, forward-looking felt standard-for-action or even rule-of-law.¹³⁹

Twenty years later, Llewellyn referred to the Cheyennes as an inspiration for his much preferred "Grand

138. See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 631-33 (1975).

139. THE COMMON LAW TRADITION, *supra* note 5, at 513 (emphasis in original).

Style" of common law adjudication,¹⁴⁰ but circa 1940 he also saw a prudent, tumbling case-law as the key to sales law development. Cases enabled law and justice to be coordinated. Cases would make it possible for culture to filter into the revised, complex, and uniform sales statute. The Cheyennes, in this sense, helped prompt one of Article 2's most unusual features.

The very language of the revised sales law invited case-law. The crucial words are often open, imprecise, and subject to varying interpretations. Reflecting on this feature of not just Article 2 but rather the whole Uniform Commercial Code, David Mellinkoff was less than pleased:

The language is now clear, now mud; now grammatical, now illiterate; now consistent, now inconsistent, slapdash and slovenly. It wallows in definition that does not define and definition that misleads—definition for the sake of forgotten definition. It includes many ways of saying the same thing, and many ways of saying nothing. The word *reasonable*, effective in small doses, has been administered by the bucket, leaving the corpus of the Code reeling in dizzy confusion.¹⁴¹

Focusing on just Article 2, John Bonsignore was more positive, but he too was struck by the language. Article 2, he thought, had an extraordinary number of "stretch words" or "weasel words."¹⁴² Bonsignore even went on to count them up: "reasonable" and "unreasonable" appear ninety-seven times in Article 2 alone; "seasonably," twenty; "circumstance," sixteen; "properly," nine; "substantially," eight; and "unconscionable," eight.¹⁴³

Llewellyn might have smiled at these distinguished scholars' "discovery" of his drafting language. After all, he consciously opted for just the approach others found so surprising. He later summarized his approach in *The Common Law Tradition* and simultaneously jabbed at those who might approach things differently:

140. "Apart from our early nineteenth century, I have come across the Grand Style only twice: in Cheyenne Indian law and in the classical Roman period." *Id.* at 45, n.40.

141. David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967) (emphasis in original).

142. John J. Bonsignore, *Existentialism, the Rule of Law and Article 2 of the Uniform Commercial Code*, 8 AM. BUS. L.J. 133, 147 (1970).

143. *Id.*

My argument is that such drafting, by centering the basic question, adding the normal keys to answering and the available clear experience and suggesting lines of useful further inquiry, would provide something much more certain (as well as much more easily usable) than the hundreds of pages of labyrinthine annotations to the N.I.L. [Negotiable Instruments Law] which hide the law today.¹⁴⁴

In 1940, *The Common Law Tradition* was not even in Llewellyn's head; the work was not published until 1960. In 1940, his thinking was interrelated with and powerfully affected by his research and analysis of the Cheyenes. Turned slightly, the best way to understand Cheyenne law—namely “trouble-cases”—could also be the best way to generate sales law. Contrary to more common varieties of codification, Llewellyn used open-ended terms and phrases to invite a case-law interpreting his model statute. The focus Llewellyn and Hoebel used in studying the Cheyennes helped Llewellyn produce what may seem a curious oxymoron: a case-law article.

V. SALES LAW IN THE POST-LLEWELLYN ERA

Understanding the jurisprudence of Article 2 is potentially of great importance in the context of current efforts to revise the Uniform Commercial Code's most venerable article. Karl Llewellyn's use of open-ended terms and invitation of a case-law article have given Article 2 a flexibility and contributed to its longevity. Article 2 has served well as the core law of sales for half a century. However, do Llewellyn's anthropological premises and his observations of Cheyenne “law-ways” continue to have relevance and usefulness today? Do Llewellyn's perspective and assumptions remain appropriate for sales law?

For starters, it seems necessary to underscore the idea that the commercial sector has changed dramatically in the 60 years since Llewellyn did his major thinking and drafting. The most pronounced domestic change is the tremendous growth in consumer sales. Historians point to the 1920s as the decade in which consumer sales became pronounced and important.¹⁴⁵ Llewellyn was undoubtedly

144. *THE COMMON LAW TRADITION*, *supra* note 5, at 419 n.39.

145. See DANIEL HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA 1875-1940* 134 (1985).

aware of this,¹⁴⁶ but there is reason to think that he did not like rampant consumption or the emergence of a mass popular culture.¹⁴⁷ Llewellyn paid minimal attention to consumer sales in Article 2, and disregarded consumer interests in other parts of the Uniform Commercial Code.¹⁴⁸ It is surely time for any revision of Article 2 to address extensively consumer sales, a crucial aspect of contemporary American life.¹⁴⁹

American commercial practices also have ceased to be limited by national boundaries. The incessantly discussed trend toward "globalization" is intertwined with the spread and acceptance of advanced capitalism and the concomitant imperatives of accumulation, competition, commodification, and profit-maximization.¹⁵⁰ Sales and sales law are obviously central to the process, as recognized by the United Nations Convention on Contracts for the International Sale of Goods and by American teachers and scholars who have begun to bring an international perspective to sales law.¹⁵¹

146. Llewellyn said as early as 1936, "And, as a further problem, there will be the thus far almost unnoticed consumer, and his protection. For even in 1870, there were consumers in America." Llewellyn, *On Warranty of Quality and Society*, *supra* note 103, at 744.

147. Perhaps battling a hangover or a foul mood, Llewellyn wrote:

[Look a minute at this tawdry spreading culture—the sentimental drool or he-man stuff that one sees as fiction; the leaded testimony at the murder trial; the intimate venomous details of an off-color sex dispute; the blat of poorer jazz; the riot of cliché of thought and phrase; the empty prettiness of poster girls.

Kamp, *supra* note 12, at 357, n.144 (quoting Karl N. Llewellyn, "This Cut-Rate American Culture" 7-8 (unpublished manuscript, on file with the *Albany Law Review*)).

148. See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from The Uniform Commercial Code*, 78 MINN. L. REV. 83, 120-36 (1993).

149. See generally EARL SCHORRIS, *A NATION OF SALESMEN: THE TYRANNY OF THE MARKET AND THE SUBVERSION OF CULTURE* (1994) (arguing that buying and selling have become virtually a defining characteristic of Americanism).

150. One provocative scholar has indeed suggested that we speak not of "globalization" but rather "the universalization of capitalism." Ellen Meiskins Wood, *Modernity, Postmodernity, or Capitalism? in CAPITALISM AND THE INFORMATION AGE: THE POLITICAL ECONOMY OF THE GLOBAL COMMUNICATION REVOLUTION* 46 (ROBERT W. MCCHESENEY, ELLEN MEISKENS WOOD, & JOHN BELLAMY FOSTER, EDS., 1998).

151. Recent texts with national and international sensitivities include, CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: CASES, PROBLEMS, AND MATERIALS ON DOMESTIC AND INTERNATIONAL* (1999); JOHN O. HONNOLD &

With sales having become both consumer-oriented and international, one wonders if the core analogies and assumptions of Llewellyn's Article 2 remain appropriate. A tribal group in this regard does not seem comparable to the modern commercial sector. Tribes are united by a clear network of families and clans or, at least, have a strong degree of common character and self-recognition. Contemporary merchants and businessmen, by contrast, are not defined by shared self-recognition but rather by the way they buy and sell with an eye to profit. Scholars have perceptively suggested that in Llewellyn's mind merchants were the equivalent of the Cheyennes,¹⁵² but almost sixty years after Llewellyn did his primary Article 2 drafting, this comparison seems at best a metaphor and most certainly not a functional analogy.

More generally, one has to wonder to what extent the commercial sector or even sub-parts of that sector have anything resembling the coherent cultural norms Llewellyn perceived among the Cheyennes? Surely whatever merchants and businessmen share is not as deep as the Cheyennes' epistemology, sense of the supernatural, understanding of family, and so on. The commercial consensus, to the extent it exists, involves only commercial practices and behaviors. But, is there even a consensus in this specific sense?

Professor Chris Williams argues that there is no empirical evidence for the projected consensus.¹⁵³ Williams reminds us that "[b]uyers and sellers have interests that are largely antagonistic. Both wish to maximize profit, but each can do so only at the other's expense."¹⁵⁴ Williams may overstate the antagonism. As noted earlier, buyers and sellers sometimes cooperate and compromise, if only with an eye to future transactions. Yet Williams is correct in suggesting that usages of trade are often vague or non-existent. Certainly when the parties actually go to court to

CURTIS R. REITZ, SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW (1992); and JOHN E. MURRAY & HARRY M. FLETCHER, SALES AND LEASES: PROBLEMS AND MATERIALS ON NATIONAL AND INTERNATIONAL TRANSACTIONS (1994).

152. Kamp toys with this comparison, see Kamp, *supra* note 13, at 357; see also Danzig, *supra* note 138, at 622-23.

153. See Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495, 1508 (1984).

154. *Id.* at 1507.

resolve a dispute, one might rest assured that whatever trade customs do exist are neither precise nor powerful enough to eliminate disagreement.

Both a more modern anthropology and the evolving understanding of American culture and society suggest how Llewellyn might have gone astray. Modern anthropologists suggest that we comprehend other cultures as much through interpretation and projection as through observation and science. The Cheyenne culture no doubt had some degree of coherence, but the type of controlling unity Llewellyn and his colleague E. Adamson Hoebel perceived tells us as much about the perceivers as it does about the perceived. The great lessons Llewellyn and Hoebel learned from the Cheyennes are in part a result of efforts to answer deep, haunting questions about the American present rather than their search of the Cheyenne past. Anthropologist Clifford Geertz has warned us to back off of this kind of theorizing because "[t]here are enough profundities in the world already."¹⁵⁵

Furthermore, traditional cultural anthropology as a whole may not be well suited for the complexities and contradictions of twentieth-century American society. Surely a trained cultural anthropologist can perceive patterns and underscore traits in American society in an especially astute way. But the society as a whole lacks the simplicity and degree of unity typical of the tribal or traditional societies customarily studied by cultural anthropologists. American Studies scholars—cultural anthropologists of their own stripe—have long since abandoned notions of a unified American culture. They speak of dominant and subordinate cultures; acknowledge differences by race, ethnicity, region, and class; and stress the tensions and conflicts more so than the unity. The notion of American culture as "melting pot," in which difference blends into sameness has given way to a "stew pot" with different recognizable ingredients or perhaps a "tipped pot" for which the ingredients have spilled out all over the floor.¹⁵⁶

155. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 21 (1973).

156. For an illustrative but not an exhaustive list of recent works that suggests a transformation in the American Studies model see SACVAN BERCOVITCH, *THE RITES OF ASSENT: TRANSFORMATIONS IN THE SYMBOLIC CONSTRUCTION OF AMERICA* (1993); Linda Kerber, *Diversity and The Transformation of American Studies*, 41 AM. Q. 415 (1989); George Lipsitz,

VI. CONCLUSION

Appreciation of Karl Llewellyn's *The Cheyenne Way* helps us conceptualize the jurisprudence of Article 2. Of course no single intellectual or social development is solely responsible for the variety of legal thought at the heart of sales law. Beyond the remarkably shapeless "legal realism," a more generalized anti-formalism, New Deal politics, squabbles between the faculties at leading law schools, and even German romanticism can be seen as inspiring Article 2.¹⁵⁷ Ideas and theories do not come about through a kind of intellectual bumper-cars; one type of thought does not unilaterally send another spinning.

But still, cultural anthropology, Karl Llewellyn's collaboration with the anthropologist E. Adamson Hoebel, and the perceived "law-ways" of the Cheyennes merit recognition for their impact on and interrelationship with Article 2 jurisprudence. Article 2 resulted in a deference to commercial practices, valorization of "usage of trade," and faith in case-law evolution. Llewellyn's achievement was intellectually spectacular and for decades strikingly successful, but in light of intellectual shifts and societal change, a new or at least updated version of jurisprudence must be brought to bear. "Shimmering, Falling as Glass" and the Cheyennes who gave him that name should be acknowledged but not given full rein in development of the next law of sales.

"Sent For You Yesterday, Here You Come Today." *American Studies Scholarship and the New Social Movements*, 40 *CULTURAL CRITIQUE* 203 (1998); and Mary Helen Washington, "Disturbing the Peace: What Happens to American Studies If You Put African American Studies at the Center?" 50 *AM. Q.* 1 (1998).

157. For a discussion of antiformalism, see GILMORE, *THE AGES OF AMERICAN LAW*, *supra* note 78, 68-86. Kamp compares Llewellyn's jurisprudence to New Deal thought. Kamp, *supra* note 13, at 381-90. Hull points out that many from Columbia Law School and the Yale Law School found their way into the early pantheon of legal realists. HULL, *supra* note 9, at 211. Rival Harvard Law School, meanwhile, was unrepresented. *Id.* See generally James Whitman, *Commercial Law and American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 *YALE L.J.* 156 (1987) (exploring links between Llewellyn and German romanticism).

