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Reason and Context: A Dual Track Theory of Interpretation

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Articles

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I. Introduction

The primary objective of this article is to analyze the contextual turn[1] in contract interpretation during the past century. This analysis is

1. The contextualist turn in American contract law interpretation is part of a broader phenomenon popularly known as the interpretive turn in law. One definition is offered by Professor Martha Minow: "[T]he interpretive turn in law . . . depict[s] law as a communal language and attaching law to the social contexts in which norms can be generated and given meaning." Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861 (1987). The rising prominence of the contextual analysis of meaning represents a fundamental paradigm shift in American contract law. Other commentators have taken different slants on the issue of what was the major shift or development in American contract law during the twentieth century. *See, e.g.* Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139 (1989) (rise of reliance theory); Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1987) [hereinafter, Pratt, *Turn of the Century*] (emergence of the doctrine of good faith as the means by which contract law was transformed to deal with reduced specificity in contracts, along with the

important because the use of contextual inquiries, often foreclosed under classical legal thought or legal formalism,[2] has resulted in a contractual interpretation process that includes a wide variety of extrinsic evidence. The admission of extrinsic evidence not only allowed for fuller arguments of the merits of contractual obligation, it also allowed for alternative views of contractual obligation. The resulting contextual methodology of interpretation has directly affected doctrinal development in such areas as reliance recovery, pre-contractual liability, and implied-in-fact contracts.[3]

The movement toward contextual interpretation of meaning was at

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increased complexity and uncertainty in contractual relations). I believe that these views of the main contract law change produced by the economic and social pressures of twentieth century America can be folded into the umbrella of contextualism. The development of the duty of good faith and reliance theory was heavily dependent on contextualism, or in the alternative, required contextual inquiry.

2. Classical legal thought refers to the style of judicial reasoning that characterized the period from about 1875 to 1940. It has also been labeled as formalism and more pejoratively as "mechanical jurisprudence." *See*, Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 THE GREEN BAG 607 (1907); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911) and 25 HARV. L. REV. 140, 489 (1912). Duncan Kennedy in discussing the concept of legal formalism in American law states: "the critical use of the term formalism, against the abuse of deduction and the fantasy of gaplessness in legal discourse, is part of the twentieth century battle between those who have wanted to depoliticize the drama as much as possible, through reason, and those who have seen it as inevitably a dangerous improvisation." Duncan Kennedy, *Legal Formalism* 13 (January 1, 2001) (unpublished manuscript, on file with author) [hereinafter Kennedy, *Legal Formalism*]. Kennedy notes that this formal style of legal reasoning is best described as a "legal consciousness." *Id.* Such a consciousness is somewhat autonomous—"it is a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest." Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* 8 (1975) (unpublished manuscript, on file with author) [hereinafter, Kennedy, *Classical Legal Thought*]. Karl Llewellyn posited that the modern era (post-1940) has seen a return to the pre-classical age of instrumental reasoning prevalent in the early and mid-nineteenth century. *See,* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 62-72, 446-461 (Little, Brown, & Co 1960) [hereinafter, COMMON LAW TRADITION]. Kennedy rejects Llewellyn's "return thesis," stating: "we live not in a time of return to the sound practice of 1830, but in a post-Classical age of disintegration." Kennedy, *Classical Legal Thought* at 9. He further explains that classical legal thought recognized various spheres of power (private, public, legislative). In this system of spheres, the domain of contract was reserved to the private sphere through the will theory. Thus, the judge's role in the private sphere of contracts was simply to enforce the will of the parties. *See id.* In order to prevent judicial usurpation, or more accurately the appearance of usurpation, the judge acted through general principles: "The basic mode of this influence of theory on results is that the ordering of myriad practices into a systematization occurs through simplifying and generalizing categories, abstractions that become the tools available when the practitioner (judge or advocate) approaches a new problem." *Id.*at 13.

3. *Infra* Part V.C.2.

least partially initiated by the adoption of the Uniform Commercial Code (Code). Karl N. Llewellyn was the main crafter of the Code's interpretive methodology.[4] Grant Gilmore provided the strongest statement of Llewellyn's role in drafting the Code. "[T]his Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from the beginning to end he inspired, directed, and controlled it."[5] Llewellyn is a seminal scholar in American contract law because of his role as reporter for the Code and principal drafter of Articles One (General Provisions) and Two (Sales). At the time of his appointment as Code reporter, Llewellyn had already established himself as a contract scholar and jurisprude. The depth of his scholarship makes him an intriguing figure for analysis.

Llewellyn was also one of the founding fathers of the Legal Realist movement of the 1930s.[6] The importance of Llewellyn as a legal realist will be explained but will not be the central focus of the article. Legal realism focused attention on the issue of judicial decision-making. As a subset of their critique of the judge as a disinterested, unbiased technocrat was the Realists' view that contract interpretation needed to expand beyond the literal meaning of words. But it was not until the drafting of the Code, under the supervision of Llewellyn, that the contextual methodology of contract interpretation received its proper attention.

The major theme of this article will be the exploration of Llewellyn's contextualism and its subsequent application in the law of contracts. This article poses that Llewellyn's most enduring influence, embodied in the Code, was the promotion of the contextualist turn in contract interpretation. It will be argued that his interpretive methodology is best characterized by the term *full contextualism* and not

4. Karl N. Llewellyn (1893-1962), after a few years at Yale, joined the faculty at Columbia in 1925 and remained until 1951, when he joined the faculty at Chicago. He made significant contributions to the fields of jurisprudence (as a leader of the Legal Realists), law of contracts, and commercial law. He was a student of Arthur Corbin and was the principal writer of the Uniform Commercial Code for which his wife Soia Mentschikoff served as Associate Chief Reporter.

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

6. *See generally*, WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (University of Oklahoma Press 1973) [hereinafter, TWINING, REALIST MOVEMENT]; AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds. 1993) [hereinafter, AMERICAN LEGAL REALISM]; LAURA Kalman, LEGAL REALISM AT YALE: 1927-1960 (The University of North Carolina Press 1986); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988); Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM HIST. REV. 424 (1969).

the hierarchical methodology generally associated with the Code.[7]

This article will show that Llewellyn has been fundamentally misread. Instead of being an anti-conceptualist rule-skeptic, he offered a vision of law and contract interpretation that bridged the conceptual-contextual divide. Llewellyn, from his criticism of abstract conceptualism[8] and the dangers of systematizing contract law, intended to frame the Code as one characterized by merchant rules and open terms ("non-fixed rules")[9] that would act to infuse contracts with commercial reasonableness. This framework exposed a particular relationship between law and society. Llewellyn, through his model, saw this relationship as a two-way street: context informing rule and rule through self-adjustment guiding context.

The article provides an intellectual history of Llewellynian thought to better understand the contextual turn in contract interpretation. It begins in Part II by examining the brand of abstract conceptualism that Llewellyn sought to expunge from the law. It then offers a brief historical analysis of the conceptual-contextual divide that preceded the Legal Realist movement. This discussion includes an analysis of the works of Christopher Langdell, Joseph Beale, Oliver Wendell Holmes, Wesley Hohfeld, Benjamin Cardozo, and Samuel Williston.[10] Part III focuses on the intellectual context of Llewellyn's work. It reviews works

7. *Infra* Part V.B.3.

8. Abstract conceptualism refers to the mode of legal thought and legal reasoning affixed to the formal deduction from abstract legal concepts. It is associated with the legal formalism that developed in America towards the end of the nineteenth century. Duncan Kennedy states that a "descriptive use of the term legal formalism refers to a range of techniques of legal interpretation that are based on the meaning of norms (whether established privately, as in contracts, or publicly, as in statutes), and refuse reference to the norms' purposes, or to the general policies underlying the legal order, or to extra-juristic preferences of the interpreter." Kennedy, *Legal Formalism*, *supra* note 2, at 3. Duncan Kennedy provides an excellent description of the various sides of abstract conceptualism or legal formalism. He distinguishes textual, conceptual, and precedential formalism. Textual formalism is "literalist to the extent that it refuses to vary meaning according to context." *Id.* at 4. Conceptual interpretive formalism "constructs general principles necessary if the legal system is to be understood as coherent." *Id.* Precedential interpretive formalism interprets according to the meaning of norms derived as the holdings of prior cases." *Id.* When combined they provide the interpretive structure to support the façade of a gapless legal order. "Interpretation positing gaplessness requires the interpreter to apply, according to their meanings, the legal norms he or she can derive textually, conceptually, or through precedent; it categorically forbids reference to purposes and policies." *Id.*

9. In reflecting on the drafting of the Code, Llewellyn states that "open-ended drafting, with room for courts to move in and readjust over the decades, had been a basic piece of the planning." COMMON LAW TRADITION, *supra* note 2, at 183 n.186.

10. Samuel Williston (1861-1963) joined the faculty at Harvard in 1890 and taught there until his retirement in 1938. He was the drafter of the Uniform Sales Act, the predecessor to Article 2 of the U.C.C. and was Reporter for the Restatement of Contracts. His treatise on contracts is considered a classic.

of legal and sociological writings from before 1930 that likely influenced Llewellyn.[11] The focus then shifts to Llewellyn's jurisprudential and doctrinal writings in the period from 1930 to 1940. Part IV examines the main features of Llewellyn's jurisprudence, and how those features impacted the Code project.

Parts II through IV set the foundation for the evolution of contextualism in contract rule application and contract interpretation that is explored in the coverage of the Code in Part V. Part V includes a discussion of two models of contextual interpretation: hierarchical and inverted contextualism. It then argues that a third model, full contextualism, better explains Llewellyn's vision of the Code's interpretive methodology. Finally, Part VI offers a dual track theory of interpretation that reflects Llewellyn's vision.[12] To provide a better understanding of the above blueprint, the remaining two sections of the introduction will briefly examine the phrases "abstract conceptualism" and the "conceptual-contextual divide."

A. Abstract Conceptualism and Contextualism

In order to study the contextualist turn in American contract law it is important to establish a working understanding or definition of contextualism and its pseudo-jurisprudential counterpoise, abstract conceptualism. Both contextualism and abstract conceptualism have as a focus the determination of the meaning of law. The meaning of law involved here includes the meaning of common law rules or precedent, the meaning of statutory enactments, and the meaning of private contracts.

Providing meaning to the words or silence (gaps) in a contract is the interpretive exercise for both the abstract conceptualist and the contextualist. The meanings attributed to a contract will, at times, diverge because the conceptualist and contextualist live in different methodological worlds. The conceptualist receives the contractual text as sacred and looks to the precepts of law that are applicable to the (linguistic) facts. For the conceptualist, the words of the contract are facts. The resolution of an interpretive dispute involves uncovering the pre-existing legal concept or derived rules applicable to the facial

11. The focus here will not be on the measuring of the relative influences of different writers on Llewellyn but on the affinity between different sources inside and outside of legal scholarship. The fact that Llewellyn's interests were so expansive assures that these writings were known and at some level internalized by him. The reviewed writings include legal, sociological, and philosophical predecessors such as Holmes and Hohfeld again, George Gardner, Morris and Felix Cohen, Max Weber, and Arthur Corbin, as well as William Graham Sumner, and James C. Carter.

12. *See infra* Part VI.C-D.

meaning of the linguistic facts. I refer to this formalistic brand of conceptualism, embodied in the writings of Christopher C. Langdell, Joseph Beale, and Samuel Williston, as *abstract conceptualism*. This is the form of conceptualism that the article refers to when discussing the world of the conceptualist and the form of conceptualism existing at the turn of the twentieth century.

For the contextualist, true understanding is found somewhere in the contextual background. It is from this background that the words of a contract are infused with meaning. This contextual meaning represents the true understanding of the parties. Given the varied nature of contextual meaning, the rules derived from the concepts of contract law should not be viewed as static. The dynamic interface between the contextual meaning of a contract and the rules of contract law will be examined in the discussion of *singing rules*[13] in Part VI. Llewellyn's vision of contract interpretation is particularly evidenced by the interface of singing rule and context.

B. Rule and Context

All creative endeavors and meaning-inducing activities occur within a context. At the level of the individual, the education, experiences, and intellectual milieu of the rule or contract creator can be mined for insight into the meaning of her work. At the level of law application, the meaning of a rule, statute, or contract is exposed by the context in which it was written. This contextual search is necessitated by the fact that the written form always represents a diminished reality. Inquiry into its context and purpose is required to infuse the writing with a deeper reality.

Contextualism in its broadest sense is the incorporation of non-textual elements into the interpretive process. It is the attempt to gain a fuller meaning of the disembodied symbols of text. Contextualism also includes the recognition that mere exposition of a text is unlikely to uncover the true understanding of the writer or writers.

This article touches upon three contextual perspectives. First, the intellectual context that surrounded or informed the writings of Llewellyn, and the Code, will be examined. Second, a contextual understanding of specific Code rules will be provided and used to understand the methodology it envisions for contract interpretation. Finally, the grassroots of contract interpretation will be explored. This involves the process of rule application to novel cases. The first two

13. The term "singing rule" was coined by Llewellyn to describe the right kind of rules. These rules "sing" with patent reason which provides guidance to the judge in applying rules to novel cases.

contextual strata will set the stage for the exploration of the third: theories concerning judicial interpretation of contracts. Such a pursuit is an attempt to describe how contract interpretation in its contextualist form can, and in many concrete cases does, operate within a conceptual understanding of contract law.

It will be necessary first to examine the rich literature that has informed the conceptual-contextual debate in contract law in order to offer theoretical insights. Given the size of this literature, an ordering tool is needed. The tool selected for this purpose is the work of Karl Llewellyn in the area of contract interpretation. This work includes his general jurisprudential writings and the application of his realistic jurisprudence in the drafting of Articles One and Two of the Code.

II. Prequel: *Fin De SiÉcle*

The rise of contextualism in contract interpretation is a testament to the impact that twentieth century analytic philosophy has had on multiple disciplines. The view of meaning as dependent upon context is a foregone conclusion today.[14] It is important to remember that this was not always the case.

Further, despite the increased understanding of language as context dependent, problems endemic to language and the law remain. First, legal rules, tightly knit or open-ended, remain conceptual in nature. Thus, any theory of contractual interpretation needs to provide a bridge between the conceptualism of rules and the contextualism of the real world. Second, at times a full contextual analysis of a contract formation fails to imbue the contract with sufficient clarity. It is important to realize that contextualism is not a foolproof methodology. In the end, law's response to linguistic indeterminacy is likely to be a formal, conceptual one.

The growth in law cases, especially the ambitious expansion of contract law throughout the nineteenth century, provided the pressure for the conceptualization of law at the end of the century. Professor Farnsworth asserts that the courts began to perceive that it was their mandate to systematize and order the law:

14. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 1953); LUDWIG WITTGENSTEIN, PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" (1965). For an explanation of the similarities between Wittgentstein and Llewellynian thoughts on meaning see, Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX L. REV. 169, 176, 199 n.190, 204-208 (1989) [hereinafter, Patterson, *Of Llewellyn, Wittgenstein*].

> During the final quarter of the [nineteenth] century much of the law of the formative era began to crystallize and the role of the judge became one of systematizing rather than creating. As the volume of case law increased, the uncertainty that had been inevitable in earlier years became unpopular and efforts turned toward a search for predictability. The principle achievements of the courts were the ordering of the system and the logical development of details.[15]

The systematization of American law at the end of the nineteenth century was the product of a liberal jurisprudence or legal consciousness characterized as formalism. The idea of systematizing the great body of common law cases along a modest number of general principles[16] was advanced by Christopher Columbus Langdell[17] and Joseph H. Beale.[18] The umbrella of general principles provided, through the process of logical deduction, *all* of the rules needed for deciding concrete cases.[19] Furthermore, these rules were welded into a harmonious whole. Max Weber described this wholeness as producing a rational, *gapless* legal order. Weber's description of such a gapless legal order of rational rules is the desideratum for a legal science based on abstract conceptualism. Weber states that:

> Present day legal science . . . proceeds from the following five postulates: first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract propositions by means of legal logic; third, that the law must actually or virtually constitute a *gapless* system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless

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15. E. ALLAN FARNSWORTH, UNITED STATES CONTRACT LAW 31 (Juris Publishing 1999) [hereinafter, FARNSWORTH, UNITED STATES CONTRACT LAW].

16. *See generally*, AMERICAN LEGAL REALISM, *supra* note 6, at 79. Corbin, Issacs, Llewellyn, and Fuller saw the classical view of contract law as internally inconsistent. "The attempt to explain all of contract doctrine on the basis of a few general principles is chimerical and destructive." *Id.*

17. *See* CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Little, Brown, & Company 1871) [hereinafter, LANGDELL, CONTRACTS].

18. *See* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 3.2 (1935) [hereinafter, BEALE, CONFLICT OF LAWS].

19. "[F]or any legal question, there was the possibility that properly analyzed, the correct answer could be arrived at by applying basic principles that were both derived from and reflected in case law." Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 106 (2000).

legal ordering of all social conduct.[20]

Langdell and Beale's abstract conceptualism is a reflection of Weber's schematic. Their basic premise was that all necessary rules could be produced internally through deduction from general, pervasive principles.[21] From this gapless order, according to conceptualists, law provides the one right answer to all real world disputes.

Soon after consolidating its gains, abstract conceptualism's claims to gapless, deductive purity came under attack. The lineage of pre-Realist attacks can be debated, but the importance of a number of writings to the Realist cause is without dispute.[22] The pre-Realist writings with the greatest impact include Oliver Wendell Holmes' groundbreaking *The Path of Law* (1899),[23] Roscoe Pound's *Mechanical Jurisprudence* (1908),[24] Wesley Hohfeld's *Some Fundamental Legal Conceptions* (1913),[25] and Robert Hale's *Coercion and Distribution in a*

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20. MAX WEBER, ECONOMY AND SOCIETY 657-658 (Guenther Roth & Claus Wittich eds. 1968).

21. See, LANGDELL, CONTRACTS, *supra* note 17. "To have such a mastery of these [principles or doctrines] as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs." *Id.* at vi.

22. The first Realist writing is attributed to Joseph Bingham for his 1912 article *What is the Law?* and his 1913 writing on *The Nature of Legal Rights and Duties*. *See*, Joseph Bingham, *What is the Law? (pts. 1 & 2)*, 11 MICH. L. REV. 1 & 109 (1912); Joseph Bingham, *The Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1 (1913). Whether Bingham's early writings are viewed as Realist or pre-Realist is open to debate. Roscoe Pound had this to say about Bingham's works: "While one finds the core of the realist approach in these early articles of Bingham, it is hardly fair to class Bingham with the modern realist school." Pound explains that Bingham believed that what judges actually do should be studied but not at the exclusion of other forms of research. In contrast, "the left-wingers of realism seem to assume that this neutral observation of official behavior constitutes the whole of legal science." Lon L. Fuller, *American Legal Realism*, LXXVI PROCEEDINGS AM. PHIL.SOC. 191 (1936) [hereinafter, Fuller, *Legal Realism*].

23. Oliver Wendell Homes, Jr., *The Path of Law*, 10 HARV. L. REV. 457 (1897) [hereinafter, Holmes, *Path of Law*].

24. Pound, *Mechanical Jurisprudence*, *supra* note 2. Dean Pound asserted that Sir Henry Maine's idealized view of legal development as the increased recognition of individual liberty provided the historical support for the sanctification of freedom of contract. Pound also cites the writings of Herbert Spencer as being in "great vogue in America" at the time. This positivist orientation held that legal evolution was the product of mechanical laws. The result was the establishment of the freedom-centered formalism of classical legal thought. *See* Roscoe Pound, *The End of Law as Developed in Juristic Thought* (pts 1 &2), 30 HARV. L. REV. 201, 222 (1917). This was the second part of a two-part article under the same name. The first part appeared at 27 HARV. L. REV. 605 (1914). *See also*, *Liberty of Contract*, 18 YALE L.J. 454 (1909) [hereinafter, Pound, *Liberty of Contract*].

25. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter, Hohfeld, *Fundamental Legal Conceptions*].

Supposedly Noncoercive State (1923).[26] The next section will briefly discuss the pre-Realist critique of classical legal thought.

A. The Pre-Realist Critique of Conceptualism

In the first few decades of the twentieth century, the citadel of conceptualism began to suffer an initial wave of assaults. The law of contracts was the center of a number of localized skirmishes.[27] In his famous article attaching the Realist label to the ferment swelling against abstract conceptualism, Llewellyn cited Holmes's pragmatic and instrumental approach to law as a touchstone.[28] Holmes offers the interpretive model of the objective prudent person to surrounding circumstances in his 1899 essay *The Theory of Legal Interpretation.*[29] Holmes's view of externality is singularly focused on the third-party prudent person. Thus, an objective interpretation of a statute or a contract focuses not on what the writer meant, but on what the words mean from the perspective of the external prudent person.[30]

Unlike the conceptualist external interpretation of meaning, however, Holmes's prudent person was created contextually. Llewellyn's view of the importance of the background of trade usage and custom in contract interpretation is consistent with this Holmesian objectification of contract meaning. Trade usage and custom are part of the prudent person's construction. It is the prudent person that

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26. Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter, Hale, *Coercion and Distribution*].

27. *See, e.g.,* Edward A. Harriman, *Nature of Contractual Obligation*, 4 N.W.L. REV. 98; Clarence D. Ashley, *Conditions in Contracts*, 14 YALE L. J. 424 (1905); Charles Morse, *The Common Law Theory of Contract*, 39 CAN. L.J. 379 (1903); Jerome C. Knowlton, *Freedom of Contract*, 3 MICH. L. REV. 617 (1905); Clarence D. Ashley, *Should There be Freedom of Contract*, 4 COLUM. L. REV. 423 (1904); Lewinsohn, *Contract Distinguished form Quasi-Contract*, 2 CAL. L. REV. 171 (1914); Nathan Issacs, *Contractual Control over Adjective Law*, 29 W. VA. L.Q. 1 (1922); Arthur R. Corbin, *Discharge of Contracts*, 22 YALE L.J. 513 (1913); Castigan, *Implied-in-fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1920); Lorenzen, *Law Determining the Nature of a Transaction*, 28 YALE L.J. 806 (1919); and *Mercantile Contracts and the Principle of Ejusdem Generis*, 25 SCOT. L. REV. 217 (1909).

28. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV.431 (1930) [hereinafter *Realistic Jurisprudence*]. "Holmes' mind had traveled most of the road two generations back." One set of commentators described the Holmes-Llewellyn connection as follows: "Indeed, one might fairly characterize substantial portions of Llewellyn's jurisprudential work as no more (and no less) than popularizations and applications of Holmes." AMERICAN LEGAL REALISM, *supra* note 6, at 52.

29. *See* Oliver Wendell Holmes, *A Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) [hereinafter Holmes, *Legal Interpretation*].

30. *See id.* "Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means." *Id.* at 419.

determines the reasonable expectations and meanings of the contesting parties. For Holmes and Llewellyn the prudent person's interpretation of a contract was not achieved through the plain meaning of words, but through a contextual understanding of the surrounding circumstances.

In *The Path of the Law*,[31] Holmes noted the dangers of conceptualism.[32] In doing so he advances the importance of patent reason in rule formation. Holmes championed what Llewellyn would later refer to as the *singing rule*. Holmes stated that "law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it sub-serves, and when the grounds for desiring that end are stated . . . in words."[33] Llewellyn would later bring this mantra to the drafting of the Code.

The hollowed rationality of classical legal thought was the subject of Wesley Hohfeld's methodological restructuring of abstract conceptualism.[34] His ambition was to look at things in a fresh manner, stripped of conceptual blinders.[35] Hohfeld's methodology laid the basis for the Realists' critique of legal reasoning.

Hohfeld recognized that the disaggregation of abstract legal concepts in each area of the law was crucial innovation.[36] He viewed legal concepts as the "chameleon-hued words [that] are a peril to both clear thought and to lucid expression."[37] Disaggregation of legal concepts required the isolation of operative facts. For Hohfeld those operative facts were relational facts. Therefore, grand concepts like property or contract rights were not independent of real world relationships.

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31. Holmes, *Path of the Law*, *supra* note 23.

32. One of the primary arguments in favor of abstract conceptualism and formalistic rule application is systemic certainty and predictability. Holmes response is that "certainty generally is illusion." *Id.*

33. *Id.* Later he states "the practical importance, for the decision of actual cases, of understanding the reasons of the law." *Id.*

34. *See* Hohfeld, *Fundamental Legal Conceptions*, *supra* note 25. *See generally*, Walter Wheeler Cook, *Hohfeld's Contribtions to the Science of Law*, 28 YALE L.J. 721 (1919) (the importance of an adequate analytical jurisprudence for efficient adjudication).

35. The Realists later championed this methodology. The core feature of Realism is to look into the world and "see it fresh; see it as it works." WILLIAM TWINING, THE KARL LLEWELLYN PAPERS 16 (The University of Chicago Law School 1968) [hereinafter, LLEWELLYN PAPERS].

36. Hohfeld's article begins with an example of the nature of a trust. He notes that abstract conceptualism had failed to provide a coherent explanation of the nature of trusts. In making this claim he provides a laundry list of famous conceptualists that had helped create the situation—Austin, Maitland, Salmond, (Walter) Hart, Langdell, and Ames. He asserts that the only way to make sense of the conceptual apparatus of the law is by "endeavoring to 'think straight' in relation to all legal problems." Hohfeld, *Fundamental Legal Conceptions*, *supra* note 25, at 18.

37. *Id.* at 29.

Asking whether a party had a property or contract right was meaningless. Instead, the crucial inquiry is whether a party has a right in relation to a particular other party. The true legal question then becomes does that other party owe a duty to the so-called rights holder? The Hohfeldian inquiry is consistent with Holmesian legal thought in that a right is meaningless unless the law provides a remedy (Holmes); a remedy is not available unless a duty is found (Hohfeld). This focus on duty avoids overgeneralization for it is not the general right but a specific duty that is the focal point. The focus on finding a specific duty is primarily a contextual undertaking. The facts will determine if a duty is owed. In the words of Hohfeld, "legal relations are, after all, *sui generis*."[38] This contextual rights-determining process is the opposite of the abstract conceptualist's deduction from a general right.

What Hohfeld did for doctrinal analysis Robert Hale did for policy analysis.[39] Hale noted that court enforcement of a right such as freedom of contract is inherently coercive: "[T]he systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom."[40] According to Hale, the decision to impose a duty on someone is infused with normative and distributive consequences.[41] Over-interpreting such policies as freedom of contract fully engages the coercive power of the state. The question then becomes is this necessarily a bad thing?[42] Hale asserted that it was when state-enforced relational duties were in fact a product of a one-sided coercive power.[43] Hence, a decision involving the application of rights and the enforcement of duties is one that entails policy analysis, not deductive logic.

1. Borrowings from the Continent: European Free Law

The European Free Law movement of the first two decades of the twentieth century offered a similar substantive critique of abstract conceptualism decades before the beginnings of the American Realist movement.[44] Despite passing references to the works of Gény and

38. *Id.* at 30.

39. Hale, *Coercion and Distribution*, *supra* note 26.

40. *Id.* at 470 (emphasis in original).

41. "The channels into which industry shall flow, then, as well as the apportionment of the community's wealth, depend upon coercive arrangements." *Id.* at 493.

42. "[L]et it be kept in mind that to call an act coercive is not by any means to condemn it." *Id.* at 471.

43. *See, e.g.*, "This power is frequently highly centralized, with the result that the worker is frequently deprived, during working hours and even beyond, of all choice over his own activities." Hale, *Coercion and Distribution*, *supra* note 26, at 477.

44. *See generally*, James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987)

Ehrlich, the Realist scholars never fully recognized the connections between the two movements. Instead, an implicit acknowledgement of the importance of the Free Law movement to the Realist movement is found in the fact that Free Law thinking openly influenced the pre-Realists, with the possible exception of Holmes.[45] Thus, by citing pre (proto)-Realist writings, the Realists implicitly recognized the groundbreaking works of the Free Law scholars. This section examines the tenets of Free Law most relevant to Llewellyn's contextualism. It will also highlight some of the explicit and implicit Free Law influences on pre-Realist and Realist writers.

The European Free Law movement offered some of the same insights that were at the center of the Realist movement.[46] It wedded the importance of customary law expounded upon decades earlier by Rudolf von Jhering[47] with the inevitability of gaps in any statutory or formal legal order.[48] The Free Law insights included a critique of the alleged

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[hereinafter, *German Free Law*]. Herget and Wallace demarcate the operative era of the Free Law Movement as 1899 to 1912. *Id.* at 401; *see also*, Stephen J. Lubben, *Chief Justice Traynor's Contract Jurisprudence and the Free Law Dilemma: Nazism, The Judiciary, and California's Contract Law*, 7 SO. CAL. INTERDISC. L.J. 81 (1998) [hereinafter, *Free Law Dilemma*]. "The Free Law Movement was, in many ways, the intellectual forerunner of the Legal Realist movement." *Id.* at 90. *See also*, WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998). "Pound, who read German and French with ease, was influenced by recent continental . . . debates . . . Pound did not invent the concept of sociological jurisprudence. He was merely the American exponent of an idea . . . earlier expounded by the Austrian Eugen Ehrlich and the French scholar Francois Gény." *Id.* at 192. "Llewellyn stands out as the promoter of the Realist movement; a movement that owes much to the German *Free Law* movement from the beginning of this century." Bernhard Grossfeld & Peter Winship, *The Law Professor Refugee*,18 SYRACUSE J. INT'L L. & COM. 3, 11 (1992) (emphasis in original).

45. This point was made by Professor Herget: "Thus, through a two-step process, writers like Llewellyn, Frank, Oliphant, and others, drew . . . mainly from earlier American thinkers [Pound, Cardozo, Gray] who, with the exception of Justice Homes, had in turn learned from the Free Law scholars [regarding the issue of legal indeterminacy]." James E. Herget, *Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59, 63 (1995) [hereinafter, Herget, *Legal Indeterminacy*]. "German *influence*, it is more discernible in the assimilation of the work of nineteenth-century German jurists by Llewellyn's American forerunners, such as Carter, Gray, Holmes, Hohfeld, and Pound." William Twining, Book Review, *The Case Law System in America*, 100 YALE L.J. 1093, 1097 (1991).

46. "The parallels between the two movements are striking: Both schools reacted to formalism, and both fell from grace after being painted as undemocratic." *Free Law Dilemma*, *supra* note 44 at 91, n.47.

47. Jhering was an early critic of formalism and what he referred to as "conceptual jurisprudence." *See generally*, RUDOLF VON JHERING, DER ZWECK IM RECHT (2 vol. 1877 & 1893), subsequently translated as, LAW AS A MEANS TO AN END (trans. I. Husik 1913). "The great contribution of Jhering was in demonstrating the necessity of taking into account non-legal factors in constructing an adequate theory of law." Herget, *Legal Indeterminacy*, *supra* note 45 at 65.

48. The formalism that pervaded German jurisprudence stemmed from its code-

gaplessness of abstract conceptualism.[49]

Free Law scholars attacked the dominant view that the role of the judge was simply to place case problems within the Civil Code's *machinery*.[50] Max Radin, in a 1925 article in the *American Bar Association Journal*, stated that "[t]o use a figure contemptuously applied by the German jurist Kantorowicz, the whole transaction [of judicial decision making] is dropped into its proper category like a nickel in a slot-machine,—and click! Out comes the decision at the bottom!"[51] The gapless Civil Code was purported to provide solutions to all present and future legal problems. Free Law scholars, such as Hermann Kantorowicz and Gustav Radbruch from Germany, Eugen Ehrlich from Austria, and Francois Gény in France argued that there would always be gaps within any statutory system. Gény in his 1899 *The Science of Legal*

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centered view of law. The 1900 enactment of the German Civil Code provided the capstone for the systematization and conceptualization of German law that had begun with the work of the Pandects in the 1850s. The height of German (abstract) conceptualism is seen as the adoption of the German Civil Code or *Bügerliches Gesetzbuch* (BGB) in 1896 and its taking effect on January 1, 1900. The new code was conceived as a comprehensive and organic whole that provided all the law that a judge needed to know. "In short, the law—broadly conceived as an interrelated system, of concepts, principles, and rules—was a logically closed system." *German Free Law*, *supra* note 44 at 407. "The last fruit of the systematic Romanist legal science was the German Civil Code . . . a system of leading concepts interconnected through logical operations, was the hallmark of conceptualism." Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 867 (1990). The Pandects are Romanists scholars who attempted to create a gapless conceptual legal system based upon the reformulation of the Pandects found in Justinian's Digest. "[T]he systematic or Pandectist movement in law, that movement whose practitioners attempted to reduce law virtually to a mathematical system consisting entirely of principles or axioms." M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 103, 104 (1986).

49. Professor Horwitz offers the boldest statement regarding the influence of Free Law on one of the founding documents of American Legal Realism—Llewellyn's 1930s article *A Realistic Jurisprudence*. Llewellyn, *Realistic Jurisprudence*, *supra* note 28. He states, "A *Realistic Jurisprudence* is, in a word, an intellectual *cut and paste* job reflecting some existing tendencies in American jurisprudence read in conjunction with his newly acquired knowledge of German *free law* jurisprudence." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 172 (1992) (emphasis in original) [hereinafter, TRANSFORMATION II].

50. Friedrich Wilhelm II and other German rulers "liked the idea of reducing judges to legal calculating machines. . . . [T]he German Civil Code aimed at the ideals of having no gaps and of binding judges strictly." Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 458-459 (2000). Von Jhering made the notion of a conceptual machine famous in his "heaven of legal concepts." Felix Cohen begins his *Transcendental Nonsense* by paying homage to the "great German jurists['s] . . . curious dream." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) [hereinafter, Cohen, *Transcendental Nonsense*].

51. Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 ABA J. 357, 358 (1925).

Method[52] first elaborated on the difference between formal law and free law. Through his method he saw legal interpretation tied to a *purposive* search for the societal effects of alternative law applications.[53] Gény's *méthode* required the judge to draw from social reality in filling gaps in the law: "The nature of things, open to legal inquiry, is the analysis and combination of factual relationships which provoke the need for, and determine the structure of, legal rules."[54] Gény's purposive interpretation is reflected in Llewellyn's notion of *singing rules*.[55]

Ehrlich and Kantorowicz[56] focused on the use of social facts, such as customs and practices, as sources of free law to be used to fill the gaps of formal law.[57] This strain of legal thought laid the foundation for Llewellyn's methodology of rule application and contract interpretation. Free Law's use of customary law is reflected in Llewellynian *situation-sense*[58] and in the central place of trade usage and custom in the interpretive methodology of the Code.[59] Ehrlich and Llewellyn saw the symbiotic nature of custom and law as especially pronounced in commercial law.[60] According to both Realism and Free Law, one must go outside formal legal sources to social reality in order to resolve the

52. FRANCOIS GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW: CRITICAL ESSAY (Jaro Mayda trans. 1963).

53. *See, e.g.*, JARO MAYDA, FRANCOIS GÉNY AND MODERN JURISPRUDENCE 5 (1978) ("Gény's thesis is that judges under codes have always . . . done more than apply legislated law with the use of processes of formal logic.").

54. It is this insight that makes Gény the pivotal figure in instigating the Free Law movement. *See* Herget, *Legal Indeterminacy*, *supra* note 45 at 66.

55. *Infra* Part V.A-B.

56. "The two founding scholars of the movement, Eugen Ehrlich and Hermann Kantorowicz, enjoyed more attention in the United States." *Free Law Dilemma*, *supra* note 44, at 89. It is in the area of sociology of law that Ehrlich heavily influenced the work of Llewellyn. Soia Mentschikoff in her biographical note on Llewellyn states that "[h]e admired Holmes, Pound, Cardozo, Max Weber, and Eugen Ehrlich." Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440, 440 (1968) [hereinafter, Mentschikoff, *Llewellyn*]. In later years, Ehrlich re-directed his research interests as the founding "father" of legal sociology. *German Free Law*, *supra* note 44 at 408, n.40. "Eugen Ehrlich . . . has been called the *inventor* of sociology of law as well as the *founder* of sociological jurisprudence. . . . [His] central insight . . . was that law consists of and can be found in the regularized conduct and patterns of behaviour in a community, association, or society." BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 93 (1997) [hereinafter, TAMANAHA] (emphasis in original).

57. *See, e.g.*, Hermann Kantorowicz, *Legal Science—A Summary of its Methodology*, 28 COLUM. L. REV. 679 (1928) (explaining formal law as the primary source of interpretation and free law as a primary source for filling in gaps in the formal law).

58. *Infra* Part V.A.

59. *See* discussion *infra* Part IV.

60. "Commercial transactions are the one area where there is often a match between lived social norms (actually followed business practices) and the norms enforced by legal institutions, in Ehrlich's time as well as our own." TAMANAHA, *supra* note 56 at 118.

gaps and contradictions found in formal law.

Within the Realist continuum of scholars, the work of Kantorowicz is most closely affiliated with the position of Llewellyn.[61] Both hold moderate positions within their respective schools of critique. Despite

61. In his writings, however, Llewellyn downplayed the importance of free law insights. It is clear, however, that Llewellyn was knowledgeable of the work of the free law scholars given the fact that Kantorowicz delivered a guest lecture in Llewellyn's seminar at Columbia University in 1934. One possible reason for Llewellyn's dismissal of Kantorowicz in particular and the Realists general disregard is a conflict of personalities. "Perhaps anti-German feeling generated by World War I had an effect on the fashionability of German scholarship. There is evidence of anti-German attitudes in the Academic community." *German Free Law*, *supra* note 44 at 432. This does not explain why the influences of Gény (France) and Ehrlich (Austria) were also downplayed by the Realists. In the *Case Law System in America*, written during his 1928-29 sojourn to Germany, he stated that "[t]he only noteworthy contribution of the Free Law movement is then to advocate that this freedom of movement [judicial discretion] be consciously understood and not exercised blindly." KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 78 (Paul Gewirtz, ed. 1989) [hereinafter, CASE LAW SYSTEM]. The free play of law envisioned by the radical form of free law was not to his liking. It failed to reflect the constraints of craft values and well crafted legal rules that were more central to his view of the common law system. In addition, this slight may be due to the fact that what was more vital to his agenda was the sociology of law insights beginning with Ihering and culminating in Ehrlich. "This whole paper builds at every point on Ehrlich

his more radical earlier writings, Llewellyn, like Kantorowicz, recognized the primary role of rules in the private legal order.[62] Calling Llewellyn a rule skeptic and Kantorowicz an advocate of the primacy of free law over formal law is a misconstruction of their moderate positions. Their critiques were aimed at rule formalism and the alleged minor role of the judiciary in the formal, gapless legal order.

The reality of legal gaps mocked the non-discretionary nature of judicial law application advanced by legal formalism. The existence of gaps necessarily expands the role of the judge from conceptual automaton to one of law creator. It is in the area of gaps or Llewellynian *leeways*[63] that societal facts or customary law are needed to keep the formal legal order flexible and workable. Through contextualism, the rules of contract law are retained but transformed through a continual immersion into the context provided by particular cases.[64] The following analysis of Kantorowicz's work could have easily applied later to Llewellyn:

> The notion of free law, Kantorowicz suggests . . . resembles natural law in that it emanates from the natural relationships of individuals in society, and it can be perceived in the *norm-consciousness of people interacting in concrete situations*. [I]t differs from natural law . . . [in that] it is not universal but transitory and contingent, always changing as society changes.[65]

The commonality of these critiques was their attack on the conceptualist' premise that *rules and only rules* decided cases. Abstract conceptualism as exemplified in classical contract law and the formal style of legal reasoning took a rules-only view of the legal order into the "marshes of absurdity."[66] The absurdity of a rules-only approach is reflected in the moderate forms of Free Law and Realism's versions of rule skepticism. Under these moderate versions, firmly supported by the later Llewellyn, rules remain the central core of contract law. The moderate Realist

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62. "Several scholars have argued that the movement did indeed call for unfettered judicial discretion. Others have pointed to the writings of Hermann Kantorowicz to support the view that the Free Law Movement solely addressed the gaps in written law, and in all other instances its methods were thoroughly conventional." *Free Law Dilemma*, *supra* note 44, at 94.

63. COMMON LAW TRADITION, *supra* note 2, at 62-120 (leeway of precedents) & 219-222 (law of leeways).

64. For an empirical study of the role of contextualism and judicial discretion within the codified schemes implemented by the Uniform Commercial Code and Federal Rules of Evidence *see*, Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WISC. L. REV. 1119.

65. *German Free Law*, *supra* note 44 at 414-415 (emphasis added).

66. COMMON LAW TRADITION, *supra* note 2, at 185.

critique holds that the absurdity of rules is more a function of the type of rules and their application and not rules *per se*.[67]

Llewellyn saw law's core as rule-based but the rigidity of the rules and their application needed to be infused with flexibility. The rules themselves needed to be formulated to allow for varied responses to ever-changing social reality.[68] The infusion of social reality into the rules of law, by combining Gény's purposive interpretation and Free Law's use of non-formal legal sources, was a means to obtain the needed flexibility in rule application. Llewellyn's version was embodied in the "law of the singing reason"[69] or singing rules. It represented his attempt to make rules flexible and self-reconstituting.[70] One characteristic of such a rule is that of direction or trend.[71] Instead of a rule being a closed space of fixed core and periphery drawn tightly to the core, Llewellyn saw formal rules as guides and not limitations that "act as borough[s] whose branches are growing."[72] This growth is nourished or instigated by non-formal or free law sources.

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67. "[T]he near-control [in the making of a judicial decision or ruling] is not because those rules are rules of law, but because of the particular kind of rule of law they happen . . . to be. So it is of the essence to distinguish among rules of law. . . ." COMMON LAW TRADITION, *supra* note 2, at 179.

68. "For the legal rule . . . could no longer be regarded as static, but rather as constantly undergoing a change of content." CASE LAW SYSTEM, *supra* note 61 at 93.

69. COMMON LAW TRADITION, *supra* note 2, at 183-84.

70. Llewellyn also made use of a core-periphery paradigm to capture the needs for the certainty of formal rules and the flexibility of free law. He states:

> That the rules of law, alone, do not, because they cannot, decide any appealed Case. . . . Substantially, the mere bare rules of law do today manage alone to decide that obnoxious but persistent body of appeals in which in fact the applicable rules are both firmly and reasonably settled and in which the fact of the case fall so obviously inside the core of the rule. . . . Again, there is that other body of cases which falls outside any firm rule core but yet so plainly within the urge or flavor or force-field of a rule or concept of law that its extension either is obviously imperative or just happens so naturally as to go unnoticed.

Id. at 189.

> I watch opinions turn to neighboring jurisdictions for light or for further butressing—especially when they pick up quotations packed with a combination of authority and situation-sense. . . .

Id. at 191.

> 71. I clearly do not regard legal rules, descriptively speaking, as something hard and fast. Rather, with every rule there are three elements at play: a core of completely fixed content, . . .; next, a fluctuating borderline area of possible expansions . . .; and, finally, a *trend* affecting these possibilities, which is determined in party by the fixed core, in part by neighboring legal rules, in part by *extralegal conditions*, and in part by the needs of those affected by law at a given time.

CASE LAW SYSTEM, *supra* note 61 at 80, n.1 (first emphasis in original, second emphasis added).

72. *Id.* at 80.

Notions of influence aside, both Kantorowicz[73] and Llewellyn emphasized the existence of gaps in any formal legal order whether statutory law (Free Law) or case law (Realists). However, the moderate versions of both theories held that these gaps were exceptions not rules, and that legal certainty was measurably attainable through the application of the core of formal rules.[74] Hence, the free play of customary law was restricted to the gaps or periphery of rules and could not trump application of the core.[75] This is reflected in Llewellyn's notion of the limited, but important, role of leeways in case law. In addition, both moderate versions emphasized the inductive use of social reality against the deductive reasoning of abstract conceptualism. From this perspective, Llewellyn advocated the infusion of social context through the substitution of abstract, fixed rules with flexible, singing rules. In the hands of enlightened judges, such as Holmes, Brandeis, Cardozo, and Hand,[76] rules could be continuously infused with real world content. The next section will examine the development of the American brand of abstract conceptualism.[77]

B. Conceptualism in American Law

Abstract conceptualism or formalism in American law has been aligned with a series of tenets. These tenets allowed the courts to avoid contextualist inquiry in favor of an internally maintained conceptual system. The tenets of abstract conceptualism, along with the writings of its two staunchest adherents, C.C. Langdell and Joseph Beale, are discussed below.

A system of abstract conceptualism is more easily maintainable in a legal order characterized by a strong view of *stare decisis* and issues

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73. "Kantorowicz was ahead of his time in signaling the contextuality of meaning and in taking an anti-essentialist, semiotic approach to legal analysis." Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 110 (2002).

74. *See, e.g.*, Lewellyn states that "shaped doctrine [that] does shape actual deciding can at times approach demonstration." COMMON LAW TRADITION, *supra* note 2, at 106.

75. *See generally*, Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 110 (2002) at 158-166. "Kantorowicz . . . emphatically did not advocate judicial disregard of enacted law. The scope of judicial freedom advocated by the free law school was constricted to the interstices that enacted law failed to address." *Id.* at 162.

76. CASE LAW SYSTEM, *supra* note 61 at 93, n.3.

77. Many Free Law scholars, as well as Llewellyn, possessed a romantic notion of the power of the enlightened judge to balance the needs of certainty and justice. In Llewellyn's case, this was made obvious with his reverence for Grand Style legal reasoning.

decided as a matter of law. In contract law, this translated into the formal "matter of law" application of doctrine. This was made possible by the use of overarching abstract principles, applied deductively, and through the objective lens of the will theory of obligation. The resulting conceptual apparatus allowed the courts to avoid inquiry into contextual reality.[78] First, contract rules were not found in the real world or situation of the case, no matter how novel, but in formal rules buried in past cases. Second, the sensitivity of juries to contextual matters, such as the characteristics of the parties, was avoided through the conversion of questions of fact to questions of law. Third, the objective theory of interpretation translated external manifestations, such as the words of a contract, as questions of general or plain meaning. An external manifestation was to be given the meaning of the prudent person and not the particularized intent that a factual analysis of the case would render. Finally, the enforcement of promise through the will theory became the linchpin of contractual liability. The agreement-in-fact or the true understanding of the parties was de-centered into finding the meaning of a promise. In short, contract interpretation was a purely conceptual inquiry into the words of the promise and not a contextual inquiry of what the parties meant by those words.

Christopher C. Langdell's 1871 casebook on contract law was one of the great acts in conceptualism. Langdell ordered his casebook using the methodologies found in the physical sciences. Law was merely a constellation of a limited number of fundamental principles. The essence of the formalist method envisioned by the late nineteenth century conceptualists is found in the Preface to Langdell's casebook:

> Law, considered as a science, consists of certain principles or doctrines. . . .
>
> Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; [they appear in] many different guises. . . .
>
> If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.[79]

These three sentences, and one more, set the conceptualist agenda.

78. *See generally*, Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 442-443 (1979). *See also*, Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. REV. 511 (1990) (reviews the ideological spilt between Williston and Corbin).

79. LANGDELL, CONTRACTS, *supra* note 17.

First, legal analysis could achieve scientific precision through the discovery and application of general principles and doctrine. Second, these principles and doctrines are to be induced from the cases. Third, through a process of deduction these scientifically derived principles could than be applied to future cases. Fourth, the eventual conceptual system constructed from the case law would be reasonably easy to operate. The individual judge would be able to derive specific rules of law from a relatively few meta-principles.

A fourth sentence in Langdell's preface is vital to the conceptual construction project. It provides the methodology needed to confront the induction of principles from an ever-expanding set of law reports. Langdell's answer to the numerical press of law cases was selectivity. Langdell notes: "Only one mode occurred to me which seemed to hold any reasonable prospect of success; and that was, to make a series of cases, *carefully selected* from the books of reports."[80] Thus, the conceptualist's methodology consisted of the selection of the few good cases while ignoring the many poorly reasoned cases. The selective pursuit of cases was defended as a short-term process needed in order to systematize the law. The lack of a sound conceptual structure had led to judicial confusion and poor judicial reasoning. Once the conceptual infrastructure was scientifically established then the number of poorly reasoned cases would diminish drastically.

Joseph Beale's 1935 *Treatise on the Law of Conflicts*[81] provides a capstone for the evolution of abstract conceptualism[82] begun by Langdell. Beale saw the common law as a rationally arranged, all-embracing system of principles. He describes principles as "the largest portion . . . of the . . . law of a state [that] are general premises which can be used for deduction and analogy."[83] He further defines standards and rules but attaches much less significance to them in the overall working of the system of private law.[84] Beale states that the most important feature of law "is not a mere collection of rules, but a body of scientific

80. *Id.* (emphasis added).

81. BEALE, CONFLICT OF LAWS, *supra* note 18.

82. *See* Joseph H. Beale, Jr., *Notes on Consideration*, 17 HARV. L. REV. 71, 81 (1903) (Beale undertakes a formal analysis of consideration in which the giving of a promise alone produces a change in a legal relation where the promise-giver "gives another man such control over his acts. . . .")

83. BEALE, CONFLICT OF LAWS, *supra* note 18 at § 3.2.

84. Beale defines a standard as "a rule which is stated as a degree of a continuously changing series." A rule is defined as "a statement of law applicable only to a narrowly defined class of cases and incapable of extension by deduction or analogy." Therefore, under Beale's scheme all rules are independent of each other and all rules are directly deduced from a general principle of common law. He gives the Rule in Shelley's case as an example of a rule. *Id.*

principle."[85] The proper application of these *a priori* principles leads to law's ultimate praxis: that of "purity of doctrine."[86]

Beale recognized the need for law to respond to changing and novel fact patterns. But his response was the prototypical solution of an abstract conceptualist. Even though a particular rule applicable to the novel situation did not formally exist in the common law, it could be found at the level of principles. The rule needed only to be brought to light by the judge.

As an example, Beale refers to the decision of Justice Shaw in *Commonwealth v. Temple*.[87] In that case, the novel situation was the introduction of the streetcar to Boston in the 1850s. The issue was whether the existing dray and omnibus line should be removed to prevent delay of the swifter moving streetcars. Shaw decided in favor of the streetcar company.[88] Beale argues that this is an illustration of the systematic and seamless nature of the common law[89]

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85. *Id.* at § 3.4. It is these scientific principles of law that allow for the formulation of "a single homogeneous philosophical system." *Id.*

86. Only two things result in the adulteration of doctrinal purity—bad judicial reasoning and legislative intervention. To the first he asserts that "wrong decisions are after all uncommon"; to the second he states that "doctrine is not greatly changed by statute." *Id.*

87. 80 Mass. (14 Gray) 69 (1859).

88. *Id.* at 80.

89. It was a system "based upon principles which covered every possible occurrences in which [e]very human act was either permitted or forbidden." BEALE, CONFLICT OF LAWS, *supra* note 18 at § 4.12. This use of Justice Shaw as an example of formalism in action must have particularly galled Llewellyn. Llewellyn viewed Shaw as a prototypical "grand style" judge. *See generally*, COMMON LAW TRADITION, *supra* note 2, at 62-71. Professor Horwitz affixes the term "instrumentalism" to this brand of judging that appeared in the early part of the nineteenth century. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 1-30 (1977) [hereinafter, TRANSFORMATION I]. "In short, by 1820 the process of common law decision making had taken on many of the qualities of legislation." *Id.* at 2. In reference to Shaw's decision in *Farwell v. Boston & Worcester RR Co.* Llewellyn states that "conscious policy is at plain work upon the rule." COMMON LAW TRADITION, *supra* note 2, at 67. In *Farwell*, Shaw displays the characteristics of a grand style judge basing his recognition of the fellow servant rule on policy arguments. The rule denies recovery to an employee against her employer for injuries caused due to the negligence of a fellow employee. Shaw argued that such a denial would lead to safer railroads. 4 Met. (45 Mass.) 49 (1842). He also demonstrates a cavalier attitude to precedent and further justifies the denial on equity or fairness grounds. Horwitz sees this as an example of instrumentalism or social engineering in which existing principles were disregarded. The existing principles were re-shaped or displaced to make private law more favorable to the entrepreneur. This re-shaping culminated sometime near the end of the 1870s. In this context the age of abstract conceptualism or formalism is seen as a way of locking in the pre-entrepreneurial class slant of the law. For a discussion of the landmark nature of *Farwell* ("elevating the paradigm of contract to its supreme place in nineteenth century legal thought") *see* TRANSFORMATION I at 209-210. The point here is, issues of substantive justice aside, a formalistic decision it was not.

1. Systemization, Disaggregation, and Retreat

Professor Horwitz describes the period towards the end of the nineteenth century as one characterized by the conceptualization and systemization of American law as described above:

> Between 1870 and 1900, one sees everywhere this tendency to generalize and systematize fields of law that had previously been conceived as a series of special cases and particular rules. The reorganization of legal architecture can be understood as an effort to create a systematic and autonomous system of private law derived from such concepts as will [contract law], fault [tort law], and property. It strove to erect an abstract set of legal categories that would subordinate particular legal relationships to a general system of classification. As we have witnessed the disintegration of these *late-nineteenth century imperial categories during the past seventy-five years—as the law of contract, for example, has been disaggregated into specialized areas* of sales, labor, consumer, and land-lord-tenant law—we see once again the *historically contingent character of legal architecture.*
>
> The process of generalization and abstraction in late-nineteenth-century law was identified with the goal of rendering private law more scientific. . . . For example, generalization permitted judges to apply the same set of rules that were applicable between sophisticated businessmen of relatively equal information and bargaining power to labor and consumer contracts between vastly unequal parties. Indeed, such *indifference to context* was regarded as an important safeguard that would ensure that the law would remain neutral and non-political.[90]

Professor Horwitz believes that the conceptualist response to the contradictions produced by systematization, and the conflicts between abstract conceptualism and a changing commercial-social reality, was the disaggregation of contract law.[91] Towards the end of the nineteenth

90. TRANSFORMATION II, *supra* note 49, at 14-15 (emphasis added). Implied in law or quasi-contract was one of the major areas of law spun off from the core of contract law. *See generally,* WILLIAM KEENER, TREATISE ON THE LAW OF QUASI-CONTRACTS (1893); Joseph L. Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 CAL. L. REV. 171 (1914).

91. Conversation with Morton J. Horwitz (January 25, 2002). The disaggregation process can still be seen at work to the present. The disaggregation process not only resulted in the separating out separate bodies of law previously contained in contract but also to erect strict boundaries between the new bodies of law. *See generally*, Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). *See also*, Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J. L. & PUB. POL'Y 146 (1985) (marriage and intimate relations):

century, areas traditionally within the core of contract law were spun off to retain the harmonious quality of the conceptual apparatus. The process of disaggregation eventually grew to include contracts in employment law, real property law, common carrier and bailment law, insurance law, sales law, and government contracts.[92]

The disaggregation process, however, was only a stopgap. By the beginning of the twentieth century, the conceptual hold on contract law was already in abeyance. The recognition of the enforceability of requirements contracts is a specific example of the loosening of the conceptual infrastructure. The 1873 case of *Bailey v. Austrian*[93] held that requirements contracts were illusory because they failed to satisfy the requirement of mutuality of consideration.[94] In that case, one party had agreed to supply the pig iron requirements of another company.[95] The case reflected the static nature of contract doctrine that required certainty of obligation at the time of formation. The commercial needs and reality of an evolving industrial economy were ignored.[96]

Less than three decades later, the Supreme Court of Minnesota informally overruled *Bailey* in *Ames-Brooks Co. v. Aetna Insurance*

> [T]here is a strong trend in the courts and legislatures to create bodies of law that control areas once governed by contract. In these areas, as in traditional marriage, the parties are free to decide whether or not to enter into the relationship. Once there, however, the terms of the relationship are to some extent dictated by the state.

Id. at 146.

92. Professor Horwitz lists "sales, labor, consumer, and landlords-tenant law" as those areas that were disaggregated from the main body of contract law. TRANSFORMATION II, *supra* note 49, at 14. He previously mentions common carrier law as another example. *Id.* He latter adds the law of insurance. *Id.* at 14-15. I have added government contract law as another example.

93. 19 Minn. 535 (1873). For an excellent discussion of the transformation of contract law at the turn of the century in the area of requirements and output contracts *see*, Pratt, *Turn of the Century*, *supra* note 1, at 443-450. For a discussion of the doctrine of Bailey v. Austrian *see generally,* Thomas Claffey Lavery, *The Doctrine of Bailey v. Austrian*, 10 MINN. L. REV. 584 (1926).

94. "Without such absolute engagement . . . there is no absolute mutuality of engagement, so that defendant has the right at once to hold plaintiffs to a positive agreement." 19 Minn. 535, 538 (1873).

95. *Id.* at 537.

96. The reality of an industrial economy is that merchants need to enter into enforceable long-term supply contracts without always fixing the quantity term in order to insure a steady stream of supplies or sales. This was alluded to in the case of Ames-Brooks Co. v. Aetna Insurance Co., 83 Minn. 346, 86 N.W. 344 (1901) which recognized the enforceability of requirements contracts. Justice Start stated that "[i]n considering . . . whether such a contract is sufficiently definite . . . a proper administration of justice will not permit us to be oversubtle, but we must interpret the contract from the standpoint of the practical business men who made it . . . and the established course of business between them." *Id.* at 349.

Co.[97] Ames-Brooks shipped grain on the Great Lakes. Aetna agreed to supply insurance coverage to Ames-Brooks for the year at a fixed rate.[98] When insurance rates increased it ceased to provide coverage for future shipments. The court held that even though the amount of coverage was uncertain, a contract was nonetheless formed for the entire year.[99] It reasoned that a court must "interpret the contract from the standpoint of the practical businessmen who made it."[100]

Nonetheless, the conceptual approach continued to maintain its dominant position in contract law analysis. Contextual inquiries were isolated to specific developments such as the recognition of requirement and output contracts, implied duty of reasonable efforts in agency contracts,[101] and a greater recognition of reliance. The implication of good faith in requirement, output, and agency contracts required contextual inquiry into historical levels of output or requirements, and the normal activities of agents. Reliance theory required a contextual determination of the reasonableness of the promise-receiver's reliance. The attack was not overt in nature, however, but was folded into the conceptual apparatus. For example, even though the *Ames-Brooks* court took a realistic view of requirements contracts it followed classical reasoning to align its decision with the conceptualism of mutuality of consideration. It reasoned that its decision was distinguishable from the ruling in *Bailey*.[102] Because the parties in the case had previously contracted, there was enough evidence to support the mutuality of obligation required under classical contract doctrine.[103] There was no real discussion of commercial practice or the duty to act in good faith. The court simply ruled that there was a mutuality of obligation *presentiated*[104] at the time of contract formation.

2. Conceptualism and the Law of Contract

The publication of Samuel Williston's *Treatise on the Law of Contracts* in 1920 represented the preeminent conceptualization of contract law. In the Preface to the original edition, Williston optimistically stated goal was "to treat the subject of contracts as a

97. 83 Minn. 346, 86 N.W. 344 (Minn. 1901).
98. *Id.* at 346-47.
99. *Id.* at 349-50.
100. *Id.* at 345. *See*, Pratt, *Turn of the Century*, *supra* note 1, at 446.
101. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (1917).
102. Pratt, *Turn of the Century*, *supra* note 1, at 447.
103. *Id.*
104. This word is attributed to the writings of Ian Macneil. *See, e.g.*, Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980).

whole, and to show the wide range of application of its principles."[105] At the same time, case law began to call into question this optimism.[106]

In the case of *Jacob & Youngs v. Kent*,[107] for example, the Grand Style contextualism of Justice Cardozo was pitted against the abstract conceptualism of Justice McLaughlin. The case is symbolic in that it shows formalism on the defensive and evidences that formalistic doctrine was no match for the skillful analysis of Cardozo. The case involved the construction of a home in which the construction contract provided for the use of "Reading" water pipe.[108] Instead, the contractor used mostly the pipe of another manufacturer.[109] All indications were that the substituted pipe was of equal or better quality.[110] The homebuyer refused to make final payment until the contractor replaced the pipe. Such a replacement was impossible without the contractor incurring high costs.[111]

Two issues presented themselves to the court. First, was the homebuyer wrong in withholding the final payment? Second, what was the proper measure of damages? Cardozo writing for a closely divided court discarded the formal solution to deciding both of the issues. With regard to the propriety of the buyer withholding payment, he criticized

105. SAMUEL W. WILLISTON, TREATISE ON THE LAW OF CONTRACTS Preface (1920). *See generally*, FARNSWORTH, , UNITED STATES CONTRACT LAW *supra* note 15. For an example of the conceptualist quibbling over the conception of promise see, Clarence D. Ashley, *What is a Promise in Law?*, 16 HARV. L. REV. 319 (1903). In addition, the dominance of promise in classical contract law is embodied in the offer-acceptance paradigm. *See generally,* Hugh Evander Willis, *Rationale of Agreement*, 27 KY. L.J. 284 (1938). For a critique of the formal offer-acceptance model see, Karl N. Llewellyn, *Our Case Law of Contract—Offer and Acceptance* (Part 2), 48 YALE L.J. 779 (1939). For an earlier attack on Willstonian abstract categorizations see George Costigan's analysis of implied-in-fact contracts. George P. Costigan, Jr., *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1920). Another example, of the doctrinal abstraction and rigidity and the beginnings of its deterioration in the late nineteenth century is the area of third party rights. The general premise was that "an agreement between A and B cannot be sued upon by C, even though C would be benefited by its performance." Jesse W. Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226 (1887). In its most abstract incarnation, the contracting parties could not even expressly grant third party rights. The evidence of deterioration is noted in the first footnote: "This doctrine is not taught in the [Harvard Law S]chool at the present day." *Id.* at 226, n.1.

106. *See, e.g.*, "The emergence of industrial society thus meant not only redistributive motives would inevitably be activated. . . . It also meant that the relatively fixed common law categories on which police power doctrines had been erected would fall apart. . . ." TRANSFORMATION II, *supra* note 49, at 30.

107. 129 N.E. 889 (N.Y. 1921).

108. *Id.* at 890.

109. *Id.*

110. *Id.*

111. Justice Cardozo held that "we think the measure of the allowance in not the cost of replacement, which would be great, but the difference in value, which would be nominal or nothing." *Id.* at 891.

the formal analysis of dependent-independent conditions.[112] Under the conceptualism of conditions, the answer would be that where the installation of Reading pipe is a dependent condition, the obligation of the homebuyer to make final payment had never been triggered. If the condition was considered independent, then the homebuyer was wrong in withholding payment. Cardozo suggested that such a dichotomy is too simplistic. Some conditions "though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant."[113] Therefore, the issue was not whether a condition is formally worded or considered as dependent or independent. The issue was whether the departure or defect is substantial or minor.

Cardozo's attack upon the abstract conceptualism of dependent-independent conditions is elegantly stated in the following oft-cited passage:

> Those who think more of symmetry and logic in the development of legal rules than of practical adaptation of the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Some-thing, doubtless may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and have found the latter to be the weightier.[114]

The determination of the materiality of a defect is a contextual undertaking. Cardozo states: "where the line is to be drawn between the important and the trivial cannot be settled by a formula. The same omission may take on one aspect or another *according to its setting.*"[115] Cardozo took a similar tact in assessing the amount of damages to be awarded for the improper installation. The issue was whether the amount of damages should be based on replacement costs, a very high amount, or diminishment of value, at best, a nominal amount. Once again, Cardozo argued that there is no formulaic solution but rather that the answer must be found in the context of the particular case.[116] He held in favor of the contractor in the awarding of diminishment value.[117]

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112. "[Some conditions], though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant." *Id.* at 890.

113. *Id.* at 890.

114. *Id.* at 891.

115. *Id.* (emphasis added).

116. He refers to the need for a contextual analysis by beginning his discussion of the proper measure of damages with the phrase "[i]n the circumstances of this case. . . ." *Id.* at 891.

117. *Id.*

In comparison to the rationality of Cardozo's contextual analysis, Justice McLaughlin's formalism seems quaint. Regarding the issue of the homebuyer's withholding payment, he simply deduces from the principle of dependent conditions that "he had a right before making payment to get what the contract called for."[118] For the conceptualist all things are black and white. In this case, no distinction is made between important and trivial conditions. Any evidence of the homebuyer's reason for wanting the specific pipe was irrelevant to the conceptual deduction.[119] Therefore, there can be only one true measure of damages: replacement costs. The key fact for McLaughlin was that more than half of the pipe installed was "non-conforming."[120] The fact that the defect was insignificant in relation to use or value is ignored in the face of such non-conformity. An injustice in this case, perhaps, but to hold otherwise would encourage loose performances in the future.[121]

The contextual-conceptual divide is again illustrated in the 1925 case of *Clifton Shirting Co. v. Bronne Skirt Co.*[122] Two merchants, in that case, entered into a multiple installment sales contract for "delivery in June, July, [and] August."[123] After an initial delivery in May, the rest of the order was not delivered until September. The buyer rejected the remaining goods as untimely. At trial, the buyer offered evidence to show that according to trade usage the contract term included three equal shipments in each of the three months.[124] The trial court admitted the evidence of usage and held for the buyer. On appeal, the majority advanced a purely rule-based conceptual argument.[125] In short, according to these judges, the extrinsic evidence of trade usage was not admissible because the contract term had been fixed by previous case law.[126] The dissent disagreed, stating that usage is admissible even when

118. *Id.* at 892.

119. In the words of McLaughlin: "What his reason was for requiring this kind of pipe is of no importance." *Id.*

120. McLaughlin observes that the contractor "installed between 2,000 and 2,500 feet of pipe, of which only 1000 feet at most complied [Reading pipe] with the contract." *Id.*

121. McLaughlin quotes the case of *Smith v. Brady* for the following proposition: "To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements. . . ." *Id.* at 893.

122. 209 N.Y. Supp. 709, 1925 N.Y. App. Div. LEXIS 8466 (N.Y. App. Div. 1925). *See also*, Case Note, 35 YALE L.J. 633, 633 (1926).

123. 1925 N.Y. App. Div. LEXIS 8466 at 6.

124. "The court upon the trial permitted the defendant to prove . . . that there was a well-known and universal trade custom as to the meaning of the expression. . . ." *Id.* 9-10.

125. "It has been repeatedly decided . . . as a rule of law . . . that were a sales contract provides for delivery . . . by use of words . . . to wit: *Delivery June, July, August*, such words mean the seller has to the last day of the last month . . . to make delivery thereunder." *Id.* at 2-3 (emphasis in original).

126. "In light of the rule laid down by the court the meaning of the words used is

the applicable rule of law is different than the usage.[127] While both opinions recognized the important role of contextual evidence in interpreting contracts, the majority saw the process as ongoing. The minority judges saw the prior conceptualization of the trade usage as a fixed rule of law that prevented further contextual inquiry.

a. Competing Visions of "Freedom of Contract"

The power of abstract conceptualism, and the evolution of the realist critique, can be gleaned from a series of law review articles that appeared in the early twentieth century. These articles dealt with the underlying theme of American contract law: freedom of contract. The first two articles appeared during the first decade of the twentieth century: Clarence Ashley's *Should There be Freedom of Contract* (1904),[128] and Roscoe Pound's *The Liberty of Contract* (1909).[129] The third article, Samuel Williston's *Freedom of Contract* (1921),[130] appeared over a decade later.

Williston, the formalist, examined the philosophical and theoretic basis for freedom of contract. In the introductory paragraph he refers to Pound's 1909 article as examining the "philosophical basis for past and current legal theorizing."[131] His view of the power of abstraction is summarized in the opening page:

> When . . . the study of abstract principles with logical deductions from them, rather than the observation of concrete facts and the drawing of inferences from them, occupies the intellectual leaders of the time, similar principles are apt to find expression in varying departments of thought. Some effects of the pursuit of an abstract idea in the latter part of the eighteenth century and during the nineteenth century and particularly upon the law of contracts form the subject of this paper.[132]

He then established that freedom of contract evolved out of the "theories

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entirely clear. It was . . . improper to allow . . . testimony to establish a custom or usage giving such words an entirely different meaning. . . ." *Id.* at 3.

127. "[A]ll agree that the words used had a real trade significance and meaning. . . . I am therefore, of the opinion that the court properly received evidence . . . to show the existence of such a trade custom." *Id.* at 14-15 (Merrel, J. dissenting).

128. Clarence Ashley, *Should There be Freedom of Contract*, 4 COLUM. L. REV. 423 (1904) [hereinafter, Ashley, *Freedom of Contract*]. *Cf.* Jerome C. Knowlton, *Freedom of Contract*, 3 MICH. L. REV. 617 (1905) (defends judicial voiding of regulatory statutes as enlightened).

129. Pound, *Liberty of Contract*, *supra* note 24.

130. Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

131. *Id.* at 365.

132. *Id.* Note again, Williston's belief in abstract principles and the importance of tracing their genealogy as evidence of their omnipotence.

of individualism and liberty."[133] Williston then criticized the *Lochner* era decisions as strict applications of that belief system, which were out of touch with modern times.[134] Williston's seemingly realist view of freedom of contract can only be understood in the narrow focus of his article. He rejected, as an exaggeration of the truth, the assertion that limitations on the freedom of contract are "a recurrence to a theory of status."[135] Williston merely supported legislative incursions that were narrowly tailored to specific concerns of public health and safety. He argued that except in the area of common carriers, most incursions into contract law are minor and the private nature of contracts as supported by freedom of contract remained intact.[136]

In contrast, Professor Ashley advocated the correctness of systemic judicial intervention into freedom of contract.[137] This type of discretionary modification of contract is an anathema to Williston's core view of the sanctity of promise and the strict enforcement of the bargain.

Professor Ashley's review of judicial limitations of freedom of contract predates the realist premise that freedom of contract is more illusion than real.[138] He argued for the ability to avoid the dictates of absolute freedom of contract by implying conditions in law, or by disregarding "unreasonable" express conditions under the guise of the parties' "true" intention.[139] Through the fiction of contract interpretation, judges uncover the true intent of the parties. Instead of criticizing judicial activism, Ashley endorsed the view that contractual intent is only the first step in the process of contract enforcement. "It is well enough for us to classify contracts as those obligations having their initiative in

133. *Id.* at 375 (referencing Jeffersonian democracy, along with the works of Smith, Ricardo, Bentham, and John Stuart Mill).

134. "Observations of results have proved that unlimited freedom of contract . . . does not necessarily lead to public or individual welfare." *Id* at 374. Williston asserted that simply citing the banner of freedom of contract is no longer a sufficient argument. "It is no longer possible . . . [to] mere[ly] appeal to liberty and freedom of contract to avert . . . 'the tragedy of a fact killing a theory,' by putting a Constitutional sanction behind a cherished dogma.'" *Id.* at 379. In another context, this quote would have been fodder for a realist attack on the Willistonian construct.

135. *Id.* at 379. *Cf.* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917) (treating the standard form contract as a return to status).

136. Williston ends the article thusly: "In different degrees, which can be determined by no reasoning *a priori*, the sphere of [freedom of] contract is limited in various relations but is seldom wholly excluded." *Id.* at 380.

137. Professor Ashely states that "it is well enough for us to classify contracts as those obligations having their initiative in the intent . . . but . . . there seems to be no essential reason why the courts cannot modify the obligation." Ashley, *Freedom of Contract supra* note 130, at 426.

138. *See supra* notes 39-43, and accompanying text.

139. "As a matter of fact, however, in all these cases the courts have in reality made a new contract for the parties." Ashley, *Freedom of Contract supra* note 130, at 424.

the intent and agreement of the parties, but when that preliminary has taken place, there seems to be no essential reason why the courts cannot modify the obligation."[140] The courts, thereby, should perform two tasks: uncovering the *descriptive* contract, and then applying it selectively based upon society's *normative* vision of contract.

Roscoe Pound's 1909 article titled *Liberty of Contract* was a full frontal attack on formalism's view of freedom of contract.[141] His criticism of the conceptualists' obsession with doctrinal freedom of contract laid the foundation for the realists' tenets of rule skepticism, and the masking function of grand abstractions. Pound characterized the freedom of contract dogma that underpinned contract doctrine as being incongruent with the level of inequality and one-sided bargaining power that exists in industrialized society.[142] The masking of this incongruence was due to an exaggeration of private right over the public good and the evolution of mechanical jurisprudence. Pound stated that "deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn."[143] The solution required the stripping of away of the formalism of contract rules to uncover underlying principles.[144]

Pound saw in the invalidation of social legislation the perfect illustration of the harm of mechanical jurisprudence.[145] Formalism places a premium on generality of application, while reasoning from underlying principles requires a more discerning analysis of facts.[146] The masking methodology behind the prohibition against legislative intervention into freedom of contract was the same as the prohibition against judicial adjustment of contracts. It was a methodology characterized by "rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts."[147]

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140. *Id.* at 426.

141. Pound poses this question toward the beginning of his article: "Why do so many . . . force upon legislation an academic theory of equality in the face of practical conditions of inequality?" Pound, *Liberty of Contract*, *supra* note 24, at 454.

142. AMERICAN LEGAL REALISM, *supra* note 6, at 6-7.

143. Pound, *Liberty of Contract*, *supra* note 24, at 457.

144. *See also*, Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839 (1999) (examines the equitable principles found in natural law theory and argues that they continue to underpin much of contract doctrine).

145. "Manifestations of mechanical jurisprudence are conspicuous in decisions as to liberty of contract." Pound, *Liberty of Contract*, *supra* note 24, at 462.

146. *Id.*

147. *Id. Cf.* Professor Horwitz view of Pound as a conservative historian primarily focused on the evolution of legal doctrine. His was the historical truth premised upon the internal perspective of "the received legal tradition." Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

Legal equality need not equate with bargaining equality. This divergence masked by the separation of the public from the private realm of contract eventually worked to weaken the rhetorical power of freedom of contract.

b. The Uniform Sales Act

The heyday of conceptualism in contract law, in its second generation of evolution, can be seen in the first major American codification, the Uniform Sales Act (Act).[148] Written by Samuel Williston, the Act was meant to simplify the convoluted rules of sales law. Instead, it was a monument to the conceptual thinking inherent in Langdellian legal science.[149] The Sales Act was a statement of generalized first principles void of any workable rules. It was a "non-codification" in that it was not an act of reform or modernization but an act of preservation of the abstract conceptual status quo.[150]

Llewellyn's transition from advocating a revision to the Sales Act to a more comprehensive Code was shaped by his view of the Uniform Sales Act as an unsalvageable conceptual anachronism, meaning that any revision effort would be a piecemeal failure. He argued that much of the law embodied in acts like the Uniform Sales Act had "become outmoded as the nature of business, technology, and financing [had] changed."[151] In the process, sales law had done something that no law should do; it lost "contact with people in their daily affairs."[152] To ensure that the new Sales Act, and subsequently the Code, did not fall prey to the same *rigidification*, Llewellyn sought to include in the text and comments "a full statement of situation, principle, and specific intent."[153] This is what can be called Llewellyn's "patent reason" method of rule making. By incorporating patent reason into the rules, he hoped that the courts would interpret them through an analysis not only of their words, but also by

148. Llewellyn's work on the Code began with the task of revising the Uniform Sales Act. His work on revising the Sales Act eventually became Article 2 of the Code.

149. "[Llewellyn] believed that the 1906 Act embodied an obsolete *form* of law—consisting of rules derived from a few broad abstractions, removed from practical experience, and expected to answer all questions." Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 473 (1987) (emphasis in original) [hereinafter, Wiseman, *Merchant Rules*].

150. Professor Gilmore's review of the Sales Act critically states that it failed to provide rules of guidance, but instead was "designed to provide access to the prevailing academic wisdom"—the wisdom of Samuel Williston. GRANT GILMORE, THE AGES OF AMERICAN LAW 71 (1977).

151. *Id.*

152. REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT 9 (1941).

153. *Id.* at 19.

their sense and purpose.[154]

The incorporation of patent reason into the text of the new Sales Act served two functions: flexibility to prevent freezing of the law, and increased predictability. As to the first objective, Llewellyn had this to say: "It is not where the words leave off, but where the reason leaves off [;] the borders need to be left open for new cases of similar reason, as yet unimagined."[155] As to the second objective, the mandate of reasoned decision-making increases the predictability of law. Providing the rule's reason forces courts to respond by outlining how that reason is advanced through the court's interpretation of the rule. This process produces better-reasoned decisions that in the long term increase the predictability of law application.[156]

In a memorandum to the Executive Committee of the National Conference of Commissioners on Uniform State Laws in 1940, Llewellyn discussed the reasons for replacing the old Uniform Acts[157] with a new Code.[158] His critique included the assertion that the Acts' formal, abstract rules had made them unresponsive to growth in the real business world. He warned that this failure must be avoided in any new code:

> [A new code] must encourage development by the courts [and incorporate] . . . language which is clear as to direction, but does not undertake too nicely to mark off the outer edges of its application. The language of principle, not that of rule drawn in derogation, is called for. Language drawn in distrust or anxiety about courts' understanding may accomplish its immediate purpose, but it paves the way with stumbling blocks within a decade.[159]

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154. *Id.* at 25 ("as much in terms of its sense and purpose as in terms of its meticulously examined wording").

155. *Id.* at 26.

156. Rule reason "results both immediately and over the long haul in a more *reckonable* course of decision and a more reckonable body of interpretation." *Id.* at 27. The vigilance needed to avoid unneeded abstraction and the freezing of formal rules would guide Llewellyn in his subsequent drafting of the Code. His distaste for abstract concepts had already been displayed in his attack on the title concept in sales law. *See* Karl N. Llewellyn, *C.I.F. Contracts in American Law,* 32 YALE L.J. 711 (1923); Llewellyn, *Title to Contract*, *supra* note 61, at 159.

157. Uniform Sales Act, Negotiable Instruments Law, and Uniform Trust Receipts Act.

158. In 1940, Llewellyn accepted William Schnader's invitation to become the Chief Reporter of the new Uniform Commercial Code. *See generally*, William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

159. Memorandum to Executive Committee on Scope and Program of the NCC Section of Uniform Acts, "Possible Uniform Commercial Code" (1940), *reprinted in*, TWINING, REALIST MOVEMENT, *supra* note 6, at 526.

The groundwork for a code of "singing" rules[160] is seen in the above statement. Tight rules with clearly defined "outer edges" are to be supplanted by the language of principle. Principle here is to be translated by infusing the rules with statements of patent reason. Courts would then use that reason as a guide to expanding or contracting Code provisions in the face of novel business developments. In this way, contextual developments would be allowed to flow into the Code in order to keep it coherent with commercial reality. For Llewellyn the shift from a conceptualist to a contextualist orientation was the necessary ingredient in creating a living commercial code.

III. Llewellyn in the 1930s: The Intellectual Context

Karl Llewellyn was a major figure in a number of areas of law including contract and commercial law, as well as jurisprudence and the sociology of law. His ideas influenced legal education, doctrine, theory, and the general perceptions of the judiciary, practitioners, and the legal system.[161] Ultimately, the key to Llewellyn's originality is the breadth of his interests and knowledge. His knowledge of Continental law and sociology elevated his view of law and its relationship to society from a vantage few legal scholars have been able to achieve.[162] His originality evidences a keen mind able to synthesize input from a wide variety of sources and ideas into an often fresh and critical script.[163]

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160. *Infra* Part VI.B.

161. Soia Mentschikoff wrote this in a biographical note: "Llewellyn was a leading exponet of realism in the field of jurisprudence. Applying the realistic method to commercial law. . . . He also wrote on legal education, emphasizing craft skills . . ., on the professional responsibility and organization of the bar; on the sociology of law. . . . A study he made with E.A. Hoebel of the law government of the Cheyenne Indians . . . broke ground in anthropological method." Mentschikoff, *Llewellyn*, *supra* note 56, at 440-41.

162. "[H]is writings reflected a preoccupation with the relation of commercial practice and economics to law; his work also revealed his expanding interest in legal sociology. He admired . . . Max Weber and Eugen Ehrlich." *Id.* at 440.

163. "If I have seen further it is by standing on the shoulder of giants." Letter to Robert Hooke (Feb. 5, 1676), *in* 1 CORRESPONDENCE OF ISAAC NEWTON 416 (H.W. Turnbull ed., 1959). Extending the Newtonian metaphor of attributing most achievements to the works of earlier intellectual "giants," Llewellyn can be thought of as a giant standing on the shoulders of other giants. Lon Fuller made a not so nice comment regarding Llewellyn's failure to acknowledge his intellectual forebears. "The citation of authorities is so often a form of intellectual exhibitionism that one hesitates to criticize a man who is free from this ostentation. Yet it does seem to me that Llewellyn errs too much in the opposite direction." Fuller, *Legal Realism*, *supra* note 22, at 218. He gives the following example: "I am particularly distressed at the absence of reference to that great pioneer among realists, Rudolf von Ihering." *Id.* Llewellyn's singularity was enhanced by a writing style that presented both a curious flare and obstacle to the reader's understanding. This stylistic extravagance was most apparent in his phraseology. An example, from his 1931 article *What Price Contract?*, brings this point

Before analyzing the intellectual context and influences that likely impacted Llewellyn's thought during the 1930s, it is important to note that the breadth of these influences debunk preconceived views of him as being dominated by any one ideology or school of thought.[164] His views of law in society were shaped by his drive for pragmatic understanding. This understanding was built from the ground up. The depth of

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to life: "Chimerical such a sketch must be—compounded of parts strangers to each other, a dream-thing, and mayhap a monster; worse than chimerical in the gaping incompleteness of content and form." This is the way Llewellyn described the problems of developing a general theory of contracts and at systematizing contract doctrine. *What Price Contract?*, *supra* note 61, at 707. Grant Gilmore attributes to Llewellyn the tripartite division of American legal history or legal thought into the "Revolutionary Era to Civil War" (Pre-Classical/Grand Style/Instrumental Style), "Civil War to World War I" (Classical or Formal Style), and the Post World War I to Present (Modern Style). W. David Dawson states that Llewellyn was the first to offer an extended legal analysis of the problem of standard form contracting with his bifurcation of assent into specific and blanket assent. W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITTS. L. REV. 21, 32 (1984). *See, generally*, *What Price Contract?*, *supra* note 61, at 731-32; Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939). Llewellyn's work on standard form contracting also gives an initial glance at his evolving contextualism. The specific intent is simply attached to the "dickered terms" of the contract. In a standard form these are the terms entered into the blanks provided in the form. They usually include the identity of the parties, price, quantity, description of the goods, terms of payment, and shipment obligations. The blanket assent given to not unreasonable or surprising terms is clearly a contextual undertaking. The blanket assent is used to determine which of the unread, fine print terms shall be incorporated into the enforceable contract. Llewellyn's methodology for making this determination is that the parties assented to terms that can be brought within the "broad form of the transaction." Slawson at 36. Llewellyn can best be seen as a *bricoleur*—a handiman building a theoretical edifice from parts found in different intellectual domains. In contemplation of his impending work on revising the Uniform Sales Act, Llewellyn likened the task to that of a craftsman. *See* CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 1-33 (1962) (making a similar analogy). Professor Hull elegantly describes Llewellyn as *bricoleur*: "Once we conceptualize Llewellyn as *bricoleur* . . . we can begin to recover the motives of his academic enterprise . . . [h]e was from start to finish an applied jurisprudent, cobbling together the bits and pieces in the universe of law and social science around him." N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 11-12 (1997). "Nor can I think of any body of material [sales law] better suited to the training of a craftsman." Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 727 (1939) [hereinafter, *Across Sales on Horseback*]. Possibly the line between the *bricoleur* and the craftsman is not so much in the source of his raw materials but in the perceived quality of the end product.

164. There is a common view that Llewellyn's call for a separation of the "is" and "ought" meant that he did not see a normative dimension to law. *See e.g.*, AMERICAN LEGAL REALISM, *supra* note 6, at 52 (notes the controversial nature of Llewellyn's assertion that in reforming law there needs to be a separation of is and ought); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 621 (1975) [hereinafter, Danzig, *Jurisprudence of the U.C.C.*]. Professor Wiseman notes that Danzig "assails Llewellyn for disguising critical ethical choices in the Code." Wiseman, *Merchant Rules*, *supra* note 149, at 468 n.13. Part VI investigates the normative dimension of Llewellyn's vision of contract interpretation.

Llewellyn's knowledge of the intricacies of commercial law, and more impressively of actual practice, was profound. In the end, jurisprudence for him was a concrete discipline. The worth of any jurisprudence was to be measured in its usefulness in understanding actual practice. A theory that failed to connect to actual social practice was to be discarded.[165]

Early in his career, Llewellyn understood that legal theory could be verified only through its application. In the Preface to his 1930 casebook on sales he stated that, "I have lifted my own voice to the lone moon, more than once. Yet it is a far cry from desire to fulfillment . . . theories take on a different aspect when they are matched against a concrete effort to apply them."[166] Llewellyn's unique place in American law is bolstered by his success in bridging the divide between theory and praxis. His work on the Code enabled him to put his theoretical ideas about law into practice.[167] The rest of this Part examines legal and non-legal influences in Llewellyn's writings.

A. Sociological Influences

What made Llewellyn unique to American legal scholars was his very "German" approach to legal theory. He actively incorporated sociological and philosophical insights into his jurisprudence.[168]

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165. TRANSFORMATION II, *supra* note 49, at 6.

166. KARL N. LLEWELLYN, THE LAW OF SALES ix (1930) [hereinafter, LAW OF SALES].

167. Professor Danzig begins his critical analysis of Llewellyn's work on the Code by noting this connection:

> Article II of the Uniform Commercial Code is one of those rare statutes which have been drafted by a self-conscious jurisprude: a person at least as reflective about the role of law in society and the relation of lawmaking institutions to each other as he was concerned about the particular lawmaking task at hand.

Danzig, *Jurisprudence of the U.C.C.*, *supra* note 164 (footnote omitted). Danzig further states that "the genius of the Code is derived in large measure from the mesh Llewellyn effected between the pragmatic demands he faced and the jurisprudential views he held." *Id.* at 623. *See also*, Patterson, *Of Llewellyn, Wittgenstein*, *supra* note 14. "Llewellyn's ultimate achievement in the Code, the articulation of a social vision of the proper relationship between doctrine and theory." *Id.* at 175. Professor Danzig develops the lack of a normative theory criticism of legal realism as Llewellyn's contextualist approach. The Code's referencing of trade usage and custom fails to provide an answer to how one defines good commercial practice or "commercially decent dealers?" He argues that Llewellyn fails to answer such questions, and instead retreats into his descriptive world of contextualism. In short, the goodness or badness of a commercial practice or a merchant's conduct will be made self-evident in a careful analysis of the context. Danzig argues that such questions are only answerable not through contextual discovery but as a matter of ethical choice. *Id.*at 629.

168. Professor Patterson phrased it as follows: "I think Llewellyn as very German in his approach to the subject of theory. He combined sociology and philosophy—a real German approach." Letter from Professor Dennis M. Patterson to author (Nov. 1, 2001) (on file with author)). *See also*, Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L.

Llewellyn's contextualism is understandable given his sociological-based understanding of law's place in society.[169] Llewellyn understood that law, knowledge, and language were socially determined constructs.[170] This external view of the meaning of law set him apart from the conceptualists who saw law as a self-contained system of meaning.

Despite Max Weber's patronage of the logically formal rational system, there was much for Llewellyn to draw upon from Weber's analysis of commercial law. Weber did acknowledge the existence of an *immanent* commercial law and the importance of good faith. First, he saw the tension between the use of a logically formal rational system of commercial law and the expectations of businesspersons.[171] To some degree the expectations of businesspersons will be frustrated due to the formal nature of pre-existing legal rules. This tension for Weber could never be fully resolved because legal certainty could only be achieved through the inherently formal nature of rules. Llewellyn never did

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REV. 705 (1992) [hereinafter, Ansaldi, *German Llewellyn*]. Llewellyn's German writings witness his "obsession with knowing truth about law, and knowing it sociologically." *Id.* at 777. *See also*, Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1130 (1982) (exposing German law influences) [hereinafter, Herman, *Llewellyn the Civilian*].

169. Thomas Kuhn explains the social (contextual) nature of knowledge and language as "intrinsically the common property of a group or nothing at all. To understand it we shall need to know the special characteristics of the groups that create and use it." THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 210 (2d ed. 1970), *as quoted in*, Dennis M. Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 SO. CAL. INTERDISCIP. L.J. 235 (1993).

170. Soia Mentschikoff, Llewellyn's wife, listed the following individuals as those that influenced him: William Graham Sumner, A.G. Keller, Arthur Corbin, Wesley Hohfeld, and Walter W. Cook, he also admired "Holmes, Pound, Cardozo, Max Weber, and Eugen Ehrlich." Mentschikoff, *Llewellyn*, *supra* note 56, at 440. Max Weber's writings on law provide an example of a sociological approach to understanding the place of law in society. Weber's rejection of Marxist economic determinism in favor of law's facilitative role in creating capitalism allowed for an internal analysis of law. Weber's formal-rational typology saw the evolution of a logically formal rational legal order as the ultimate achievement of European law. This elevation of a logically formal rationality to the apex of world legal systems is an antithesis to the Realists attack on the logically formal rational system existing at the beginning of the twentieth century. Weber defines the *logically formal* as "where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where definitely fixed legal concepts in the form of highly abstract rules are formulated and applied." MAX WEBER, SOCIOLOGICAL WRITINGS 205 (Wolf Heydebrand ed., Continuum 1999). This rational system envisions an acontextual application of the law. "Law is formal to the extent that . . . unambiguous general characteristics of the facts of the case are taken into account." *Id.* These were the premises of abstract conceptualism about which Llewellyn and the Realists were at odds.

171. "[T]he expectations of parties will often be disappointed by the results of a strictly professional legal logic. Such disappointments are inevitable indeed where the facts of life are juridically 'construed' in order to make them fit the abstract propositions of law." *Id.* at 216-217.

concede to this view. His thoughts on purposive interpretation, contextualism, singing rules, and situation-sense[172] were attempts to diminish the formal nature of rules and to bridge the gap between legal rules and commercial practice.

Despite his "disappointment thesis," Weber did see the importance of formal law incorporating the immanent law of commerce. His vehicle for this incorporation was the commercial principle of good faith. He saw good faith as attendant to the determination of contractual intent and one that is contextually determined:

> In the sphere of private law the concern for a party's mental attitude has quite generally entailed evaluation by the judge. "Good faith and fair dealing" or the *"good" usage of trade* or, in other words, ethical categories have become the test of what the parties are entitled to mean by their "intention." Yet, the reference to the "good" usage of trade implies in substance the recognition of such attitudes which are held by the average party concerned with the case, i.e., a general and purely business criterion of an *essentially factual nature*, such as the average expectation of the parties in a *given transaction*. It is this standard which the law has consequently to accept.[173]

This excerpt contains much of what interested Llewellyn, including the important role of trade usage, transaction types, situation-sense, meta-principles of good faith and fair dealing, and the law's awareness of these contextual matters.[174] The next section reviews the works of William Graham Sumner and James Coolidge Carter who also likely influenced Llewellyn.

1. Status Quo and Dynamic Contextualism: Of Sumner, Carter, and Llewellyn

According to Llewellynian, contextualism law formation should be a dynamic, contextually driven process in which law instantaneously adjusts to real world novelty.[175] By its fluid, continuous invocation of context into rule adjustment Llewellynian contextualism is synchronic in nature. This view of contextualism was, however, opposed in the early part of the past century by the works of sociologist William Graham Sumner and attorney James Coolidge Carter and their status quo-

172. *See* discussion *infra* Part IV.B.

173. WEBER, SOCIOLOGICAL WRITINGS, *supra* note 170, at 216 (emphasis added).

174. It is also important to note the is-ought view of trade usage. The role of law is to recognize and encourage *good* trade usage. These are the elements that Llewellyn explores in developing his jurisprudence of commercial law.

175. *Infra* Part VI. C. (discussing dual track theory of interpretation).

preserving model of contextualism.[176] In the Sumner-Carter model, context was embedded historical custom, and the process of change was slow and historical deferring. Legal rules were not to focus on the more idiosyncratic nature of trade usage, but reflect ancient custom.[177]

While the dynamic contextualism of Llewellyn was an antithesis to the formalism of abstract conceptualism, Sumner-Carter contextualism was easily reconcilable with the existing formal-deductive apparatus of classical legal thought. Sumner-Carter contextualism provided the rationale for formalizing the application of rules as a depository of ancient customs.[178] The formalization process separated rule formation from contemporary contextual factors by tying it to an evolving historically connected custom.

At the highest level of abstraction, Sumner and Carter speak of the ever-changing law and the "necessity of adjustment to mutable life-conditions."[179] But their idea of *adjustive change*[180] was the slow evolutionary change of Spencerian sociology.[181] According to this

176. The works of Sumner and Graham were well known to Llewellyn. *See, e.g.*, KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (Univ. of Chicago Press 1962) [hereinafter, LLEWELLYN, JURISPRUDENCE]. "Carter's saying as to custom holds: 'more and better than known —felt.'" *Id.* at 107; "[Carter's LAW: ITS ORIGIN, GROWTH, AND FUNCTION] is the best known work; much more satisfactory is the little-known pamphlet, THE IDEA AT THE ACTUAL IN LAW (1890)." *Id.* at 146, n.15; "But ten years later [1906] Carter was still teaching at Harvard that law is but discovered by judges." *Id.* at 516; "Llewellyn himself later credited Keller and Sumner as direct influences on his intellectual formation, claiming that reading Sumner in particular had been one of the most exciting experiences of his undergraduate days." Ajay K. Mehrotra, *Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of the Cheyenne Way*, 16 L. & SOC. INQUIRY 741, 746 (*citing*, TWINING, REALIST MOVEMENT, *supra* note 6 at 92, 414, n.25); "Llewellyn's early engagement with the ideas of Oliver Wendell Holmes, Jr., Benjamin Cardozo, Roscoe Pound, Jerome Frank, the American philosopher John Dewey, the American sociologist William Graham Sumner. . . ." Ansaldi, *German Llewellyn*, *supra* note 168, at 770-71; "Llewellyn's principal mentor at the Yale Law School, Arthur L. Corbin, was a great enthusiast of Sumner's mores . . . Llewellyn found the same message in Carter's customary jurisprudence. . . ." Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1071-1072 (1993).

177. "From his cradle to his grave [a human being] is the slave of ancient custom." WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 4 (1906).

178. Llewellyn asserted that Carter's work on customary law was a "belated monument" to the theoretical side of the Formal Period of legal thought. LLEWELLYN, JURISPRUDENCE, *supra* note 176, at 187.

179. WILLIAM GRAHAM SUMNER & ALBERT GALLOWAY KELLER, THE SCIENCE OF SOCIETY 651 (Yale Univ. Press 1927) [hereinafter, SUMNER & KELLER].

180. *Id.* at 653.

181. "No man who has seriously followed Spencer's sociological writings . . . has any excuse for not knowing that law, . . . is a matter of growth from unpromising beginnings, through illimitable time. . . ." *Id.* at 657. *See also*, Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI-KENT L.

model, law was a crystallized form of long-standing societal mores. These mores and their subsequent crystallization into law evolve slowly over long stretches of time. The evolutionary framework of legal change is expressed by Carter when he asserts "that habit and custom . . . furnish the rules which govern human conduct, and they still exert over enlightened man the same imperious dominion that they did among the primeval hordes."[182] Thus, Sumner and Carter saw legal change as radically graduated.[183] The diachronic nature of status quo contextualism mandated that the legal interpreter look deep into the past of customary common law. The primary importance of rule application, even to novel fact patterns, was not to adjust the rule to fit context, but to seek to harmonize the application with historical custom.

Llewellyn rejected Sumner-Carter's brand of contextualism in *The Cheyenne Way* as "wooden, externalized, graceless, and cumbersome maladaptation."[184] He argued "[t]hat [the] ideal type of regularity and predictability which it is *law's office* to provide is one in which laymen's reasonable expectations are not upset by over-crystallized law-stuff."[185] Llewellyn emphasized the rapidity of social change and the need to provide flexibility in legal rules so that they could be constantly updated.[186]

Dynamic contextualism looks to contemporary and more importantly to the future of law application. The interpreter focuses on the trade usage and evolving business customs of the day. The flow of contextual factors into the law necessitates, and directs, the continuous adjustment of rule to context. Novel fact patterns viewed as *situation-*

REV. 847 (1994). "One of the most prominent Social Darwinists, Yale sociologists William Graham Sumner. . . ." *Id.* at 849; "William Graham Sumner was the most vocal advocate of Herbert Spencer's 'social statics.' Sumner contended that 'even a drunkard in the gutter is just where he ought to be.'" Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1517, n.100 (1994), *quoting*, WILLIAM GRAHAM SUMNER, SOCIAL DARWINISM: SELECTED ESSAYS OF WILLIAM GRAHAM SUMNER, 24, 122-123 (William E. Leuchtenburg & Bernard Wishy eds. Prentice-Hall Inc. 1963).

182. JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 119 (G.P. Putnam's Sons 1907) [hereinafter, CARTER, LAW].

183. For Sumner the transformation of mores into law was a process of "imperceptible graduations." SUMNER & KELLER, *supra* note 179, at 660-61.

184. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 288 (1941) [hereinafter, CHEYENNE WAY].

185. *Id.* at 287 (emphasis in original).

186. Llewellyn states the following as one of the tenets of Legal Realism: "The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society is purports to serve." LLEWELLYN, JURISPRUDENCE, *supra* note 176, at 55.

types[187] require a relatively ahistorical rule adjustment. The primary objective is rule modification not rule preservation. In an even greater break with custom, rule adjustment is forward-looking, taking into account the consequences of the rule adjustment to the case at bar and to future categories of cases.[188] In this way, the contemporary context does not simply affect law formation, but law formation recursively affects the future context of law in turn. For example, a "good" trade usage could be used to inform the rule adjustment, while a "bad" trade usage could be eradicated by the rule adjustment.[189]

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187. For an analysis of Llewellyn's notion of situation sense or types *see infra* Part IV.B.

188. "[T]he monumental demand by Llewellyn for judges . . . to elaborate logically, cogently, and deductively, their reasons for a rule and for a holding, but at the same time relating logical process inductively to the situation-type including the times and needs of the time." Charles D. Breitel, *Llewellyn: Realist and Rationalist*, 18 RUTGERS L. REV. 745, 752 (1964). The forward-looking dimension of rule adjustment was clearly stated in *The Common Law Tradition*: "[A]n adequately resilient legal system . . . regularly, absorb the particular trouble[d case or novel legal issue] and resolve it each time into a new, usefully guiding, forward-looking felt standard-for-action or even rule-of-law." COMMON LAW TRADITION, *supra* note 2, at 513.

189. The function of law to recognize and channel trade usage toward the "good" is alluded to in *The Cheyenne Way*. Llewellyn states that "a trouble-case drives strongly toward becoming precedent gives the imperative or standard repeatedly a chance to *jump ahead* of the actual behavior pattern." CHEYENNE WAY, *supra* note 184, at 287 (emphasis added). For an explanation of the notions of *good* and *bad* business practices of usage *see, infra* Parts VI.C., VI.D. For Llewellyn, the proper evolution of commercial practices included a weeding out of bad practices by the courts. The role of a codification would be to weed out the practices adopted by the courts but that have been rendered obsolete with the passage of time. *See generally*, Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-1949*, 51 S.M.U. L. REV. 275, 285-286 (1998) (stating that desirable practices were selected for legal recognition gradually by the courts).

Llewellyn's and Sumner-Carter's models of contextualism led to different views on the propriety of legal codification. The graduated view of legal change promoted by Sumner-Carter saw the slow change of historical context as the means of ensuring legal certainty and predictability. Llewellyn, in contrast, saw the primary threat to certainty in law as a divergence between legal rules based in past custom and rapidly changing commercial practice. It was through dynamic contextualism that such divergence could be minimized:

> To the extent that *when the court is called upon* its judgment will jump with the layman's prior non-legal expectation, that layman can plan safely, counting on the law, although without knowing it. In a régime of change, *certainty* in law is attained whenever change in the judges' ways moves in step and pace with changes in the ways—and so in the expectations—of the relevant laymen. Certainty fails for most laymen, whatever the fixity of the formula, when the judge's reaction fails to jump with the change in laymen's ways, and only then.

LLEWELLYN, JURISPRUDENCE, *supra* note 176, at 107 (emphasis original). Llewellyn's view that divergence between legal rules and real world practice is the primary cause of legal uncertainty was asserted at a much earlier time. "[W]orse confusion and worse misleading would be the inevitable outcome if the Bylaw-stuff operating in the trade should be ignored because it does not happen to be Class A Law-stuff for official courts." CHEYENNE WAY, *supra* note 184, at 52.

For Llewellyn, the Code project was a vehicle to discard the old rules that had diverged from modern commercial practice, while for Sumner-Carter such radical change was anathema to the stabilizing force of law.[190] For Carter, the recognition of customary law is best left to the judicial branch and not by preemptive legislation.[191] Thus, Carter only favored codification as a formal recognition of evolutionary developments in the customary law, and at most to act as supplement to that law.[192]

Despite the different views of the graduated and dynamic models of contextualism, Llewellyn owed much to Sumner and Carter. The importance of custom to rule formation underlies the works of all three. For example, Sumner espoused the concept of the *folkway*, the primary roles that social mores and practices play in society's control of human conduct,[193] suggested to Llewellyn the primary role of groups in society.[194] Llewellyn used the principle of groups to argue that effective legal rules could never be the product of simple deduction from abstract principles. Legal rules needed to be open to the induction of meaning through a constant analysis of the practices of merchant groups. It was in the customs and usage of these groups that Llewellyn found the living, customary law that he brought to the Code project. It was from Sumner's folkways and Carter's customary jurisprudence that Llewellyn derived the importance of legal rules changing to reflect commercial reality and the need to balkanize commercial society into relevant sub-groups.[195]

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190. Carter was the chief spokesperson for the group that fought against the adoption of the Field Code in New York, and in his 1907 lectures, *Law: Its Origin, Growth, and Function*, he asserted that "no real advance is possible except through the slow, gradual, unconscious, but willing change of thoughts, and consequent changes of conduct and custom." CARTER, LAW, *supra* note 182, at 324.

191. "The judges are both by appointment and tradition the experts in ascertaining and declaring the customs of life." *Id.* at 327.

192. "The American advocates of legal evolution were William G. Hammond and James C. Carter. In this paradigm, law was viewed as the slowly evolving customs of the people; courts merely declared law, and law could not deliberately be changed by legislation, although legislation might be occasionally necessary to clarify the law." James E. Herget, *Organic Natural Law: The Legal Philosophy of George Hugh Smith*, 41 CATH. U. L. REV. 383, 386 (1992).

193. "The folkways are a societal force." WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 3 (Ginn & Co. 1906).

194. For Sumner the "folkways are the widest, most fundamental, and most important operation by which interests of men *in groups* are served." *Id* at 34 (emphasis added).

195. Sumner saw folkways as developing mainly from sub-groups within society. "Each group thinks its own folkways the only right ones, and if it observes that other groups have other folkways, these excite its scorn. . . . It therefore strengthens the folkways." *Id.* at 13. *See generally*, Allen R. Kamp, *Legal Development: Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and The Uniform Commercial*

B. Pre-1930 Legal Writings

Arthur Corbin, as the promoter of a reliance-based alternative to contractual liability, challenged the established Willistonian promise-based construct. The result was Williston's reluctant incorporation of the reliance-based liability of promissory estoppel in Section 90 of the *Restatement of Contracts*.[196] Corbin had been a teacher and mentor of Llewellyn. His view of the need for reliance-based recovery was nurtured by his reading of cases not as bastions of doctrinal purity, but as illustrations of law-molding fact patterns.[197] His fact-based analysis of cases was not conducive to the unity of doctrine thesis advanced under the Willistonian construct.[198]

Corbin's obsession with "operative facts"[199] had a profound influence on the younger Llewellyn. Corbin and Llewellyn believed that contract law needed to better reflect commercial reality. Their innovation included reversing the causal flow from contract rules to practice envisioned by the conceptualists, and replacing it with a flow that worked commercial practice into contract rules.[200] Llewellyn understood that the conceptualism of contract law needed to be tailored to a fact-focused inquiry.

One source for the re-conceptualization of law was found in the previously noted work of Wesley Newcomb Hohfeld.[201] Hohfeld's

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Code in Context, 59 ALB. L. REV. 325 (1995) [hereinafter, Kamp, *Between-the Wars*]. "[The] message of sociology and anthropology figure substantially in Llewellyn's thought. William Graham Sumner and Boas, the anthropologists cited by Llewellyn, focused on the behavior of particular groups rather than individual behavior. . . ." *Id.* at 353.

196. *See, e.g.*, Lon L. Fuller & William R. Perdie, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L. J. 52, 64 (1936) (containing Fuller and Perdue's discussion of Williston's reluctance to recognize reliance damages as a measure of damages).

197. GILMORE, THE AGES OF AMERICAN LAW, *supra* note 150, at 79.

198. Corbin believed that the presumption of intention from the law's view of legal relations was a serious undertaking. "To indulge such a presumption is merely to hold that the actual intention of the parties is not the determinative fact, or even that it is wholly immaterial." Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 204-05 (1917).

199. "Arthur L. Corbin . . . studied cases not so much for their doctrinal statements but for the essential facts, from which the great variety of applications of contract law could be seen." FARNSWORTH, UNITED STATES CONTRACT LAW *supra* note 15, at 45. Corbin used cases "to tear down or challenge current over-statements." *Rule of Law*, *supra* note 61, at 1265.

200. Patterson, *Of Llewellyn, Wittgenstein, supra* note 14, at 171.

201. Soia Mentschikoff wrote that Llewellyn was "influenced by the fact-to-result analysis of cases used by Arthur L. Corbin and by the narrow-issue thinking of Wesley Hohfeld and Walter W. Cook." Mentschikoff, *Llewellyn*, *supra* note 56, at 440. "[A] challenge to the very structure of Contract doctrine . . . [t]he precursor was Walter Cook, following Hohfeld's jurisprudence. . . ." *Rule of Law*, *supra* note 61, at 1267.

work, along with Corbin[202] and Walter Wheeler Cook's[203] elaborations, provided insight as to the role of conceptual systems in providing practical guidance to legal disputes. Hohfeld reasoned that there were a few broad types of jural relations that cut across all legal categories.[204] Clearer understanding of these fundamental legal conceptions was not an exercise in "transcendental nonsense" but provided "solution[s] [to] practical, every-day problems of the law."[205]

Hohfeld attempted to demonstrate that the existing conceptual apparatus was the product of "ambiguity of thought and language."[206] The device for recognizing fundamental legal conceptions or jural relations was operative or constitutive facts. Thus, classical contract thought's fixation on the formation of contract by exchange of offer and acceptance were not constitutive but merely evidence of a creation of a jural relationship.[207] What likely attracted Llewellyn to Hohfeld's conceptualism was its attempt to deconstruct existing concepts like "right" or "contract" into real world relationships.[208] Hohfeld's use of operative facts also had a natural affinity with the works of Llewellyn and Corbin. In Hohfeld's scheme, the introduction of new operative facts is what changed one jural relation into another. Llewellyn's contextual analysis was aimed at the same discovery of operative facts.[209]

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202. The follow-up work of Corbin and Cook was made necessary by the untimely death of Hohfeld in 1918 at the age of 39. *See, e.g.*, Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J 163 (1919-20); Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921).

203. Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919).

204. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 25. *See also*, WESLEY N. HOFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS (1923); Albert Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 ILL. L. REV. 24 (1920).

205. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 25, at 20.

206. *Id.* at 23.

207. The true operative fact is proving the written agreement is the same as the one exchanged at the earlier time, that it had not been modified, and that it was indeed exchanged. *Id.* at 28. Another example as taken from contract law is the equation of written agreement with contract is not an example of an operative fact disclosing the nature of the jural relation. A written agreement is an example, instead, of an evidential fact.

208. Llewellyn wrote a brief biographical note on Hohfeld in 1932. In it he stated that while Hohfeld's conceptual analysis "can obviously solve no cases it makes for clarification and cuts very close to the atomic structure of the law on its conceptual side." Karl N. Llewellyn, *Wesley Newcomb Hohfeld*, 7 ENCYCLOPEDIA SOC. SCI. 400, 401 (1932).

209. Hohfeld's analysis also allowed for a broadening of the judicial inquiry into finding the applicable law. In Hohfeld's concluding paragraph he noted that his analysis allowed the "use of persuasive judicial precedents that might otherwise seem altogether irrelevant." Hohfeld, *Fundamental Legal Conceptions*, *supra* note 25, at 59. In addition to Corbin-Hohfeld operative facts' analysis, Llewellyn's views of the importance of the

The writings of John Dewey, a colleague at Columbia University, also proved to have a natural connection to Llewellyn's thoughts. The convergence of theory and praxis at the heart of pragmatism fit into Llewellyn's view of the relationship between jurisprudence and law. Dewey, in his 1924 *Logical Method and Law*,[210] presented the philosophical grounding for the Realist cause. First, according to Dewey, in the area of legal reasoning, deduction needed to give way to induction.[211] Second, legal rules needed to be open, flexible, and responsive to social reality.[212]

Dewey's schematic of proper legal reasoning is aligned with Llewellyn's views of contextual interpretation and the use of singing rules. General rules or principles need to be adjusted to comport with concrete situations. In such a methodology of rule interpretation/ application, the focus is on social facts.[213] The role of social facts in rule application was subsequently encompassed by Llewellyn's concept of situation-sense.[214]

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concrete in the application of contract rules were partially informed by the work of Levin Goldschmidt:

> Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and the life conditions of the time and place; it is thus not eternal or changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.

COMMON LAW TRADITION, *supra* note 2 at 122. Goldschmidt was a mid nineteenth century German legal historian and commercial lawyer. The quote is from the Preface to Kritik des Entwurfs, eines Handelsgesetzbuchs, Krit. Zeitschr. F.d. ges, Rechtswissenschaft, Vol. 4, No. 4. He was a firm believer that law was immanent—to be found in the *Natur der Sache* or "the nature of the matter." Goldschmidt was also the leading figure in the failed German commercial codification movement of 1861. *See generally*, James Whitman, *Commercial Law and the American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156,157-159, 163-166 (1987). It is this interest in Romantic thought represented by Goldschmidt that influenced Llewellyn's view of the role of commercial practice in law reform. *Id.* at 167 The free play of custom advanced by Goldschmidt is evident in the full contextual analysis advanced by the Code. *Id. at 170-73* It is also evident in Llewellynesque concepts like situation-sense and singing rules.

210. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) [hereinafter, Dewey, *Logical Method*].

211. "It follows that logic is ultimately an empirical and concrete discipline. Men first employ certain ways of investigating, and of collecting, recording and using data in reaching conclusions, in making decisions[.]" *Id.* at 19.

212. They are to be "conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic 'principles.'" *Id.* at 27.

213. If this is allowed to happen, then "attention will go to the facts of social life, and the rules will not be allowed to engross attention. . . ." *Id.* at 27.

214. *Infra* Part IV.B.

C. *Contemporaneous Writers*

George Gardner asserts in his 1932 article, *Principles of the Law of Contracts*,[215] that it was time for the *theoretical jurist* to develop a new approach to the jurisprudence of contract law.[216] He believed that the next step in the improvement (simplification) of contract law was the quantification of reasonableness.[217] This view represented a rejection of the pure formalism of law as strict logical deduction. Gardner provided a curious definition of the rules of contract law as "merely so much intellectual apparatus designed to bring the fact which will end the proceedings into a satisfactory relationship to the facts that went before."[218] Thus, the next step in the progress of contract was the simplification of this legal apparatus.[219]

Morris Cohen attempted to simplify the conceptual apparatus of contract law in his 1933 classic *The Basis of Contract*.[220] Cohen cited the modern industrial enterprise as the impetus for the rise of the importance of contract. He stated that "extensive commerce . . . tends to introduce the disintegrating force of rational reflection into the hard crust of traditional mores and beliefs."[221] Cohen concluded that Maine's

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215. George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932) [hereinafter, Gardner, *An Inquiry*]. Llewellyn had this to say about Gardner's article: "Gardner, if I read him right, was shocked at the disorder and disharmony and un-thought-throughness which he found in the doctrines gathered under the label Contract." *Rule of Law*, *supra* note 61, at 1267.

216. Gardner concludes that "[w]hat is needed [is] . . . a system of criticism by which new decisions will be constantly tested by [underlying] principles, and by which alleged principles, whether old or new, will be constantly tested against them." Gardner, *An Inquiry*, *supra* note 215, at 42.

217. Quoting Pollock, "reasonableness, no doubt, is the ideal of the common law[.]" *Id* at 1.

218. *Id.* at 4.

219. "The simpler and more direct this intellectual apparatus the smaller will be the chance of error and the more just and certain the result of the litigation will become." *Id.* at 4.

220. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933). Morris Cohen 's 1933 article holds a special place in contract lore. It was one of the first American law review articles to provide a general accounting of the philosophical basis of Anglo-American contract.

221. *Id.* at 555-556. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). The following quote is most apropos in reviewing Cohen's *The Basis of Contract*: "We no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit. We read covenants into them by application when we find them *instinct with an obligation imperfectly expressed*." *Id.* at 100 (emphasis added). *Id.* at 166-167. Cardozo supports Cohen's notion of the inevitability of regulation: "Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be, every generation must work out for itself." *Id.* at 87.

stages of legal progression are partially true, but incomplete.[222] For Cohen, the shift from status to contract (from the medieval to the modern era) was not the final transition. Instead, it seemed inevitable that freedom of contract's reign would be short-lived. Inequality of bargaining and other vices would need to be restrained by government regulation.[223] For Cohen, the end-state of Maine's evolutionary process would be quasi-contract, quasi-status. In this end-state, freedom of contract would be scrutinized on behalf of the weaker against the stronger. This status-based recognition of protecting the weak through regulation is reflected when the law, courts or legislators recognize such classifications as merchant-consumer, franchisor-franchisee, large company-small company, professional-lay person. The different statuses would attach certain duties and protections to the parties.[224]

Cohen asserted that distributive concerns should play a role in limiting the scope of this private right to contract.[225] In short, Cohen argued that the fixation on enforcing the will of the parties in the classical theory of contract should not be the only factor weighed in contract enforcement decisions.[226] What Cohen had in mind was not the *per se* re-ordering of the rules of contract; they would remain a relatively pristine reflection of personal liberty. Rather, Cohen envisioned an external regulatory apparatus that would guard against the blossoming of a Nietzschean extermination of the weak.[227]

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222. Cohen states:

> Maine's observation that the progress of the law is from status to contact is . . . partly true in certain periods of expanding trade. But close on the heels of expansion comes consolidation . . . and in the wake of increased freedom of contract we find increased regulation. . . . At no time does a community completely abdicate its right to limit and regulate the effect of private agreements.

Cohen, *The Basis of Contract supra* note 220, at 558.

223. In the wake of increased freedom of contract we find increased regulation, either through the growth of custom or standardization or through direct legislation." *Id.*

224. Cohen recognizes the distinction between freedom of contract and "real" freedom when he states that "[r]egulations involving some restrictions on the freedom of contract are necessary to real liberty. . . ." *Id.* at 587.

225. "But mere freedom as absence of restraint, without positive power to achieve what we deem good, is empty and of no real value." *Id.* at 560.

226. "But the notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon the utterly untenable theory as to what the enforcement of contracts involves." *Id.* at 562.

227. *Id.* at 563-64. In addition, Cohen analyzes the *justifications* for contract law. The traditional adage for the importance of the public enforcement of private contracts is the *sanctity of promises.* The practicality of such a standard is rejected on two fronts. First, it would be inefficient for a legal system to attempt to enforce all promises. "No legal system does nor can attempt to enforce all promises." *Id.* at 572. Second, the injustice to categorical application must give way, at times, to ensure needed flexibility in business dealings. *See id.* at 572-73. From these two caveats to the sanctity of the promise adage, the evolution of doctrines of *changed circumstances* and the importance

Morris Cohen's analysis of the foundations of contract law was followed by Felix Cohen's 1935 critique of conceptualism in general. In *Transcendental Nonsense and the Functional Approach*,[228] Felix Cohen rejected legal formalism in favor of an instrumental-pragmatic-contextual approach.[229] In this work, he provided an eloquent accounting of the static nature and indeterminacy of rules. Cohen's basic methodology is consequentialist.[230] His attack on conceptualism called for a redefinition of conceptions "as functions of actual experience."[231]

Cohen invoked contextualism in his discussion of the morality of the application of a given rule: "[T]he ethical appraisal of a legal situation is not be found in the spontaneous outpourings of a sensitive conscience unfamiliar with the social context, the background of precedent, and the practices and expectations, legal and extra-legal, which have grown up around a given type of transaction."[232] Here we see a version of Llewellyn's notion of situation-sense. Elsewhere, Cohen stated that "one may suspect that a court would not consistently hide behind a barrage of transcendental nonsense if the grounds for decisions were such as could be presented without shame to the public."[233] The importance of singing rules is implicit in this statement. Llewellyn believed that rules that sing with *patent reason*[234] would force courts out from behind abstract concepts and result in *singing* decisions.

These articles were part of a prolific outpouring of Realist writings throughout the 1930s that included an array of articles on jurisprudence,

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of formality in the Anglo-American system can be drawn. The twentieth century has seen an expansion of the contractual excuse doctrines, along with the expansion of traditional duress to include economic duress are cases in point. Cohen notes the importance of contract law refraining from attaching liability during the negotiation of a contract. "Negotiations would be checked by such fear [of liability]. In such cases men do not want to be bound until the final stage, when some *formality* like the signing of papers gives one the feeling of security, of having taken the proper precautions." *Id.* at 574 (emphasis added). *See generally*, Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

228. Cohen, *Transcendental Nonsense*, *supra* note 50.

229. Cohen states that "functionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience." *Id.* at 822.

230. "If the functionalists are correct, the meaning of a definition is found in its consequences." *Id.* at 838.

231. *Id.* at 827.

232. *Id.* at 840.

233. *Id.* at 820.

234. Llewellyn's concept of a singing rule is a rule that expressly states ("sings") with the reason for its existence or its patent reason. "To begin with. Then, a rule with a singing reason is by definition both well designed to purpose and unmistakably so." COMMON LAW TRADITION, *supra* note 2, at 246. In more cumbersome terms, he states that the "law of singing reason" is a "rule which wavers both a right situation-reason and a clear scope-criterion on its face yields regularity, reckonability, and justice all together." *Id.* at 183.

contract, and sales by Llewellyn.[235] These writings laid the basis for the more overarching jurisprudence of contract rules and interpretation that he brought to the Code project. Part IV examines Llewellyn's writings during this period. This examination is structured by the major features of Llewellynian jurisprudence: fact sensitivity, situation sense, emptiness of conceptualism and paper rules, indeterminacy of rules, and transaction-types.

IV. Flowering of Llewellynian Jurisprudence

Realism owes its name to Llewellyn's 1930 article *A Realistic Jurisprudence* (*"Realistic Jurisprudence"*).[236] This article was followed the next year with the equally important *Some Realism about Realism* (*"Some Realism"*).[237] Taken together, they provide insight into the contextualism that Llewellyn developed in contract interpretation. In *Some Realism*, he expresses rule skepticism as a fundamental tenet of legal realism.[238] This thesis holds that the level of abstraction and rationalization had reached a point in the law that there were always two rules, mutually contradictory, available to courts when deciding a particular case. Because of this, a court must look to the factual world for guidance to choose between competing premises.[239] The necessary corrective is found in the fact patterns of cases derived from contextual reality.

A. Fact Sensitivity and Discarding Paper Rules

The corrective of social reality has both *is* and *ought* dimensions. The "is" dimension recognizes that situation facts have always been the covert force behind judicial decisions. Their importance has been hidden behind the deductive-style of judicial writing. The communal technique of legal reasoning dictates that opinions work deductively from concept/rule to fact. This reasoning is the necessary product of classical legal thought. Llewellyn attacked the vice of abstract conceptualism:

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235. For a selective presentation of some of these writings see, AMERICAN LEGAL REALISM, *supra* note 6.

236. *Realistic Jurisprudence*, *supra* note 28.

237. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1930-31) [hereinafter, *Some Realism*].

238. Llewellyn states a common point of departure for the legal realists' was a "[d]istrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing." *Id* at 1237.

239. "The search is for correlations of fact-situation and outcome which (aided by common sense) may reveal *when* courts seize on one rather than another of the available competing premises." *Id.* at 1240 (emphasis in original).

"Too much is written and thought about 'law' and 'rules,' lump-wise."[240] He argued that in the *ad hoc* case it is necessary to separate ought and is. In order to understand what a court is actually doing it is important to set value judgments aside to see what facts are the driving forces behind the decision.

The "ought" dimension comes into play in the re-conceptualization of existing law to correlate it with the fact world. The aim of this exercise is to forego abstract conceptualism in favor of narrower categorization. In *Some Realism*, Llewellyn argues that Realists believe in the value of "grouping cases and legal situations into narrower categories [and they] distrust verbally simple [paper] rules—which so often cover dissimilar and non-simple fact situations."[241] In *Realistic Jurisprudence*, he noted sarcastically that "[t]he old categories are imposing in their purple, but they are all too big to handle."[242] Llewellyn stated most cases affect only a small number of people.[243] Thus, it is inherent in the nature of the case system that rules have narrow application. Therefore, any study of law, whether by scholar or reformer, must begin with the study of "particularized situations."[244] In his conclusion to *Realistic Jurisprudence*, Llewellyn stated that "the clearer visualization of the problems [of law] involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior."[245] The result of such an approach is the elimination of the "paper rules" of abstract conceptualism" in exchange for "rules with real behavior correspondences."[246]

B. The Situation-Sense of Transaction-Types

The most innovative and important of Llewellynian concepts in the area of contract interpretation is situation-sense. Llewellyn defined situation-sense as "the type-facts in their context and at the same time in their pressure for a satisfying working result."[247] Type-facts are not party-specific but facts that relate to a situation-type.[248] Professor

240. *Id.* at 1239.
241. *Id.* at 1237.
242. *Realistic Jurisprudence*, *supra* note 28, at 457.
243. Llewellyn states "most pieces of law affect a relatively small number of persons ever or at all, with any directness . . . ." *Id.* at 459.
244. *Id.* at 460.
245. *Id.* at 464.
246. *Id.*
247. COMMON LAW TRADITION, *supra* note 2, at 60.
248. Professor Todd Rakoff uses *Jacob & Youngs Inc. v Kent* to illustrate this point. Todd D. Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense,' in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 208 (Jack Beatson & Daniel Friedmann eds., 1995). Cardozo saw two situations-types for deciding whether a builder

Rakoff, in an excellent reconstruction of situation-sense methodology, lists eight distinctive features:[249]

- The inquiry begins with the operative or "paradigmatic" facts of the case. This begins the process of "constructing models which describe type-situations."[250]

- The different situation-types, although disparate, "link up to large propositions about the way society works."[251]

- The role-types of the parties (as determined by the situation-type) and their relationships are constructed jointly by law and society.[252] It is the *jointness* of this construction that allows for the constant refitting of rules to social dynamics.

- The refitting process is usually a product of interstitial change; the rules to be refitted are taken from "a limited universe of possibilities."[253] This gradual process of refitting is the essence of common law change.

- Situation-sense recognizes that contract law embodies a "plurality of evaluative premises" that are often in conflict when applied to a given situation-type.[254]

- Situation-sense methodology and the reconstruction of rules are backward and forward-looking. They look to the past reason behind the existing rule and how alternative reconstructed rules will fit and

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is owed final payment despite constructing a building that possesses a relatively minor defect. *See id.* The two situation-types were the sale of "common chattels" and a contract to build a "mansion or a skyscraper." *Id.* Ultimately, he decided that the second type required its own rule—substantial performance—while the first dictated the application of the traditional rule of perfect tender. *See id; see also*, Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISCP. L.J. 19, 22 (1993) (noting that the construction of legal categories is partially an adoption of roles and transactions defined by society).

249. Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense,' supra* note 248, at 216-19.

250. *See id.* Rakoff importantly notes that "[t]hese models do not aspire to the universality present in abstract rules." *Id.* at 216. They are rules that are cut from social content and not from an internal conceptual ordering. *See id.*

251. *Id.*

252. *Id.* at 216-217.

253. *Id.* at 218.

254. However, it avoids the use of meta-principles to choose among competing premises. This avoidance of a method to choose between competing normative premises is the weakest link in the situation-sense framework. I will deal with the use of meta-principles in the reconstruction of rules in Part VI.D.

justify situation-types in the future.[255]

• The "problem" of discretion implicit in the fact that the judge constructs the situation-type is ameliorated by her appreciation of how things actually work.[256]

• A wise solution to the novel fact pattern is achievable through the uncovering of the needs, purpose, and meaning lying beneath the legal and social situation.[257]

Through this methodology, legal rules are made to fit a "structured" social context.[258]

Llewellyn offered a mature version of situation-sense in his 1954 testimony before the New York Law Revision Commission:

> [T]he existing law can sometimes point up clearly how *not* to make law, whether simplicity has been sought by way of some mere *word-formula which does not fit the situation and the situation's set of problems*. . . . [T]he effort to throw into a single basket the hugely varied situations . . . has led again and again either to plain injustice or to the court's jumping whatever traces were sought to be imposed upon it—with a resulting complete uncertainty. Where operation and results are today scrambled and unreliable even though the word-formula *looks*, then what is needed is to re-examine the problems and the material and to come out with language which *really fits the need*.[259]

Thus, a judge is not apt to find a ready-made rule directly applicable to a given fact pattern. The indeterminacy of facts, however, in a novel case can be somewhat ameliorated through their attachment to a category of

255. Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense,'* *supra* note 248 at 219.

256. *Id.*

257. *Id.*

258. *Id.* at 221.

259. Statement of Karl N. Llewellyn to the Law Revision Commission pertaining to a Study of the Uniform Commercial Code, *reprinted in*, TWINING, REALIST MOVEMENT, *supra* note 6, at 538. Llewellyn's view of the importance of situation-sense in interpreting contracts was already apparent in his 1931 article *Some Realism*. "The search is for correlations of fact-situation and outcome which (aided by common sense) may reveal *when* courts seize on one rather than another of the available competing premises." *Some Realism*, *supra* note 237 (emphasis in original). Continental influences can be seen at work in his notion of situation-sense. In *The Common Law Tradition* he associates situation-sense with Gény's *libre recherche*. COMMON LAW TRADITION, *supra* note 2, at 260-61; *see also* Herman, *Llewellyn the Civilian*, *supra* note 168, at 1126 at n.3; *see also generally*, FRANCOIS GENY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (2d ed. 1954). "Situation sense . . . serve[s] . . . to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result." COMMON LAW TRADITION, *supra* note 2, at 60.

facts[260] that the law views as significant.

This attachment of the particular facts to a category of facts is affected not only by a natural affinity between case and category but also by the subconscious filtering of the facts through the prism of the judge's prior experience. Llewellyn was attempting to harness within the judicial mind's subconscious processing of fact through situation-sense. It is with these devices and the natural human processing of new facts that the context of real-life continually replenishes and updates the law. The next two sections offer an example of situation sense and its potential interpretive power.

1. Llewellyn, Situation Sense, and Implied Warranties

Llewellyn gives an historical account of the replacement of *caveat emptor* in sales law with implied warranties as an example of situation-sense working its magic.[261] In the early part of the nineteenth century, the situation-type that dominated the commercial sales cases involved the factorage industry. Factors acted as conduits between manufacturers, merchant parties, and consumers. The *caveat emptor* doctrine suited the purpose of protecting the factorage industry from liability for defects in the goods that they transferred. The thought was that the purchaser had the right and the duty to inspect the goods before taking possession. Therefore, any subsequent defects should be at the buyer's risk since the factor did not normally have an opportunity to inspect. In addition, many feared that affixing such liability for product defect would bankrupt the factorage industry.

Over time, the role of the factorage industry began to diminish in importance and a new situation-type, that of distance sales, developed. In such sales, the goods were sold directly from the merchant producer to the end consumer. In such sales, the purchaser takes legal possession of the goods before or while the goods are in transit. Therefore, the importance of inspection was greatly diminished since the purchaser was likely to have already assumed the risk of loss, or incurred substantial expenses prior to any such inspection. This recurring situation-type

260. In Llewellyn's 1930 casebook his narrow categorization of transaction types included a separate index in which transactions were cataloged according to commodity types. LAW OF SALES, *supra* note 166, at 1073-77. The Index listed the following commodity types: Agricultural and Foodstuffs, Animal Products, Livestock, Fish, Forest, Mineral, Semi-Manufactured Goods, Manufactured Foodstuffs, Other Finished Manufactures, Stocks of Goods, and Obligations. LAW OF SALES, *supra* note 166, at 1073-77. Llewellyn saw the major task of the judge of "constant[ly] reaching for a sound way to fit the facts into some significant pattern or type." COMMON LAW TRADITION, *supra* note 2, at 125.

261. Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 737-44 (1936) [hereinafter, *Warranty I*].

impressed upon the courts[262] the need to protect the purchaser and exposed the poor fit of the general rule of *caveat emptor*.[263] Thus, the rule was reconstructed to allow for the implication of warranties in distance sale of goods transactions.

2. Interpretive Power of Situation-Sense

In *The Cheyenne Way*,[264] Llewellyn described the transformation of situation-sense into law through the concept of *regularity*. The seeds of situation-sense or transaction types begin with a singular occurrence that is then repeated. Through a long-term process of regularity, the situation or type is recognized as reflective of a legal practice.

> [T]he regular makes its way into the legal. . . . [T]hey begin in non-sophistication, in the operation of direct, primitive sense of justice out of life practice. As they then pass through the crucible of conflict into recognized result, they move into a process of more conscious drive toward a regularity which rests not on life-practice but on legal practice.[265]

This is the concept Llewellyn refers to as the process of legality. The danger is that the upward flow from transaction to type to rule is stymied when the *regularity as authority* resists further adjustment or change. This is the danger of legalism. The rules of law act as receptacles of regularity but once filled are likely to stagnate. Therefore, the rules need to provide a mechanism to constantly recycle the supply of regularity. The drafting of singing rules, the use of purposive interpretation, and the full admissibility of contextual evidence were Llewellyn's chosen means to accomplish this end.

The natural effect of situation-sense was the categorization of transactions along both general and particular fault lines. In the area of general categorization, the two most prominent groupings evidenced in the Code are the merchant-consumer and the relational-discrete contracting distinctions.[266] Llewellyn believed the sale of goods between

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262. "Impressing" the courts occurs when a "given rule or principle or 'analysis' grates against the immanent rightness of the situation-type." COMMON LAW TRADITION, *supra* note 2, at 352.

263. Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 884 (1939) [hereinafter, *First Struggle*].

264. CHEYENNE WAY, *supra* note 184.

265. *Id.* at 286.

266. Others have argued that present day courts have been more apt to disregard the distinction. *See, e.g.*, William J. Woodward, Jr., Symposium: *Consumer Protection and the Uniform Commercial Code: "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the U.C.C.*, 75 WASH. U. L.Q. 243 (1997).

merchants and those to consumers were different situation-types.[267] Therefore, he proposed a separate set of merchant rules. His major underlying thesis was that different contract types needed to be dealt with differently. This was opposed to the Langdell-Williston construct of general principles and rules that applied to all forms of contract. Although Llewellyn's idea of separate merchant rules was rejected, he was able to incorporate merchant-consumer distinctions throughout the Code.[268]

C. *Law's Conceptual "Apparatus"*

Llewellyn's 1931 article in the Yale Law Journal entitled *What Price Contract?—An Essay in Perspective*[269] is arguably his most famous article.[270] He began his analysis with the inherent problems of formulating a "general" theory of contract or what he refers to as "a dream-thing and mayhap a monster."[271] He noted that any such theory can only maintain coherence by peeling off parts of the body of law it is attempting to theorize or systematize: "[They] drop quietly out of contemplation, unnoticed, unmissed, unmourned—and unaccountable for."[272] This idea anticipated the continued development of specialized bodies of law, such as employment law, which was previously within the core of contract law.[273]

Llewellyn's awareness of the detachment of abstract conceptualism from reality is pronounced. "Overwhelmingly 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-production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of facts salvation lies."[274] The problem with

267. See, Wiseman, *Merchant Rules*, *supra* note 149.

268. *See id.* at 472.

269. *What Price Contract?*, *supra* note 61. *What Price Contract?* is one of a number of seminal contract law articles to appear at this time. Others include: Gardner, *An Inquiry* (1932), *supra* note 215, M. Cohen's *The Basis of Contract* (1933), *supra* note 220, and Lon Fuller and William Perdue's *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936) & 46 YALE L.J. 373 (1937).

270. A LEXIS search on October 14, 2001 uncovered 131 recent law review articles citing Llewellyn's "What Price Contract?" The multi-layered nature of its discourse presents an opportunity for exploration from the perspective of doctrine, theory, and jurisprudence. It provides a prism into many of the issues of contract law that framed the legal discourse during the era of legal realism. It is these same issues that continue to affect contract law discourse at the turn of the twenty-first century.

271. *What Price Contract?*, *supra* note 61, at 704, 707.

272. *Id.* at 705.

273. It also reflects the earlier historical process of disaggregation of contract law that began in the late nineteenth century. *See generally*, TRANSFORMATION II, *supra* note 49.

274. *What Price Contract?*, *supra* note 61 at 751.

abstract conceptualism was not so much in its abstractness but its formalism. Llewellyn well understood that law, especially contract law, was inherently wedded to concepts and rules. The problem with abstract conceptualism was its static nature. The abstract concepts may have justified themselves from a "rule fit"[275] measurement at the time of their creation but their formalistic application over time increasingly divorced them from social reality.[276]

Llewellyn asserted that the systemization of contract law through a pyramid of self-contained rules, doctrines, and principles would serve the beneficial goal of establishing a framework of understanding.[277] The price to be paid for an abstract conceptual system was the *rigidification* of rules. The Formal style of adjudication that existed during the early part of the twentieth century consisted of fossilized rules coupled with formalistic application. A necessary product of such a style of thought is a legal order that increasingly diverges from a dynamic social reality. In *What Price Contract*, Llewellyn provided a game plan to prevent the rigidification of rules under a systematized-conceptual rendering of contract law.[278] His price-reduction methodology included being awake

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275. *Infra* Part VI.A.

276. A broad-based example of this phenomenon was the discrete transactional paradigm at the core of classical contract law. The contract core at the end of the nineteenth century was premised upon single transactional exchanges. The contractual viewfinder remained fixated to the exact time of formation—the door to contractual liability and interpretation was fixed in place at that moment in time. Proceeding through the twentieth century, it became clear that the discrete transactional paradigm was ill suited to the increasingly long-term, relational nature of modern day contracts. Llewellyn's critique of abstract conceptualism related to the static nature of the formalistic application of concepts noted previously and to the indeterminacy of judicial decision-making due to overly broad generalizations in the law. As to the latter he states that:

> Outstanding among our lawmen is a distaste for and distrust of wide, sharp edged generalization thought through and carried through with rigor. Generalize we will, and we love to; and when the mood strikes us we will generalize across the horizon. What we will not do is to fence the edges of our generalizations, to fix them and follow them through to courageous, inconvenient conclusions.

LLEWELLYN PAPERS, *supra* note 35, at 90. Professor Wiseman summarizes the Llewellynian view that "the failure to think in narrower categories led law remote from life, articulated opinions whose reasoning was necessarily covert—opinions that failed to provide rules on which either merchants or their lawyers could rely." Wiseman, *Merchant Rules*, *supra* note 149, at 493 n.121. *See, e.g.*, "For it, we have paid, increasingly heavy, of academic abstraction and remoteness." LAW OF SALES, *supra* note 166, at ix.

277. *What Price Contract?*, *supra* note 61, at 730 ("the self-government of groups contract provides an original frame-work, a constitution, a source of ultimate sanction"); *see also id* at 736 ("the major importance of legal contract is to provide a frame-work").

278. "[I]f we can keep ourselves awake to the situations concerned . . . we stand a chance of avoiding that loss—via rigidification of rule and of imagination." *Id.* at 705

to the situations of social reality, "awake to people and their doings," and being aware of the "legal compartments" or categories of law that had been systematized.[279]

D. Indeterminacy: Rules and Counter-Rules

Another prong of both Llewellyn's and the general realist attack focused upon the indeterminacy of judicial reasoning in a domain of abstract conceptualism. The bedrock of abstract conceptualism is that its concepts and methodology of deduction lead the judge to the one right rule and the one right answer. Llewellyn argued that an element of choice existed throughout the conceptual pyramid: "[I]n our system we have large numbers of mutually inconsistent major premises available for choice—'competing rules,' 'competing principles,' 'competing analogies.'"[280] The limitation of the notion of a single right answer was that it foreclosed inquiry into alternatives that could produce a "better" right answer.[281] The law as judicial choice was at the heart of the Realist critique.

Llewellyn's best doctrinal writings appeared in the mid-1930s, dealing with the issue of implied warranties. *On Warranty of Quality and Society* was published in two parts.[282] In it, Llewellyn chronicled the monumental displacement of the doctrine of *caveat emptor* in the law of sales by a regime of implied warranties.[283] He pointed out that the transformation was influenced by mercantile necessity.[284] It was not a response to any sort of concern for consumer protectionism. Rather, in this study it is evident that Llewellyn saw the increasing relational nature of contracts.[285] The Willistonian construct of offer-acceptance-consideration was ill prepared for such a non-discrete transactional or relational contract world.

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279. *Id.*

280. COMMON LAW TRADITION, *supra* note 2, at 12.

281. *Id.* at 24-25. "[T]he better is the enemy of the good, that an atmosphere or climate of thinking that *the* right answer must be single can acquire its effect on the process of deciding." *Id.* at 24 (emphasis in original).

282. *See Warranty I*, *supra* note 261; Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341 (1937) [hereinafter, *Warranty II*]. *See generally*, Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILLANOVA L. REV. 213, 230 (1966).

283. *See, e.g.*, "But the level of dealing . . . can shift far toward *caveat venditor*, and has done so. . . ." *Warranty I*, *supra* note 261, at 718; "as Pennsylvania must be seen in terms of supervening *caveat emptor*" *Id.* at 729; "a contract for future delivery . . . carries . . . an obligation . . . [to] be at least merchantable . . . and for such contracts *caveat venditor* is explicitly announces." *Id.* at 741.

284. *See* Llewellyn's discussion of the replacement of factorage sales with direct dealing. *Warranty II*, *supra* note 282, at 349-353.

285. *Id.* at 375-79 ("Continuing Transactions").

The classical response to relational contracts was to regard them as a series of divisible contracts. Once divided each contract could be made to fit the Willistonian construct. Llewellyn criticized this approach as an example of the sterilization of contract law and its divorce from commercial reality:

> Consider, for instance, the queer rules which courts indulge, severing *each* contract between two parties from each other contract. . . . No businessman . . . could think that way: what they see is 'an account.' . . . 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.[286]

Llewellyn's contextual mindset allowed him to see how contract law needed to be transformed from rules premised on the fixed to those predicated on the continuing transaction.

In his doctrinal work of the late 1930s, one can see the germination of ideas fundamental to his work on the Code.[287] In *The Rule of Law in Our Case-Law of Contract*,[288] the development of a more complete theory of rules becomes evident. Despite being labeled a rule skeptic, Llewellyn saw an important place for rules in the case law system, but only the right kind of rules. "[O]nly a right good, well-carpentered rule of law will in a case-law field achieve those things—notably a clean guidance and a moderate predictability."[289] The notion of a singing rule is alluded to in his discussion of principle. He located principle between the poles of fixed rules, or accepted formulae, and a full inquiry into policy and ethics. Principle is a middle ground that "permits of frank critique, of open change, and of responsible choice."[290] This middle ground is the future domain of his singing rule, "for in its little way and lesser range the concept of 'true rule' operates much along the same lines as does 'principle.'"[291] In a way the singing rule, when imbued with patent reason, acts as a mini-principle or as a *rule-ification* of principle.

The benefit of the middle ground of rule-principle amalgamation is

286. *Id.* at 376-77.

287. The seedbed for Llewellyn's drafting of contextualism into the Code is found in a prolific outpouring of writings on commercial and contract law during the late 1930s. In chronological order these writings included: *Warranty I*, *supra* note 261 (1936); *On Warranty II*, *supra* note 282 (1937); *Title to Contract*, *supra* note 61 (1938); Karl N. Llewellyn, *On Our Case Law of Contract—Offer and Acceptance* (Part 1), 48 YALE L.J. 1 (1938); *Across Sales on Horseback*, *supra* note 163 (1939); *First Struggle*, *supra* note 263 (1939); and *Our Case Law of Contract—Offer and Acceptance* (Part 2), 48 YALE L.J. 779 (1939).

288. *Rule of Law*, *supra* note 61.

289. *Id.* at 1243.

290. *Id.* at 1249.

291. *Id.* at 1251.

a clearer and more predictable law. In the conceptualist world of abstraction and of fixed, formulaic rules coherency or rule fit is achieved by "construing facts out of recognizability."[292] The facts are manipulated in order to avoid the injustice of a particular rule application. In this way the novel contextualism of a problem case is removed.[293] Such manipulation had created a divergence between doctrines as expressed and as applied in the case law. The result was the rendering of much of contract doctrine as non-law. For doctrine to be law, Llewellyn asserted there had to be a semblance of fit between doctrine and practice.[294]

E. Transaction-Types and the Dissecting of Conceptualism

In 1939 and 1940, Llewellyn published the last of his series of sales and contracts articles prior to beginning work on the new Sales Act that would become Article Two of the Code.[295] These articles included *Across Sales on Horseback*,[296] *The First Struggle to Unhorse Sales* (*"First Struggle"*),[297] and *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method* (*"Problem of Juristic Method"*).[298] In *Across Sales on Horseback*, Llewellyn viewed business, and the law of sales, of the nineteenth century as being singularly fixated on price, and uncaring about the satisfaction of the consumer.[299] Behind the façade of price, hide issues of quality and utility.[300] These issues were exposed during the early part of the twentieth century:

> [W]atch Sales law over the last forty years [1899-1939] and you will see . . . the consumer and his interest shouldering in beside the purely merchant-to-merchant problems of the prior century, you will see regulatory practices and rules and practices emerging again to control the individualistic haggling of the early 19th century market—all moving to make price include in fact and deed the things which

292. *Id.* at 1253.

293. "For the nature of generalizing and ordering synthesis of particularized and discrepant data is to force the rubbing out of attention any discrepant particulars." *Id.* at 1259.

294. "[T]hat where doctrine does not square with case-results, that doctrine is *not law*." *Id.* at 1269.

295. This drafting exercise took the better part of a decade with the first published version appearing in 1949.

296. *Across Sales on Horseback*, *supra* note 163.

297. *First Struggle*, *supra* note 263.

298. Karl N. Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940) [hereinafter, *Problem of Juristic Method*].

299. "Business . . . in Veblen's caustic eye, centers on price differential, and cares less for . . . giving satisfaction to consumers. Such was our earlier Sales law. Such is much of it still." *Across Sales on Horseback*, *supra* note 163, at 725-26.

300. *Across Sales on Horseback*, *supra* note 163, at 725-726.

people need to have included.[301]

Llewellyn is unclear whether the internalization of cost and risk into the price is primarily a private phenomena or one induced by public regulation. Given the Realist distrust of the public-private distinction, it is clear that the internalization plays out in the practices of commercial life whether privately or publicly induced.

Llewellyn's dissection of the abstract concepts of sales law continued with an attack on warranty and title concepts in the follow-up work *First Struggle*.[302] The germination of situation-sense in *First Struggle* is evidenced by the notion of "stock intellectual equipment."[303] Llewellyn's idea of stock equipment rested upon sales law developing transaction types from the "fact-pressures"[304] of cases. As to the task of developing such transaction types, he had this to say:

> It is dangerous business, this of setting up "types" of transaction.[305] But the job needs doing, it needs doing over until it gets done right.[306] Our fields of law, our patterns of legal thinking, our legal concepts, have grown up each one around some "type" of occurrence or transaction, felt as a typical something ... and, as a type-picture.[307]

Clearly, for Llewellyn the job had not been done right in the existing sales law. The problem with sales law was that it had failed to carve out sufficiently narrow conceptual categories. The two targets of Llewellyn's dissatisfaction were the twin pillars of title and *caveat emptor*.

The concept of title in sales law was that of *lump* title borrowed from property law. In such an abstract form, all key issues of risk of loss, contractual duties, and ownership revolved around the single determination of whether title had passed to the buyer. To Llewellyn,

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301. *Id.* at 726.

302. *First Struggle*, *supra* note 263.

303. *First Struggle*, *supra* note 263, at 876. *Compare* Professor Kastely's excellent article on the role of trade usage in the U.C.C. in which she borrows Llewellyn's coinage of stock equipment. Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, 'Express Terms,' and Consistency under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986) Professor Kastely's thesis is that courts when construing written terms in conflict with trade usage should give effect to the usage unless the parties expressly agree to a variant. This can be seen as a partial example of the inverted hierarchical contextualism model discussed in *infra* Part V.B.2. *Compare*, Kamp, *Between-the Wars*, *supra* note 195, at 335 (providing thesis that the "struggle to unhorse sales" was Llewellyn's attempt to get the "common" out of the law of sales).

304. *First Struggle*, *supra* note 263, at 876.

305. *Id.* at 880.

306. *Id.* at 881.

307. *Id.* at 880.

this abstraction of the title concept in sales law represented all that was wrong with abstract conceptualism. In the longest footnote one may ever come across, Llewellyn had this to say about the application of such concepts: "[T]he problem has failed of study, as to . . . why judges continue blind use of inadequate concepts, how far they remodel such by finding useful qualifications and distinctions, how far they get results by distortions of the facts which leave the legal formulae seemingly unchanged."[308] These abstract, all-or-nothing concepts of title and warranty were no longer reflective of the reality of commercial practice.

In attacking these concepts of title and warranty, Llewellyn noted that categories of cases or fact patterns could no longer properly fit under these broad conceptual umbrellas. In the area of title, the international documentary transaction made the idea of lump title[309] outdated. The rights and duties of buyers and sellers did not hinge on who literally held title to the goods. In the overseas documentary transaction, for example, in the C.I.F. contract the risk of loss passes to the buyer at the point of shipment while the title document is not transferred until later.[310] Holding that the risk of damage to the goods remained with the seller until the transfer of title was no longer a reflection of commercial practice.

Ultimately, Llewellyn believed that it was the facts of a case or type of transaction that should decide issues of loss and warranty and not any lump concept.[311] Part V will examine the above facets of Llewellynian thought in relationship to the theory of interpretation that Llewellyn attempted to incorporate into the Code.

V. Contract Interpretation: U.C.C. Contextualism

By 1940, the foundation for the contextualist approach to interpretation that Llewellyn brought to the Code project was firmly in place. *Problem of Juristic Method* exposed a mature version of situation-sense as a methodology to infuse legal rules with dynamic social context.[312] If anything, Llewellyn saw the "trouble-case" as the impetus

308. *Title to Contract*, *supra* note 61, at 173 n.24.

309. *Id.* at 165.

310. *See generally*, JAN RAMBERG, ICC GUIDE TO INCOTERMS 2000 (ICC PUBLICATION NO. 620) (1999) (this guide of trade terms is universally accepted by businesspeople, courts, and arbitration panels as authoritative; it provides 13 different terms of which 6 are "shipment terms," such as FOB and CIF, meaning that the risk of loss is transferred to the buyer prior to the transfer of title).

311. *First Struggle*, *supra* note 263. This process of developing broad concepts such as title rules centered around smaller transaction types has not come easily to the law. "The getting of such stock equipment is a struggle." *Id.* at 876.

312. "If interlocking behavior gets patterned in fact, with a resulting back-and-forth of adjusted action and adjusted expectation, deviations will bother. . . ." *Problem of Juristic*

for a rule change[313] because the existing rule does not fit the new, recurring fact pattern. Eventually the ill fit between rule and fact pattern or situation-type places pressure on the courts to adjust or reconstruct the legal rule. The rule adjustment pressured by social context comes within the internal legal-conceptual structure of existing law. Thus, the solution to the trouble case lies within an ascending degree of abstraction.[314] This process of generalization is not the transcendental nonsense of classical legal thought. This process of generalization requires abstract concepts to be stripped to their underlying purpose, reason, and principle. It is the reason behind the rule that provides the means for law to reconstruct itself in order to respond to the trouble-case, novel fact patterns, and new situation-types.

Llewellyn possessed great insight into the intricacies and deficiencies in existing commercial law. More so, he possessed an unrivaled knowledge of actual commercial practice. It is this knowledge that made him the logical choice to head the Code project. In 1930, he wrote a snippet for the *Encyclopedia of the Social Sciences* entitled *Case Law*. He noted that in the case law system change is made only incrementally. At times, however, a divergence develops between a more rapidly changing society and the slower-to-change case law. This divergence eventually calls for a major change that is the domain of the legislature. It is clear from his writings in the late 1930s that he believed the divergence between law and society had rendered many of law's legal concepts unworkable.[315] The time was right for a major codification of commercial law.

Llewellyn's work in the 1940s as the Chief Reporter of the Code, and as principal Drafter of Articles One and Two, and prior to that the Revised Uniform Sales Act, provided him with an opportunity to apply his jurisprudential ideas to law-making. The result was a code that incorporated his view of contextual interpretation of contract rules and their relationship to real world facts. The success of the Code project transformed contract law through the ascendancy of contextualism in contract interpretation.

The shift toward contextualism in the Code replaced Williston's traditional-conceptual-static model of interpretation with Llewellyn's

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Method, *supra* note 298, at 1360.

313. "Often enough it takes a trouble-case to crystallize perception that the right pattern is there. . . ." *Id.*

314. "[T]he brain-sweat, of a trouble-case, though it be an utterly unique one, drives by its whole quality toward generalization . . . [an] *occasion* for awakening to, and voicing, normative drives which have been building unnoticed." *Id.*

315. *See, e.g.*, Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558 (1940) (notes that matters of international ocean commerce were left out of the Uniform Sales Act).

modern-contextual-dynamic approach. Williston's theory of interpretation, embodied in the Uniform Sales Act, was built on a narrow foundation of objective fact. These objective facts were dominated by the "plain meaning" of words. Llewellyn's view of external manifestations was that the written contract was only one piece of evidence in a grand pool of objective fact.[316]

Williston's view of objective reality was merely a virtual reality represented by word symbols; Llewellyn's goal was to unearth the actual reality of transactions. Williston's view of reality was temporally and spatially fixed. The focus of the Willistonian theory is the plain meaning of the written words of contract at the exact time of formation. In contrast, time or space does not tightly bind Llewellyn's objective universe. The words of contract are only meaningful through a broad-based contextual analysis. This analysis embraced background evidence that evolves well before contract formation and continues throughout the life of the contract relationship. The rest of this article is devoted to understanding the contextualist turn in contract interpretation initiated by Llewellyn's vision for the Code.

A. Triumph of Contextualism

The importance of U.C.C. contextualism in the development of a theory of interpretation has gained the attention of an increasing number of legal scholars.[317] This brand of contextualism is a reflection of Llewellyn's theory of meaning as a "pragmatic blend of theory with practice."[318] He believed that any theory of interpretation should focus on actual practice or the actual agreement of the parties. He saw the Willistonian construct, which placed express terms of the contract as the central focus of the interpretive enterprise, as hopelessly acontextual.[319] The primary premise of the Willistonian approach was that it was the job

316. *See supra* Part IV. A-B.; *See also infra* Parts V.A-B.3,VI.C.

317. *See, e.g.*, Patterson, *Of Llewellyn, Wittgenstein, supra* note 14. *See generally*, Symposium, *Interpretation Symposium*, 58 S. CAL L. REV. 1 (1985); Nicholas M. Insua, Note, *Dogma, Paradigm, and the Uniform Commercial Code:* Sons of Thunder v. Borden *Considered*, 31 RUTGERS L.J. 249 (1999). Oliver Wendell Holmes championed the contextual method of meaning. In his *Theory of Legal Interpretation* he noted that "[I]t is not true that in practice . . . a given word or even a given collocation in original collection of words has one meaning and no other." Holmes, *Legal Interpretation*, *supra* note 29 at 417. The contextual nature of understanding the true meaning of language was stated in *Towne v. Eisner*: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." 245 U.S. 418, 425 (1918)

318. DENNIS M. PATTERSON, GOOD FAITH AND LENDER LIABILITY 3, n.11 (1990) [hereinafter, PATTERSON, GOOD FAITH].

319. *Id.* at 12-13.

of the interpreter to seek the plain meaning of the express terms of a contract. In contrast, Llewellyn worked under the premise that there is rarely, if ever, a plain or singular meaning for the words of a contract. The following excerpts demonstrate the stark contrast between these two approaches to contract interpretation:

> Williston On Contracts:
>
> If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court. The court will give that language its natural and appropriate meaning; and if the words are unambiguous, will not admit evidence of what the parties may have thought the meaning to be.[320]
>
> Llewellyn—Revised Sales Act
>
> But if usage can be determined with some reasonable reliability, the policy . . . of giving usage as full a scope as reason will permit, is the only sound policy. . . .
>
> Wherever the usages of a particular trade or mercantile situation have . . . been reduced to fair and balanced form by a body representing both buyers and sellers of the character engaged in a particular transaction, the incorporation of such body of usages into the transaction, as the background of the particular terms of the bargain, is presumed.[321]

The practical difference between Williston's textualism and Llewellyn's contextualism is in the very nature of the rules of interpretation that they create. Williston's view results in rules of interpretation that are formal, closed, and mandatory.[322] In contrast, Llewellyn's view dictates rules that are open, flexible, and discretionary.[323] The use of the word discretionary does not mean that a court is free to disregard the rules, it means that the general rules of

320. WALTER H.E. JAEGER, 1 WILLISTON ON CONTRACTS § 95 at 349-50 (3d ed. 1961).

321. SECOND DRAFT OF THE REVISED UNIFORM SALES ACT, Vol. I U.C.C. DRAFTS 335 (complied by E. Kelly, 1984).

322. For an analysis of the mandatory-discretionary distinction *see*, Lawrence M. Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U. L. REV. 751 (1965).

323. Closed, fixed rules are unable to respond to gaps in rules and unforeseen situations. Llewellyn asserts that these problems can be solved through the use of rules drafted "using a zone rather than a surveyor's line to border the rule." COMMON LAW TRADITION, *supra* note 2, at 183.

interpretation themselves do not preordain a particular result. Particularized rules of interpretation that are mandatory in nature, however, are warranted for certain transaction types. For example, as contract law began to disaggregate and spin off specialized areas of law, insurance, common carriers, federal warranty, and numerous mandatory rules of interpretation were developed in each area. Thus, the "duty to defend" in insurance law has developed a mandatory interpretation.[324] The fiduciary duty of the common carrier has developed a fixed meaning. Mandatory rules of interpretation are found in the Code. For example, a limitation of liability clause in a consumer contract may not preclude recovery for consequential damages.[325]

Particularized rules of interpretation aside, the general rules of interpretation under Willistonian formalism tend toward the mandatory type. The contract has a single meaning to be gleaned from a facial analysis of the written agreement. For Llewellyn, a purely facial analysis hides the multiple meanings of words and only a full-scale contextual excursion will yield the true or intended meaning. This difference is a reflection of their differing views of contract interpretation.

For Llewellyn, Williston's view subjected the meaning of contracts and rules to the subjectivity of the interpreter. In contrast, he saw contextualism as the means of overcoming the subjectivity of interpretation. It is the contextualism of the contract that channels the interpreter to the true objective meaning. Ultimately, both Williston and Llewellyn claimed that there was a singular *legal* meaning for the words of a contract; but for Llewellyn that meaning resided below the surface of the words in the background of commercial reality. Figure 1 below provides a typology of the different features of formal-conceptual and realist-contextual theories of interpretation (the first two rows continue below the solid line).

324. The insurance contract is an example is highly regulated through state statutory and regulatory law. "A classic example [of law requiring specified terms] is legislation prescribing standard terms for insurance policies." E. ALLAN FARNSWORTH, FARNSWOTH ON CONTRACTS § 4.29 at 611 (2004).

325. *See* U.C.C. § 2-719(3).

Figure 1
Theories and Modes of Contract Interpretation

Formalism (Williston)	Conceptualism	Abstraction	Gaplessness	→
Legal Realism	Particular/types	Situation-sense	Leeways	→
→ Textual Analysis	Singular (facial) Meaning	Plain Meaning Rule	Bargain Theory	
→Contextual Analysis	Multiple (facial) Meanings	Extrinsic Evidence	Reasonable Expectations	

Llewellyn's brand of contract interpretation embraced the relational side of contracts and the view that contracts are living, evolving entities.[326] He referred to this type of long-term, relational form of contracting as *running combination*.[327] This focus necessitates a theory of interpretation that moves beyond the actual words of the written contract to the agreement embodied in the "relationship." It assumes that the contract-as-written rarely reflects the actual agreement and that only in cases of relational breakdown does the written contract become the avenue of ultimate appeal.

B. Forms of Contextualism

The acceptance of a contextual analysis of meaning into a theory of contract interpretation leads to the issue of application. What form

326. As is contract to government, so is mere agreement to contract; so also, usage plus initiative and acquiescence to mere agreement. In the self-government of sub-groups contract (agreement) provides an original framework, a constitution, a source of ultimate sanction in dispute or breakdown. . . . [F]urther factual agreement from time to time, informed by usage and that running combination of initiative and passivity which does not even call for onscious agreeing, fills the framework with living content and often stretches or overlays it as to make the initial contract a wholly misleading picture of what occurs

What Price Contract?, *supra* note 61 at 730-31.

327. Later in the same article he summarizes his thought on the topic. "[T]he major importance of legal contract is to provide a framework . . . a framework highly adjustable, a framework which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in case of doubt and a norm of ultimate appeal when the relations cease in fact to work. *Id.* at 336.

should the contextual interpretive methodology take? The next three sub-sections will examine three forms of contextualism. First, hierarchical contextualism, the form most commonly associated with Code methodology. Second is inverted contextualism, a form that flips the traditional Code hierarchy. Third, full contextualism reflects the interpretive methodology that most closely aligns with Llewellyn's vision.

1. Hierarchical Contextualism

Judge Posner has stated the rationale for a priority approach to evidentiary considerations of intent. The reason for excluding extrinsic evidence in the face of a seemingly integrated contract is the "[d]esire for certainty and predictability, perhaps combined with some distrust of juries."[328] He then noted that extrinsic evidence should be used as a default or "tie-breaker"[329] when there is more than one plausible interpretation of contractual language. Hence, contextual evidence's only purpose is to "disambiguate" the contract.[330] This approach is more closely related to the traditional, acontextual plain meaning rule.

Historically, under the edifice of the plain meaning rule, most offerings of extrinsic evidence were denied.[331] The plain meaning rule in its strictest application was the evidentiary crutch of abstract conceptualism. Under this interpretive style, concepts and words had singular meanings. Most contractual language could be construed to satisfy the threshold of plain meaning. A determination that a disputed term is unambiguous, that it had a plain meaning, ended the contextual inquiry.[332]

A simplified hierarchical contextualism, the one advocated above by Posner, acknowledges the importance of extrinsic evidence but would only seek its help in cases of ambiguity.[333] This narrow view of the role

328. Residential Mktg. Group v. Granite Inv. Group, 933 F.2d 546, 548-49 (7th Cir. 1991).

329. *Id.* at 549.

330. *Id.*

331. *See, e.g.,* Clifton Shirting Co. v. Bronne Shirt Co., 209 N.Y.S. 709 (1925), N.Y. App. Div. LEXIS 8466 (holding that evidence of an obvious trade usage is inadmissible when the meaning of the words of a contract are deemed clear).

332. *See generally*, Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and the Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, (1998) (using the California rules of contract interpretation argues that when the normal rules of interpretation fail to provide an adequate solution the courts should be guided by a "just result" principle).

333. *See, e.g.,* Steven W. Feldman & James A. DeLanis, *Resolving Contractual Ambiguity in Tennessee: A Systematic Approach*, 68 TENN. L. REV. 73 (2000) (explains traditional hierarchical approach to interpretation but also notes a "flexible approach" approved by the Tennessee Supreme Court holding that it is permissible to consider the

of contextual or extrinsic evidence is rejected by the Code. The Code's version of hierarchical contextualism prioritizes interpretative materials from the textual to different types of contextual evidence.[334] However, it allows a broader use of contextual evidence to not only clarify an ambiguity, but also to supplement the contract and to fill in gaps. Nonetheless, the Code preserves the hierarchy of the traditional approach in the event of evidentiary conflict.[335] The written contract prevails over any conflicting contextual (extrinsic) evidence.

2. Inverted Contextualism

A variant of hierarchical contextualism has also been advanced.[336] This variant poses an inverted hierarchy in which the sequential ordering places express terms at the bottom of the "priority" rules of interpretation. The trumping order would be along the following lines: general standards of reasonableness, default rules, trade usage, course of dealing, course of performance, and express terms.[337] A critique of such a theory of interpretation can be found in judicial concerns that parties will use extrinsic evidence to rewrite their contracts in order to advance a beneficial *post hoc* interpretation.[338] The inverted hierarchy model responds to this concern by granting greater priority to more generalized standards and default rules. Such background evidence is less susceptible to being manipulated by the parties.[339]

The inverted hierarchy model, advanced by Professor Zamir, is differentiated not only from the more conventional hierarchical ordering but also from the full contextualism model discussed in the next section.[340] Zamir asserts that Llewellyn's contextual analysis does not

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"situation" of the parties and surrounding circumstances to interpret even a facially unambiguous contract).

334. U.C.C. § 2-208 (2).

335. *See, e.g.*, U.C.C. § 2-202(a) (1997) ("a writing intended by the parties as a final expression . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented [but not contradicted] by course of dealing or usage of trade. . . ."); U.C.C. § 2-208(2) (when inconsistent "express terms shall control [over] course of performance and course of performance shall control both course of dealing and usage of trade").

336. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997) [hereinafter, Zamir, *Inverted Hierarchy*].

337. *Id. passim.*

338. *See, e.g.*, Eskimo Pie Corp. v. Whitelawn Diaries, Inc., 284 F. Supp. 987 (S.D.N.Y. 1968).

339. Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc., 664 F.2d 772, 803, n.43 (9th Cir. 1981).

340. Zamir, *Inverted Hierarchy*, *supra* note 336: "At the top of the hierarchical pyramid stands the parties' express agreement" (conventional hierarchical). *Id.* at 1712. "No clear hierarchy between these sources necessarily exists" (full contextualism). *Id.* at

provide an ample place for default rules and general principles.[341] In short, it is only after the contextual analysis is complete that these two sources of extrinsic evidence are used as a last resort. One could argue that a more expansive view of default rules would incorporate trade usage and custom.

Llewellyn saw the true default rules embedded in commercial practice. Regarding general principles, the immutable quality of good faith, fair dealing, reasonableness, and unconscionability ensured an important role of general principles in Llewellyn's contextual analysis. Besides these meta-principles, Llewellyn's incorporation of "singing rules" into the Code was an attempt to make the underlying purpose, reason, and policy of the rule part of every contextual analysis.

The second point of differentiation is Zamir's contention that Llewellyn's contextualism is centered upon the finding of contractual intent. In contrast, inverted contextualism "implies that social values should, and do, play a key role in the interpretive process as well."[342] This assertion is hard to quarrel with other than to say that it is not at odds with the ultimate aim of Llewellyn's contextualism. Llewellyn's contextualism was a reaction to the formalism of traditional rules of contract interpretation. The traditional obsession with the written contract served to prevent the introduction of social forces into contract law. Llewellyn's contextualism was meant to unblock the flow of social values into contract, along with policy considerations, distributive consequences, and extra-legal considerations. In addition, Llewellyn viewed trade usage and custom as reservoirs of social values. The inverted model is attractive to those who reject this normative dimension of Llewellyn's theory of interpretation. The next section will assert that the true meaning of contract is best served by disregarding all notions of hierarchy.

3. Full Contextualism

Llewellyn's embrace of a fully contextual theory of contract interpretation is evident in the earlier review of his writings. As was provided in that review, Llewellyn considered as indeterminate all written contracts. The true meaning of a contract is only available through a thorough inquiry into the contextual background.[343] The Code

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1713.

341. Inverted hierarchy adds to "the list of sources . . . overlooked . . . by the Llewellyn school, namely, statutory and judge-made default rules and general principles of contract law." *Id.* at 1714.

342. *Id.*

343. Llewellyn's belief in full contextualism is apparent in *Realistic Jurisprudence* when he states that "what we need is patience to look and see what is there." *Realistic*

provides support for both a hierarchical and a fully contextual analysis.[344] In fact, I will argue that the Code embraces full contextualism with the hierarchical ordering triggered only when the full contextual analysis fails to provide an answer.

Comment Four to Section 1-205 states that the language of a contract "is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade."[345] This method envisions a full contextual analysis to determine the meaning of a contract. The ordering of contextual evidence is provided in Section 2-208, which first requires an analysis of the express terms, course of performance, course of dealing, and trade usage on an equal footing. It states that only if they cannot be "construed . . . as consistent" do the priority rules apply.[346] The elements of full contextualism are listed below in Figure 2.[347]

Figure 2
Elements of Full Contextualism

- language selection
- purpose for selection of language and contract type
- surrounding circumstances at time of writing (prior dealings, trade usage, custom)
- nature and type of transaction
- characteristics of parties
- course of performance (waiver, modification, practical construction)
- change of circumstances
- contextualism of the reader-interpreter (education, experience)
- remedial consequences

Jurisprudence, *supra* note 28 at 457.

344. *See* U.C.C. §§ 2-208(2) (hierarchical ordering); *see also* 1-205 (4-5) (full contextualism).

345. U.C.C. § 1-205(2), Comment 4 (1990).

346. U.C.C. § 2-208 (2) (1990).

347. The second item on the list in Figure 2 refers to the purpose of the contracting parties' selection of language and contract type. Ronald Dworkin describes the uncovering of purpose as the aim of interpretation:

> [E]ven if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the formal structure for all interpretive claims. I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted. . . .

RONALD DWORKIN, LAW'S EMPIRE 58-59 (1986).

The theory of full contextualism questions why a court should exclude any evidence that is probative to its assigned task of finding contractual intent or meaning.[348] In fact, some courts allow the admission of all extrinsic evidence even in cases of a fully integrated contract.[349] This evidentiary shift has been rationalized by referencing the "ambiguity" exception to the parol evidence rule.[350] The admission of extrinsic evidence may uncover an ambiguity that was not apparent in a facial reading of a contract. Professor Kniffin noted the trend in some state courts toward a "context rule" where the goal is to "find reality by admitting extrinsic evidence without limitation."[351]

The court in *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*[352] stated the case for full contextualism:

> Although some courts still follow traditional bargain theory and refuse to delve beyond the express terms of a written contract, the better approach is for the courts to examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties. Courts today tend to be willing to look beyond the written document to find the "true understanding of the parties."[353]

Llewellyn advocated the full contextualism view of contract interpretation, despite the prioritizing of Section 2-208(2).[354] Professor Patterson likens Llewellyn's vision of contract interpretation to a

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348. In 1939, Marjorie Greene, premised the essence of full contextualism in a question: "[I]f it is actual intent we are after, . . . [w]hy then . . . does the court exclude all evidence but that of the writing itself, which is necessarily inadequate evidence of motive and intention?" Marjorie Greene, *Theories of Interpretation in the Law of Contracts*, 6 U. CHI. L. REV. 374 (1939).

349. *See generally,* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 803, n.43 (9th Cir. 1981); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040 (5th Cir. 1971); Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968).

350. *See generally*, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.12A AT 319 ("Determining Whether Language is Ambiguous").

351. Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 ORE. L. REV. 643, 661 (1995). *See, e.g.*, Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767 (Alaska 1982); Berg v. Hudesman, 801 P.2d 222 (Wash. 1990); Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 808 P.2d 919 (Nev. 1991); Smith v. Melson, Inc., 659 P.2d 1264 (Ariz. 1983); R. Zoppo Co. v. City of Dover, 475 A.2d 12 (N.H. 1984); Dental Prosthetic Services, Inc. v. Hurst, 463 N.W.2d 36 (Iowa 1990).

352. Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 808 P.2d 919 (1981).

353. *Id.* at 921-22.

354. *See, e.g.*, David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 S.M.U. L. REV. 617 (2001) (arguing that custom is a part of language). "The Code not only makes custom and conduct relevant to interpreting an agreement; it makes them part of the agreement itself . . . (perhaps Llewellyn never intended a strict hierarchy anyway)." *Id.* at 620-621.

hermeneutic circle.[355] In short, the whole (contract or agreement-in-fact) is greater than the sum of its parts (words, conduct, and context). However, the meaning of any part (words) cannot be understood without reference to the whole and the whole cannot be understood without reference to its parts.[356] Applied to contract interpretation "[t]o understand the Agreement of the parties one must look at their language. To understand the language one must investigate the commercial background of its use[.] To understand any single element requires an understanding of the totality."[357] The words of commerce can never be fully understood without resort to the commercial practice in which they are used.[358]

Justice Traynor in *Pacific Gas v. G.W. Thomas Drayage Co.*, enunciated the theoretical side of full contextualism.[359] The case involved an owner who hired a contractor to perform work at his building. The contract included an indemnity clause protecting the owner "against all loss . . . resulting from . . . injury to property, arising out of the performance of the contract."[360] During the course of performance the owner's property was damaged.[361] The defendant-contractor sought to introduce evidence that the indemnity clause was meant only to cover injury to property of third parties.[362] The lower court determined that the indemnity clause had a plain meaning to cover all forms of injury and barred the admission of extrinsic evidence.[363]

In reversing, Justice Traynor advanced a full contextual approach by stating that the test of admissibility is not whether the text "appears" unambiguous to the court but whether the extrinsic evidence can reasonably support an alternative meaning.[364] "Accordingly the meaning

355. PATTERSON, GOOD FAITH, *supra* note 318, at 34.

356. *Id.* at n.67. *See generally,* M. HEIDEGGER, BEING AND TIME 194-95 (J. Macquarrie & E. Robinson trans. 1962).

357. *Id.* at 34-35.

358. Patterson ultimately regards the Llewellyn vision akin to Wittgenstein's view that "the meaning of a word is its use in the language." *Id.* at 35, *citing*, L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G. Anscombe trans. 3d ed. 1968).

359. Pac. Gas & Elec. Co. v. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968).

360. *Id.* at 643.

361. *Id.*

362. *Id.*

363. *Id.*

364. In so doing he rejects Learned Hand's narrow objectivity in favor of a full contextual determination of meaning. *See id.* In his well-known "twenty-bishops" hypothetical on the objective theory of contract Hand asserted that, "[a] contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911). Hand further states that "if, however, . . . when he used the words, he intended something else than the usual meaning which the law

of a writing '. . . can only be found by interpretation of all the circumstances that reveal the *sense* in which the writer used the words.'"[365] Thus, the plain meaning rule was expressly rejected. More importantly, Traynor introduced the importance of the reader's context along with the context of the writing. The singular meaning attached by a judge is a product of his or her particular experience, education, and linguistic skill. The verbal context is thus expanded to include the time of the writing and the time of the reading. Immersion in the context of the writing is a way of filtering out the contextual bias of the reader. A full contextual analysis curtails the subjectivity of the interpreter.[366]

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imposes on them, he would still be held [liable]." *Id.* Lord Denning in *Storer v. Manchester City Council* offers a similar explanation: "A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract' if by his words he has done so." [1974] 1 W.L.R. 1403, 1408 (C.A. 1974). Of course this begs the question: What is the "usual meaning" of the words? For Justice Hand, a plain meaning reading by a court is the usual meaning. For Lord Denning, a similar singular meaning of words is implied. In contrast, Justice Traynor sees full contextualism as the primary paradigm for contract interpretation, placing the plain meaning paradigm in the realm of unreality. Justice Traynor asserts that such absolute objectivity of word meaning does not exist, and therefore, words cannot on their own act as operative external signs of meaning. If words had absolute and constant referents, it might be possible to discover contractual intention in the words . . . [w]ords, however, do not have absolute and constant referents." 442 P.2d 641, 644. Traynor's embrace of full contextualism is not unrestricted. He distinguishes two purposes for the admission of extrinsic evidence: to show that the contract is susceptible to more than one meaning and then to prove that alternative meaning. If the extrinsic evidence does not prove that the written contract is "reasonably susceptible" to more than one meaning, then it is excluded from supporting an argument for an alternative meaning. The important point is that Traynor's full contextualism does embrace the unrestricted admission of extrinsic evidence for the first purpose. Ultimately, whether it is admitted for the second purpose is simply a determination that the "meaning issue" is will be determined as a matter of law (no alternative meaning) or a matter of fact.

365. *Id.*, *partially quoting*, Universal Sales Corp. v. Cal. Press Mfg. Co., 128 P.2d 665, 679 (emphasis added). Traynor quotes Arthur Corbin's *The Interpretation of Words and the Parol Evidence Rule*:

> The meaning of particular words or groups of words varies with the . . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.

Id. at 644-45, *quoting*, Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965).

366. Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040 (5th Cir. 1971). "The Code manifests the law's recognition of the fact that perception is conditioned by environment: unless a judge considers a contract in the proper commercial setting, his view is apt to be distorted or myopic, increasing the probability of error." *Id.* at 1046. The court in *Columbia Nitrogen Corp. v. Royster Co.* was even more emphatic in its reasons for admitting contextual evidence despite the existence of an express term. It reasoned that contextual evidence ensures that a ruling "reflects the reality of the marketplace and avoids the overly legalistic interpretations which the Code seeks to abolish." 451 F.2d 3, 10 (4th Cir. 1971). The court also stressed important roles that

C. *Application of Full Contextualism*

The following two sub-sections provide examples of the impact of the contextualist turn on American contract law.[367] The first involves the *Nanakuli Paving v. Shell Oil*[368] case that illustrates the application of full contextualism from the judge's perspective. The second section ventures some introductory insights of contextualism's role in directly shaping contract doctrine during the later part of the twentieth century.

1. Praxis: *Nanakuli Paving v. Shell Oil Co., Inc.*

The distance that contextualism has advanced since the writings of the early-Llewellyn is illustrated in *Nanakuli Paving & Rock Co. v. Shell Oil Co, Inc.* ("*Nanakuli*").[369] *Nanakuli* involved a dispute concerning a long-term supply contract in which the defendant was a supplier of asphalt paving materials. The plaintiff was a paving contractor that sued for breach of contract when the supplier summarily increased the price of

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prior dealing and trade usage play in the Code's interpretive process. Trade usage and prior dealings play "unique and important roles" and therefore "overly simplistic . . . interpretation of a contract should be shunned." *Id.* at 11.

367. Contextualism has also worked a transformation in legal education. This transformation is apparent when comparing law school exams prior to the turn of the twentieth century with those immediately prior to the turn of the twenty-first century. Exams on file with author. The 1872 Harvard Law School Contracts Exam consists of fifteen mini-essay questions of one to two sentences in length. The grip of Langdellian conceptualism is firmly in place after but two years of tenure. The first ten questions directly relate to the nuances of the consideration doctrine while the last five questions attempt to ferret out the characteristics of dependent and independent conditions and promises. This is intended to be purely a doctrinal analysis void of any contextualism. The questions are those of a conceptualist interested only in testing the intricacies of a self-contained conceptual system. Essay questions taken from four law school sections (four different professors) given in January and May of 1996 show how contextualism now pervades legal education. One question involves the interpretation of a contract to clear trees for the purpose of constructing an electric transmission line. The fact pattern implicates the full range of contextual analysis, along with the duty of good faith performance and the duty to re-adjust. It references trade usage, custom, large variation in bid prices, and a variation of prior dealing evidence. It also implicates the meta-principle of good faith from both the promisor and promisee perspectives.

In another exam question, the meaning of the written words is once again at issue. The student is offered two types of contextual evidence—the pre-contract negotiations and industry custom. A review of the remaining exam questions shows one question expressly inviting the student to extend or distinguish *Jacob and Youngs v. Kent.* Two other questions deal with the issue of implied employment contracts and good faith discharge, and another one deals with the use of promissory estoppel to enforce an assurance given in connection with a trucking contract. All of the questions challenge the express terms of a written contract and invite a fuller contextual analysis.

368. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 803, n.43 (9th Cir. 1981).

369. *See id.*

its products.[370] The contract expressly granted the supplier the right to unilaterally post new prices without notice.[371] The contractor asserted that despite the express term it was a widely accepted trade custom to "price protect" contractor-purchasers under long-term supply contracts.[372] The District Court had set aside the jury verdict in favor of the contractor holding that the express contract was clear and unambiguous on the issue of price protection.[373] The Court of Appeals reversed and remanded holding that, despite the clarity of the express term in allowing ad hoc price increases, the jury was at liberty to construe the trade usage of price protection as consistent with the express term.[374]

The appellate court saw the trade usage of price protection, within the context of this particular contract, as overwhelming evidence of the true understanding of the parties.[375] However, the court was unwilling to completely ignore hierarchical contextualism. Instead of allowing the jury to find that the trade usage (context) trumped the operation of the express term,[376] it instructed that the jury be given authority to *construe* the contradictory express term as being consistent with the trade usage.[377]

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370. *Id.* at 777.

371. *Id.* at 778 (noting "Shell's Posted Price at time of delivery").

372. *Id.*

373. *Id.* at 777.

374. "Lastly we hold that, although the express price terms . . . may seem, a first glance, inconsistent with a trade usage . . . a jury could have reasonably construed price protection as consistent with the express term." *Id.* at 780.

375. *Id.* at 793 ("Nanakuli went beyond proof of a regular observance; there clearly was enough proof for a jury to find that the practice of price protection in the asphalt paving trade existed").

376. The *Nanakuli* court addressed an issue within the contextual analysis of how one defines a "trade" for purposes of applying the appropriate trade usage. A number of hypothetical cases can be used to flesh out this issue. In case one, suppose that price protection was a more unique feature of the asphalt supply industry in Hawaii than Hawaiian supply contracts in general. This finding would provide the strongest case for accepting a variant meaning than the one offered by a simple reading of the express term. The court held that under the Code "[a] party is always held to conduct generally observed by members of his chosen trade." Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 791 (9th Cir. 1981). Suppose instead that price protection was not common within the asphalt supply business, but was common in most (Hawaiian) long-term supply contracts in general. Section 1-205 (2) of the Code states that "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 court interpreted this to "mean that parties can be bound by a usage common to the *place* they are in business, even if it is not the usage of their particular trade." *Id.* The court, however, places an important limitation on "general" usage by holding that a party is held to such a usage "to the extent of his actual knowledge of these practices or to the degree his ignorance of those practices is not excusable." *Id.* It is clear, however, that whether a general business practice or a specific trade use, their meanings are a contextual undertaking.

377. The *Nanakuli* analysis involved a number of specific issues of contract

Nonetheless, the theory of full contextualism is espoused throughout the opinion:

> [T]he commercial context, which under the U.C.C. should form the background for viewing a particular contract. The full agreement must be examined in light of the close, almost symbiotic relations between [the contracting parties.][378]

> [C]ourts should not stand in the way of new commercial practices and usages by insisting on maintaining the narrow and inflexible *old rules of interpretation*. We seek the definition of trade usage not only in the express language of the Code but also in its *underlying purposes*, defining it liberally to fit the facts of the particular commercial context.[379]

The twin pillars of Llewellyn's theory of rule and contract interpretation are displayed in these two quotes. The first quote embraces the contextual-relational view of contracting. The second quote reflects the purposive interpretation of Code provisions envisioned in Llewellyn's notion of singing rules.

The *Nanakuli* court's embrace of full contextualism was not complete, however. The court asserted that a full contextual inquiry is mandated under the Code but then stepped back to assert a default rule borrowed from hierarchical contextualism, namely the priority of the written contract over contextual evidence.[380] Given the facts of the case, in which a trade practice better reflected the true understanding of the parties and yet was inconsistent with an express term in the contract, the court's implication that the jury still needed to read them as consistent is a salutation to a bygone era of contract interpretation symbolized in the

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interpretation. One such issue was whether two instances of price protection by the supplier constituted a course of performance or a waiver? If it is determined that the two subsequent instances of price protection were evidence of a course of performance, then the jury is free to use that evidence to "interpret" the express term of the contract or to find a modification of that term. If considered a waiver, then it may be considered as evidence that the parties construed the price term to not require price protection. In addition, a waiver does not modify an express term. For our purposes, the fact that subsequent acts, whether construed as course of performance or waiver, are admitted into evidence is a victory for contextualism. In fact, the court rejected the waiver argument and held that the subsequent conduct could be used as part of a full interpretive inquiry into the meaning of the express contract.

378. *Nanakuli Paving & Rock Co.*, 664 F.2d at 778.

379. *Id.* at 790.

380. *See id.* "Performance, usages, and prior dealings are important enough to be admitted *always*, even for a final and complete agreement." *Id.* at 795 (emphasis added). *See also*, Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); Michael Schiavone & Sons, Inc. v. Securally Co., 312 F.Supp. 801 (Conn. 1970). *Cf.* Southern Concrete Services, Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581 (N.D. Ga. 1975), *affirmed*, 569 F.2d 1154 (5th Cir. 1978) (unpublished opinion).

plain meaning rule. Any reasonable reading of the express term, price to be "Shell's Posted Price at time of delivery" precludes any duty to price protect. Yet the court holds that a jury could read the express term as being consistent with the trade usage of price protection. Despite the consistency mandate, the court's appeal to contextual evidence is a rejection of the plain meaning rule's embrace of *a priori* determinations of word meaning.

2. Importance to Contract Doctrine

The contextualist turn in contract interpretation, at least partially initiated by the Code, directly affected the doctrinal development of contract law. The increased use of contextual evidence made possible a situation-sense approach that produced a "bulking"[381] of facts resulting in changes in the law. This process and its impact on contract are topics for another article. Two areas of contract law, however, readily come to mind in this regard: pre-contractual liability and implied contracts. In the area of pre-contractual liability, the fine line between contract and non-contract has been increasingly blurred.[382]

The most wide-ranging effect of contextualism is the allowance of the entrance of a pre-contractual promise through the backdoor of contract interpretation. Evidence of promises made during the negotiation stage, formerly precluded by strict application of the plain meaning and parol evidence rules are now admitted as evidence to "clarify" the written contract.[383]

A contextualist approach also led to the expansion of implied contracting. Implied contracts expand the role of courts from simply enforcing express contractual obligations to implying contract rights and duties in fact (and ultimately those implied in law). It is generally accepted that certain contract rights evolve from societal recognition.

381. "[T]he emergence of a new interest will even by random selection result in bulking fact and emotional pressures repeatedly on a single side, and thereby result in appropriate change of law." *Case Law System*, *supra* note 61, at 251.

382. The expansion of contractual liability into pre-contract has not won its day but there are signs of movement. *See generally*, G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221 (1991); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969). The ability of promissory estoppel to affix liability for non-contractual promise represents the most aggressive foray into pre-contract. *See, e.g.*, Larry A. DiMatteo & Rene Sacasas, *Credit and Value Comfort Instruments: Crossing the Line from Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 BAYLOR L. REV. 357 (1995) (potential liability for representations made in informal business letters).

383. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 803 (9th Cir. 1981); *see also* discussion *infra* Part V.C.1.

The rights are then implied into the contractual relationship through either the implied-in-fact or the implied-in-law doctrines.[384]

The expansion of implied-in-fact contracts into the employment relationship illustrates the importance of contextualism. This intrusion into the employment-at-will doctrine was made possible through the expanded use of evidence, such as employee manuals, company policies, and orientation materials, leading to the "contractualization" of the employment relationship.

In a broader way, contextualism made possible the rise of reliance theory and the expansion of the good faith performance doctrine. As contractual liability increasingly began to hinge on the reasonable expectations of the promisee and not the plain meaning of the words of the promisor, contextual evidence became imperative in order to prove reasonable reliance. Good faith as embodied in the Code necessarily requires a contextual inquiry. Professor Patterson puts the issue succinctly: "Acting in good faith is not a self-defining term. A party acts in good faith relative to the agreement . . . [t]hus, one must first analyze the agreement of the parties."[385] The acontextual nature of classical contract law and its fixation on contract language retarded the evolution of a thicker conceptualization of good faith.

The application of a full contextual analysis to contract law interpretation resulted in the demise of the definiteness requirement (certainty of terms). This allowed for the expansion of implied contracts through the greater implication of terms. In the area where written contracts possess too few terms, classical contract law rendered such writings non-contracts. In order to make an enforceable contract, the parties had to demonstrate a definitive agreement on all material terms. Contextualism, as implemented by the Code, discards the definiteness requirement. Context can now be used to provide the definitiveness lacking in the written agreement. The use of custom, trade usage, and the doctrine of good faith to imply contract terms has enabled courts to find contracts where none would have been found under pre-Code classical contract law.[386]

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384. *See,* Julia Barnhart, *The Implied-in-Fact Contract Exception to At-Will Employment: A Call for Reform*, 45 U.C.L.A. L. REV. 817 (1998) (commenting on California court decision expanding doctrine to include not only wrongful termination, but employee demotions); Tammy Harris, *Employer and Employee—Employee Handbooks: Leveling the Playing Field?*, 33 LAND & WATER L. REV. 351(1998) (describing use of employee manuals in in-fact lawsuits).

385. *See* Patterson, *Of Llewellyn, Wittgenstein, supra* note 14, at 185.

386. *See generally*, Richard E. Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, WISC. L. REV. 822, 830 (1967). *See generally*, Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L.

The implication of terms through contextual evidence is true to Llewellyn's insight. First, commercial context provides the true understanding of the parties. This true understanding should be referenced in all cases of contract interpretation. When the written agreement fails to provide the necessary material terms, the commercial context is used to imply the needed terms. But, more importantly, commercial context is used to truly understand even written agreements that facially provide all material terms. Second, the importance of finding contractual intent is accentuated by the contextual approach. Under classical contract law, finding intent was collapsed into finding an apparent intent from a reading of the contract. Contextualism requires an inquiry into the background in search of the true intent of the parties.

VI. Dual Track Theory of Interpretation

Rule skepticism was one of the central tenets of the Realists critique of classical legal thought. Llewellyn was much more a centrist in this regard. He was a believer in the usefulness of properly drafted rules. In his view, rules that sang with patent reason and were open-textured enough to allow the law of society (commercial practice) to illuminate that reason overcame the shortcomings of the old abstract rules. An unpublished manuscript, *The Theory of Rules*,[387] provides insight into Llewellyn's view of the proper role of rules in the legal order. He rejected the ultimate precision of legal rules.[388] Instead, he attributed the goal of legal precision to the "ideology of formal logic" of abstract conceptualism. Llewellyn asserted that if a corrected ideology is implemented by stripping the dominate ideology of the formalism of logic and its goal of a logically precise legal structure, rules could be made to sing.[389] Although not a true believer in the transformative or critical power of law, he nonetheless saw a role for rules as guiding principles.[390] They could encourage the selection of the better options

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REV. 261 (1985) (notes two problems of implied or standard terms: an institutional bias against unconventional expressions and restraint on market forces that might encourage innovation). *See also*, LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 40-41 (1998) [hereinafter, DIMATTEO, CONTRACT THEORY].

387. "Rule of Thumb and Principle" in LLEWELLYN PAPERS, *supra* note 35, at 81 (Professor Twining estimates that it was written in the period 1938-40).

388. The demise of rule precision is endemic in the dynamic nature of modern society: "The pace of an industrial civilization, its ongoing regroupings of interest, people, and problem, have presented new states of fact too rapidly for knowledge to keep up with them." *Id.* at 83.

389. The rules of classical legal thought were detached from underlying purpose and policy. "A statute merely declaring a rule, with no purpose or objective, is nonsense." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

390. *See, e.g.*, COMMON LAW TRADITION, *supra* note 2. "Rules Are Not to Control,

available in commercial practice.[391]

For Llewellyn, the contextual nature of contract interpretation required the formulation of rules that allowed a free flow of context into rule application. These types of rules had two features. First, the rule itself had to provide guidance for its application to a wide variety of contexts, including unforeseen novel fact patterns. Associated with this notion of guidance, is a normative dimension often neglected in the view of Llewellyn's realism as *ought* is *is*. This normative dimension holds that proper rules can have a transformative impact on real world practice. In short, it allows a court to draw commercial practice from context and then to enforce good while rejecting bad practices. This feature is captured in Llewellyn's notion of the singing rule as it is through the reason behind the rule that a court is able to differentiate good and bad practice. Second, the rule had to be flexible enough to allow for its continuous reformulation (expansion and contraction) in order to allow it to be applied to contexts not foreseen at the time of its original formulation. This second feature is best captured in the open-ended, standard-like rules that pervade the Code. This part will examine the features of these types of rules that Llewellyn believed were needed to make the Code a truly living law.

A. The Singing Rule: Collapsing the Verticality of Principle to Rule

The rule that Llewellyn targets for criticism is what he calls the rule-of-thumb or paper rule. It is a rule cut off from its underlying rationale or purpose:

> For the nature of rule-of-thumb classification of cases—and it is the precise ascription of the raw case to its class, and so to its legal consequence, which is the heart of the matter—the nature of such classification is that problems of the *purpose* of the classification, the *reason* of the classification, the *use* or *value* of the classification, can be disregarded in using the rule because they have been solved and left behind.[392]

Furthermore, in a given fact situation there is likely to be opposing rules of thumb. Thus, functional rules need to supply something more than a rule of thumb. The opposite of the rule-of-thumb would be a singing rule, one that sings of its purpose, reason, and use. Llewellyn believed that the essence of rule formulation and application was "the search for

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but to Guide Decision. Where the rule rates high in wisdom and is technically clear and neat, the guidance is indeed so cogent as, in effect, to be almost equivalent to control. . . ." *Id.* at 179.

391. *See infra* Part VI.D.

392. *Id.* (emphasis in original).

purpose and the creative application of that purpose to the facts at hand."[393] This epistemological view that it is the purpose behind words that give them meaning fits into Llewellyn's overall contextual approach to statutory and contractual interpretation.

The contextualism inherent in contract interpretation placed stress upon the inherently rigid nature of rules. The varied contextual landscape required differentiation in rule application. The courts, in the grand style[394] tradition, are left the task of infusing contract rules with needed flexibility of application. Forcing courts to deal with the reasons behind rules or contracts required them to fit and justify their own rule applications. This process ameliorates the danger of a technically correct rule fit that nonetheless diverges from the ideal fit that the reason behind the rule would dictate. This is what Llewellyn saw as the difference between the *harsh* form of a rule and the rule of reason.[395] The differentiation in application requires a purposive analysis of both the rule and the contract. What purpose does a rule hope to achieve; what is the rationale for the rule?[396]

Llewellyn believed that good drafting, whether in statute or contract writing, made the patent reason for a clause or provision readily apparent to the reader. It is from this patent reason that an interpreter of the provision can glean its intended meaning. Biographer William Twining explains Llewellyn's view that "construction and application are

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393. John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 285 (2000) (argues that what is commonly describes as intent has always been a matter of convention).

394. "Llewellyn frequently spoke as though an optimum mode of legislative-judicial interaction would be for legislatures to articulate a policy preference in their statutes, and for courts to resolve situations according to the *reason* of the policy. This mode of decision-making he termed *the Grand Style* and praised it highly." Danzig, *Jurisprudence of the U.C.C.*, *supra* note 164, at 632 n.39. *See also,* John E. Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 2 (1981) ("Article 2 is singular in its emphasis upon purposive interpretation and construction"). Professor Corbin stated the matter of Grand Style contract interpretation succinctly:

> [A]t some point it becomes necessary for courts to look to substance rather than the form of the agreement, and to hold that substance controls over form. . . . What the are doing here, . . . is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" . . . it is recognizing that sometimes silence says more than words, and it is understanding its duty to the *spirit* of the bargain is higher than its duty to the technicality of the language.

3 ARTHUR CORBIN, CONTRACTS § 570 (rev. ed. 1960).

395. "[A] rule in its harshest form is applied in a recurring situation *which the harsh form of the rule happens to fit.*" COMMON LAW TRADITION, *supra* note 2, at 124 (emphasis in original).

396. *See generally*, Patterson, *Of Llewellyn, Wittgenstein*, *supra* note 14, at 190-91.

intellectually impossible except with reference to some reason and theory of purpose."[397] Llewellyn saw the idea of purposive interpretation in the grand style reasoning and it appealed to him. Purposive interpretation and grand style judging were necessary components of Llewellyn's overall theory of interpretation.[398] Llewellyn "wanted judges to understand the goals of the [Code], and to interpret and apply its provisions to carry out the law's purposes."[399] In this way, the application of Code rules could be made to *sing* with patent reason.[400]

B. Singing Rules and Contextualism

Llewellyn, although not named as such, defines the singing rule, as

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397. TWINING, REALIST MOVEMENT, *supra* note 6, at 321-22.

398. Llewellyn's belief in purposive interpretation guided his drafting of the Code. Comments to Section 1-102(2)(b) reflect Llewellyn's view of the importance of patent reason to a "semi-permanent" code:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make possible for the law embodied in this Act to be developed by the courts in light of unforeseen and new circumstances. . . .
>
> . . . The Text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.
>
> . . . The Code seeks to avoid . . . interference with evolutionary growth. . . .
>
> The principle of freedom of contract is subject to exceptions found elsewhere in the Act . . . [good faith, fair dealing, unconscionability]. . . . In this connection, Section 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

U.C.C. § 1-102(2)(b), Comments 1 & 2 (1990).

399. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 564 (2000).

400. Professor Gedid explains Llewellyn's theory of patent reason:

> In drafting the Code, Llewellyn continuously and consistently employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means. . . . The patent reason principle also assigns a definite role to the courts in interpreting and applying the open-ended principles of the Code. . . . The important point is that Llewellyn's understanding of the judicial process led him to draft language of principle and to use policy, purpose, and reason to convey meaning. Faced with that statutory architecture, courts should not and probably cannot avoid using policy and purpose in interpreting the Code. . . . Nor should courts automatically resort to the plain meaning of a statute or the dictionary meaning of a word.

John J. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 385-386 (1988). Llewellyn's belief that any semi-permanent code must incorporate patent reason was further evidenced in his drafting of the Comments to the Code provisions. They are a reservoir of the policy and purpose behind the Code provisions. The Comments were "clearly an integral part of the patent reason device incorporated into the Code." *Id.* at 383.

a rule that is the product of the drafting "technique of explicit principle."[401] It is a rule that articulates the reason for its existence and incorporates the reason onto its face. Such rules are attractive because of their "open-endedness," they are "free to meet new conditions with guidance; it presses [judges] toward resolving questions on new emergent facts along similar lines; it enables them, under the use and guidance of the rule itself, to solve such problems in a satisfying fashion."[402] In this way, the rules of law are true to their legal heritage while at the same time being re-worked to respond to an ever-changing social reality.[403] As a result, the judge and jury can balance the concerns for certainty and fairness.

The emergent fact patterns Llewellyn alluded to necessarily implicate the rule at its edges. Fact patterns that confront the rule at its core are dealt with summarily in Figure 3 ("solid lines"). The problem with rule-of-thumb and formalistic application is they do not provide a means to deal in a substantive way with cases at the edge. Because no leeway or adjustment is provided by the rule-of-thumb, the rule is applied in an all or nothing mode. In contrast, singing rules provide both the letter and spirit of its existence. It is from the spirit of the rule that solutions to cases at the edge can be substantively solved. The following excerpts from *The Theory of Rules* stress the importance of open-ended flexibility and clarity of reason:

> What I am trying to say is that when it comes down to cases, a rule is seen and felt as "clear" not in terms of verbal rule-of-thumb precision but in terms of a sense or intent or bearing or essence which the language does not state and *circumscribe* with precision but merely *indicates* with adequacy.[404]

> What we do have is an urge and practice, treating as "the rule" some line of *sense* to which the most authoritative formulation is but a guide.[405]

The best of singing rules possess both the quality of purpose and the quality of direction. Such a rule gives a "*direction* of such guidance from within the rule *to the purpose of the rule*."[406]

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401. LLEWELLYN PAPERS, *supra* note 35 at 86.

402. *Id.*

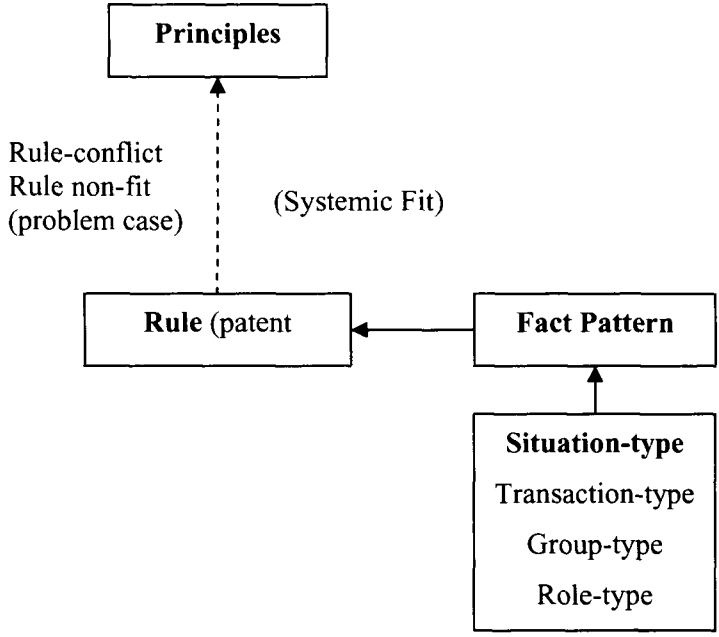
403. "[T]he better and best law is to be built on and out of what the past can offer; the quest consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow." COMMON LAW TRADITION, *supra* note 2, at 36.

404. LLEWELLYN PAPERS, *supra* note 35, at 91 (emphasis in original).

405. *Id.* at 94 (emphasis in original).

406. *Id.* at 95 (emphasis in original).

Figure 3
Dual Track Theory



Llewellyn explained that direction is found not only in the expansion of the rule or the principle behind the rule, but also in its contraction.[407] Further, the adjustment of rule to fit the case at the edge (problem or novel case[408]) requires a broadening of the purposive interpretation upward from the specific rule to the entire body of rules or area of law (shown in Figure 3, "dotted line"). The interpreter is called upon to formulate a rule adjustment that not only provides a proper fit for the specific rule, but also fits and justifies the rule application within the context of the entire body of law.[409]

For Llewellyn, rules are much like words in that they are non-

407. The reason for the rule may indeed dictate a "whittling or modification by way of principle." *Id.*

408. This is akin to Ronald Dworkin's concept of the *hard case*. *See*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

409. The concept of "fit" and "fit and justify" is taken from the works of Ronald Dworkin. *See generally*, RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985). This notion will be expanded upon in the next section.

notational in character. In *Case Law System in America*[410] he stated that, "[w]hat a word symbol signifies *can* extend beyond that which already occurred or [had] . . . been conceived of only in a normative sense, not in a descriptive sense."[411] The indeterminacy of words, and by necessity, the indeterminacy of legal rules, provide both limitation and opportunity. The rules have no meaning until infused with particular life experiences. Resulting flexibility of word meaning or context-driven meaning allows for, using Llewellyn's words, law's "immanent expansive capacity."[412] It is this capacity that allows "singing rules" to be fitted to novel fact patterns. Or in recognition of the symbiotic relationship between rule and fact, allows for the novel fact pattern to infuse the rule with meaning. The marriage of context with rule reason can best be explained by the dual track theory of interpretation discussed in the next section.

C. *Dual Track Theory of Interpretation*

The dual track theory[413] of rule-contract interpretation, anticipated in Llewellynian thought, incorporates a conceptual track and a contextual-factual track (see Figure 3). The contextual track connects the fact pattern of the case at bar with a given situation-type. In this way, the greater context is allowed to flow through the case and into the rule. The rule's application to a novel or problem case also requires an upward flow along the conceptual track. In the problem case, the rule reason does not provide sufficient guidance for a rule adjustment to fit the fact pattern. This situation can exist where there is a rule non-fit or rules conflict. In the former, there is no one rule that directly fits the case. There is a gap either in the Code or within the rule itself. In the case of rules conflict there are a number of rules that could conceivably fit the case. In both these cases the interpreter is required to review the Code or area of law in its entirety, including resort to the law's meta-principles[414] to develop a rule application or fit that is true to the law as a whole.

410. LLEWELLYN, CASE LAW SYSTEM, *supra* note 61.

411. *Id.* at 74, n.1 (emphasis in original).

412. *Id.* at 74. *See also,* DIMATTEO, CONTRACT THEORY, *supra* note 386, at 13.

413. I am not 100 percent sure whether this term is original or of my making. Llewellyn's term *doubled-barreled objectivity* relates to the different types of contextual inquiries but not to a conceptual and a contextual dichotomy. *See generally*, COMMON LAW TRADITION, *supra* note 2. In double-barreled objectivity the interpreter using the reasonable person standard first examines the conduct of the contracting parties through the prism of trade usage and custom. The second barrel is the determination of whether the parties intended a variant meaning than the one implied by usage and custom. *See generally*, Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S C. L. REV. 293, 329-331 (1997).

414. The Code's meta-principles include the duties of good faith, fair dealing, the doctrine of unconscionability, and the principle of commercial reasonableness.

The two tracks require multiple of contextual analysis in the infusing of meaning into contracts and contract rules. First, the meaning of a Code provision is to be determined before being applied to a contract dispute. The main focus of this contextual analysis is the reason for the Code provision. For Llewellyn, the reason or purpose for the drafting of a Code provision is not merely an historical analysis. The reason, although historically uncovered, is forward-looking and not confined to a temporal moment. The contextual meaning of a Code provision is not a bounded reason aimed at affecting a certain result to a particular reality. Rather, it is one of unbounded reason looking to respond to possible future realities. In a future context, the question becomes can the rule be extended to make a rule application comply with its underlying purpose? That underlying purpose or reason is found within the context of its writing and subsequently by the reasoned application of the rule over time. Second, the meaning of the contract being disputed must be infused with meaning. That meaning is also uncovered through a contextual analysis. Contextual analyses are used to infuse meaning into both the contract and the rule being applied. In this way, the rule is constantly refreshed with real world change.

In the area of rule meaning, two contexts are relevant: the context (purpose) for its creation and the context of the particular rule application. This is the dual track theory of interpretation. Track one is the initial formulation of rule meaning through an understanding of its purpose and that purpose within the entire system of contract rules and principles. The result is a search for meaning within the conceptual side of contract law. Track two involves understanding the meaning of the words of a contract to which the rule is to be applied through an enhanced contextual analysis. This enhanced contextual analysis or track is reflected in Llewellyn's notions of situation-sense and transaction-types.

A common understanding is that a court looks solely at the facts of the case at bar and simply applies a static rule of law to resolve a dispute. For Llewellyn, before any such rule application, the decision-maker is required to ascend a factual-contextual track. Before the application of rule to case, the decision-maker works up from the facts of the case to a situation. The situation-type includes a variety of variables, including: (1) The subject matter of the contract (*transaction-type*), such as type of goods, services, and property, and the characteristics of the transaction (long-term, discrete); (2) The type of person (*role-type*), such as merchant, consumer, minor, stranger, long-term supplier; and (3) The type of business, industry, profession (*group-type*). The examination of these broader contextual factors allows for the placement of the case within an evolving usage or custom and uncovers the *rule-in-the-facts*.

The rule-in-the-facts approach is made possible by open-textured rules that allow the contextual findings to be incorporated through flexible rule application. Thus, the rule is allowed to evolve in order to effectuate a reasonable rule fit to a new situation-sense or transaction-type.

D. Normative Side of Dual Track Interpretation: From "Ought as Is" to "What Might Be"

Llewellyn's allegiance to notions such as situation-type and the immanent law of business transactions characterize him as a believer of a ground up view of commercial law. Singing rules simply direct the judicial decision-maker to find the law of the case in the background or context of business dealings. The dual track theory of interpretation need not be so narrowly defined. In fact, Llewellyn's vision incorporates a two-way-street in which context impacts rules but at the same time, the purpose/principles behind the rules inform practice. His belief in patent reason worked at both the levels of rule and real world practice. The flow is in both directions from rule/principle to facts and from facts to rule/principle.

The contextualist turn to some extent has converged the *is* and *ought* of contract law into a dialectical relationship. Llewellynian hermeneutics has made the "is" of commercial practice into the "ought" of contract law. The reality-centered notions of situation-sense and full contextualism provide the narratives of contract law-in-action. It is in these narratives of commercial life where the meanings of contract rules are located. In the words of Professor Cover, "[o]nce understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[415] All legal and normative rules are found in the contextual narrative that supplies them "with history and destiny, beginning and end, explanation and purpose."[416] Thus, the reality of commercial life is the normative prism upon which law is modified or adjusted. In the case where the rules fail to reflect practice they cease being law from both is and ought perspectives.[417] For Llewellyn, contract law was best formed through open rules. Open rules allow for continuous adjustment to satisfy the normative reality.

The "ought as is" equation is not impervious to attack. A successful

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415. Robert M. Cover, *Foreward:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

416. *Id.*

417. "Each boring yields new evidence that our accepted formulations of the rules of law in the field of [c]ontract do not express the cases . . . the impression is, in a word, that large portions of currently accepted [c]ontract doctrine neither *are* law, nor *ought* to be law." *Rule of Law*, *supra* note 61, at 1268.

attacker would show that in fact a normative alternative exists beyond commercial reality. That, in fact, a choice is presented between the normative value of practice and an imagined alternative.[418] In this critique of real-world practice, the law or rules of contract act as a vision to what practice should be. In fact, Llewellyn's open and singing rules do provide a normative vision. The conversion of is to ought in contract rules represents but the first step in the normative function of contract law. It provides the interpretive meaning of the parties' agreement. The second step involves the issue of whether the court, through the meta-principles of contract or sales law, should convert the agreement into a legal contract. This is the second or normative step, the reconfiguration of the "is" to the "what might be."[419]

The key to a singing rule is to provide both the rule and the reason for the rule. The patent reason given for the rule is more than a guide for the judge applying the rule. It is a mandate for the judicial decision-maker to provide a reason for her particular application or interpretation of the rule. The language of a singing rule aims "to *elicit* the court's best judgment, in applying or in developing the principles stated; and as being apt language to elicit from a court a *statement of the reasons* which move it to read the act as it may read it."[420] Thus the rule informs the interpretation and the interpretation in turn replenishes the rule with real world application. It is in this way that the rules and principles of the law become self-revising. Each revision, as orchestrated by judicial application, is aimed at bringing the rules into accord with real world practice.[421]

418. Critical legal scholars have asserted the notion that structures of law foreclose alternative possibilities. *See generally*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIÉCLE*) (1997); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) (city as an essentially restricted entity and powerless versus alternative possibility: as a beacon of civic activism and virtue); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (management-labor relations set within the frame of employer domination versus an alternative possibility of a workplace where the true power rests with the workers).

419. "To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' [but] . . . the 'what might be.'" Cover, *Nomos and Narrative*, *supra* note 415, at 10. For another example of the merger of is and ought is what Professor Richard Parker refers to as "prescriptive-descriptive tenets." Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

420. Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 564 (1940).

421. "[B]ack into the life of the [persons] who live under it, in those particular spots in which the gears have come to lose their meshing, or to grind." *Id.*

VII. Conclusion

Contextualism's import in contract law is based on the belief that the creation of a written contract works to separate the text from the context of the writing. This metaphoric distance becomes pronounced as the writing travels through time from creation to contract dispute and ultimately, interpretation. The same is true in the distancing of legal rules from the creation of their text to the context of their application. As with contracts, the reification of practice into rule imbues real life into an artificial thing that will need to be interpreted in subsequent applications.

Llewellyn sought to provide the means of constantly decoding text or rule by opening the interpretative process to a continuous flow of context. By pushing the flow of context into contract, he hoped to diminish the distance between the rule and the context of its creation. The elimination of this dichotomy would serve both to uncover true contractual understanding and to keep his Code fresh and alive.

Ultimately, Llewellyn's immanent law provided that in every contract dispute it is the context that colors the pre-existing rule or Code provision. The core feature of realism was to look into the world and "see it fresh; see it as it works."[422] The negative version of this Realist' aphorism leads to conceptual nihilism. Conceptual nihilists view the actual workings of legal thought and judicial reasoning as revealing the emptiness of law's concepts.

The later Llewellyn was more optimistic. His extended aphorism attests to this belief in a workable conceptual system where "the fresh look is always the fresh hope."[423] The fresh look is both backward and forward-looking. It is through this duality that form and substance, regularity and fairness, and concept and context are turned from adversaries into dialectical partners. For Llewellyn this process required the infusion of context into the rules governing contracts. Through the dual track method of interpretation, rules could be saved from becoming the relics of abstract conceptualism. Instead, the law of contracts would be continuously updated through the use of contextual inquiry mandated by open-ended, singing rules.

422. LLEWELLYN PAPERS, *supra* note 35, at 16. Llewellyn spoke of the "neglected beauty of the obvious." *See* COMMON LAW TRADITION, *supra* note 2, at 339.

423. COMMON LAW TRADITION, *supra* note 2, at 510.