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Reviving the Realist Restatements and the Common Law Codes: Neil Cohen and the Grand Style

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REVIVING THE REALIST RESTATEMENTS AND THE COMMON LAW CODES: NEIL COHEN AND THE GRAND STYLE

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ABSTRACT

The "Second" Restatements and the Uniform Commercial Code have shaped the sensibility of lawyers and law students for the last half century. Both projects were anti-formal at their core, articulating pragmatic principles to guide judicial decision making without necessarily determining the outcome. Recent jurisprudence interpreting the Restatements, as well as efforts to update both sets of instruments, have taken a formalist turn. As examples, this essay will consider judicial interpretations of § 402A of the Restatement (Second) of Torts where internet platforms like Amazon are involved. Then it will consider the tortured and recently concluded experience in connection with the Restatement (Third) of Contracts – Consumer Contracts. Finally, it will offer an appreciation of Neil Cohen, the draftsman, and describe his crucial role in the most recent round of Restatements and UCC revisions.

INTRODUCTION

The "Second" Restatements and the Uniform Commercial Code (UCC) were mid-century reform projects that shaped the sensibility of lawyers and law students for the next half century. These harmonization efforts of the last century were instruments of a realist revolution. Corbin,[1] Braucher[2] and Farnsworth (both *ex officio*),[3] and Cardozo (*ex cathedra*)[4] remade Contract

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1. Arthur Corbin was a professor at Yale Law School and the author of the treatise, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contracts Law*, which first appeared in 1950. *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW (1950). He was a participant in the drafting of both the first and second restatements of contracts. His views influenced both the second restatement and the drafting of the UCC. Corbin's role in shaping a realist vision of contract law is described by Grant Gilmore in, *The Death of Contract* and *The Ages of American Law* (1977). *See generally,* GRANT GILMORE, THE DEATH OF CONTRACT (Ronald L. K. Collins ed., 2d. ed. 1974); GRANT GILMORE, THE AGES OF AMERICAN LAW (Yale University Press 1977).

2. Robert Braucher was the reporter of the Restatement (Second) of Contracts until 1971, when he joined the Supreme Judicial Court of Massachusetts. *Robert Braucher: Associate Justice Memorial*, MASS.GOV https://www.mass.gov/person/robert-braucher (last visited Oct. 31, 2022).

3. Edward Allan Farnsworth was a professor at Columbia Law School. *E. Allan Farnsworth*, WIKIPEDIA, https://en.wikipedia.org/wiki/E._Allan_Farnsworth (last updated Oct. 4, 2022). He succeeded Robert Braucher as reporter of the Restatement (Second) of Contracts in 1971. *Id.*

4. Benjamin Cardozo served as a justice of the New York Court of Appeals from 1914-1932. His opinions in such cases as Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921), Allegheny Coll. V. Nat'l Chautauqua Cnty. Bank, 246 N.Y. 369, 159 N.E. 173 (1927), influenced both the first and second Restatements of Contracts.

law. Prosser[5] and Cardozo (again) reconceptualized the law of Torts, while Llewellyn, Gilmore, and others codified the law of Sales and Secured Credit.[6] Both projects were anti-formal to the core, articulating principles to guide judicial decision making without necessarily determining the outcome.[7] Lewellyn's approach to drafting was described by Jean Braucher as seeking "precision of expression but not precision of policy."[8] This vision still informs, at least ostensibly, the now largely complete millennial revisions of the UCC and the ongoing "Third" Restatement project. In that regard, the "Revisions" and the "Thirds" have been described as correcting errors and excesses of the earlier efforts, while adapting to more modern commercial technologies.

Mid-century realism manifested in slightly different ways in the Restatements and the UCC. The realism of the Restatements was focused on judicial behavior;[9] the realism of the UCC used commercial practice as its reference text.[10] The Restatements of Torts and Contracts enlisted principles of risk allocation, reasonableness, and good faith, to allow courts to make contextualized decisions about behavior and guide parties' predictions about liability. The UCC situated reasonableness and good faith in the context of the commercial transactions of the time, informed by conversations with merchants, lenders, customers, and borrowers. The goal, however, was to articulate the norms of behavior to be followed by real people in real transactions.[11]

I am not the first to suggest that the recent revision and modernization efforts have been more than a little bit subversive of the realist vision that informed the Second Restatements and the common law Codes. But, as this

5. William Prosser was the author of the treatise *Prosser on Torts,* and the Reporter for the Restatement (Second) of Torts. *William Lloyd Prosser*, WIKIPEDIA, https://en.wikipedia.org/wiki/William_Lloyd_Prosser (last updated Jun. 14, 2022).

6. Karl Llewellyn was the leader of the Uniform Commercial Code project and the reporter for Article 2 of the UCC. Grant Gilmore was the Reporter for Article 9 of the UCC *Karl Llewellyn*, WIKIPEDIA, https://en.wikipedia.org/wiki/Karl_Llewellyn (last updated Jul. 26, 2022).

7. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 UNIV. COLO. L. REV. 541, 543 (2000).

8. Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1425 (2005) (describing Farnsworth).

9. While I characterize him later as a formalist (for his rule-based approach to the common law), the epigram, "The law is what judges do," can actually be traced all the way back to the proto-realist, Oliver Wendell Holmes. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

10. Karl Llewellyn justified the Uniform Commercial Code project as rationalizing and supporting commercial practice:

> All of this law is not only part of the law of a business community which reaches across state lines and which therefore falls into the field of what can properly be hoped to uniform, but it is also a body of law which today has an amount of experience behind it wide enough and strong enough to warrant the reduction of that law to statutory form.

Karl N. Llewellyn, *Why a Commercial Code*, 22 TENN. L. REV. 779, 779 (1953).

11. See section I, below.

symposium looks backward to chart a course forward, it is worth planting a "pin" as of 2022. The realists used commercial practice and the world around them as the benchmarks for their legal instruments. They were creatures of the American optimism of the post-WWII era.[12] Today, everything is in flux. Donald Trump has normalized types of commercial behavior that would have left the optimistic realists speechless. The coronavirus has destabilized many businesses. Crypto is (at least for the moment) crashing. Inflation is (at least for now) back, and we may be teetering on the brink of another European war. It should not be a surprise, therefore, that commercial law harmonization is in crisis as well. Can it be saved? Should it be saved? And what about Neil Cohen? Is he part of the problem, or is he the cure?[13]

My thesis today is that Jean Braucher's capsule description of Karl Llewellyn's drafting style is very much the lesson and prescription lived (so far) by Neil: "precision of expression but not precision of policy."[14] We will hear throughout this symposium about Neil as the consummate draftsman, as well as the consummate linguistic broker. This sounds neutral. It is not. But to explain why Neil is a powerful force for good, and not *just* a technician, requires a bit of unpacking – first of the realist vision, then of its rise, fall, and hopefully renewal. The short version is, that without Neil, it could have been a lot worse . . . .

This essay will proceed in four steps. First, it will sketch the contours of the realism embodied in the Restatements and UCC. Second, it will describe the formalist turn, both in the UCC, and in the Restatement revisions (the Thirds). Third, it will consider recent examples, looking first at the recent hyperformal judicial interpretations of the term "seller" as used in § 402A of the Restatement (Second) of Torts where internet platforms like Amazon, are involved, and second at the tortured and recently concluded drafting experience in connection with the Restatement (Third) of Contracts – Consumer Contracts. Finally, it will talk about Neil the draftsman and his role in the most recent round of Revisions.

I. REALISM IN THE RESTATEMENTS AND THE UNIFORM COMMERCIAL CODE

I am certainly not the first to point out the influence of mid-century legal realism on the Second Restatements of Contracts and Torts, and the UCC.

12. Llewellyn was inclined to give the participants in commercial transactions the benefit of the doubt, saying:

> I am willing to admit a certain amount of bad faith and stupidity on the part of anybody today, but I am reasonable and I don't think general standards ought to be drawn with the assumption that there is going to be unreasonableness.

Llewellyn, *Why a Commercial Code?*, *supra* note 10 at 782.

13. This essay is about law reform, but it is also about Neil Cohen. Neil has been a colleague and friend for over twenty years. I hope he will forgive me for addressing him by first name.

14. *See* Braucher, *supra* note 8, at 1425.

Grant Gilmore declared the Second Restatement of Contracts as the harbinger of the *Death of Contract*.[15] He tells the story of the victory of Corbin, Cardozo, and Farnsworth over the more formalist/classical approach to contracts taken by Holmes and Williston.[16] Gregg Maggs notes that the UCC was sometimes referred to as "Karl's Kode," a tribute to the realist, Karl Llewellyn, its principal drafter.[17] It is worth mentioning just a few examples here.

The Second Restatements and the UCC sought to embed the law in the "seamless web" of human relationships. Indeed, the Restatement (Second) of Contracts had a tort-like feel. It spoke of: (1) what behaviors could be reasonably expected in particular contexts; (2) how the law could channel and/or encourage appropriate commercial behavior; and (3) how the costs of harm should be allocated. Concepts of risk allocation, and the words "reasonable" and "good faith" appear often. Gilmore proclaimed the death of contracts,[18] but he was not mourning it. He was observing that it was taking its proper place in relation to torts, as regulating the harms associated with breach of promise in various types of relationships. Promissory estoppel is offered as the classic example: a form of "contractual" liability that could easily be recast as a tort of negligent promising.[19] But there are other examples that appear both in the Second Restatements and the UCC, including the recognition that doctrines like mistake, impossibility, and frustration should be governed by principles of risk allocation.[20]

Perhaps the most "realist" aspects of both the Second Restatement of Contracts and Article 2 of the UCC are (1) the concept of "usage" or "practical construction;"[21] (2) their rejection of the "four corners" approach to the parol evidence rule; and (3) their treatment of boilerplate.

With regard to interpretation, both the Restatement and the UCC liberalized the circumstances under which extrinsic evidence could be introduced to interpret or supplement a deal. The Second Restatement provided that the scope of contractual obligation would be affected by "usage"[22] and "course of performance."[23] Article 2 of the UCC invoked "practical construction" in § 2-208 (now embodied in § 1-303). That section explained that contracts should be interpreted first in light of the terms, but also with reference to "course of performance," "course of dealing," and

15. GILMORE, THE DEATH OF CONTRACT, *supra* note 1.

16. *Id.*

17. Maggs, *supra* note 7, at 541.

18. GILMORE, THE DEATH OF CONTRACT, *supra* note 1.

19. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981).

20. RESTATEMENT (SECOND) OF CONTRACTS §§ 151–154, 261, 265 (AM. L. INST. 1981); UCC § 2-615 (AM. L. INST. & UNIF. L. COMM'N 1977).

21. RESTATEMENT (SECOND) OF CONTRACTS §§ 219–223 (AM. L. INST. 1981); UCC § 2-208 (AM. L. INST. & UNIF. L. COMM'N 1977).

22. *Id.* at § 220.

23. *Id.* at § 202(4).

"usage of trade."[24] This pragmatic approach to contract interpretation made it difficult to exclude extrinsic evidence from consideration.

Consistent with this view, both the Restatement of Contracts and the UCC limited the effect of the parol evidence rule.[25] The Second Restatement's parol evidence rule moved beyond the four corners of the contract, to allow parties to prove both incompleteness and ambiguity with extrinsic evidence.[26] Section 2-202 went further, always allowing express terms to be "explained or supplemented" by "course of dealing or usage of trade or by course of performance."[27] In sum, both the Restatement and Article 2 of the UCC envisioned a contract not limited by its written terms. Both instruments paid lip service to the primacy of contractual text. However, both gave the judge, in the first instance, and ultimately the fact finder, the power to override the text where it was inconsistent with the demonstrated understandings of the parties.

This was nowhere more evident than in the Restatement's treatment of standardized contracts and the treatment of conflicting forms under the UCC. Both the Restatement and UCC drafters (Llewellyn and Farnsworth) recognized that standard forms were not generally read. Each instrument, however, addressed a slightly different boilerplate problem. Restatement § 211 dealt with the problem of the single form, drafted by a repeat player, and adopted, without negotiation, by a consumer or other customer. Section 2-211(3) states:

> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.[28]

Comments (b) and (c) note that the contracts are not expected to be read.[29] As such, where assent to certain terms cannot be reasonably inferred from assent to the transaction, they would not be treated as part of the "deal." UCC § 2-207 addressed conflicting boilerplate. What would happen if the boilerplate in two standard forms disagreed? The answer reached by Article 2 was straightforward. Where terms conflicted, the parties could not be said

24. *Id.* at § 2-208. It should be noted that the revision to Article 1 of the UCC called for the deletion of § 2-208, as the substance was also contained in new § 1-303. The words "practical construction" now appear nowhere in the statute. On the one hand, this is not a "substantive" change. Since the term was in a section title, rather than in the language of the text. However, to the extent that the concept of "practical construction" suggested an approach to interpretation, this may be offered as evidence of the shift in approach I have described.

25. RESTATEMENT (SECOND) OF CONTRACTS §§ 209–212 (AM. L. INST. 1981); UCC § 2-202 (AM. L. INST. & UNIF. L. COMM'N 1977).

26. RESTATEMENT (SECOND) OF CONTRACTS §§ 209–212 (AM. L. INST. 1981).

27. UCC § 2-202 (AM. L. INST. & UNIF. L. COMM'N 1977).

28. RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981).

29. *Id.*

to have agreed to them. Accordingly, the conflicting terms would drop out.[30] Further, UCC § 2-202 limited an "integration" to terms on which both forms agreed. Therefore, extrinsic evidence should always be admissible to prove or disprove assent to any term that did not appear in both forms. Both Restatement § 211 and UCC § 2-207 reflected a realist's understanding of assent. Terms are not binding unless there is a reasonable basis for finding that they have actually been agreed to.

Without offering a complete inventory, two further examples of mid-century realism can be found in the Second Restatement of Torts and Article 9 of the UCC. Section 402A of the Second Restatement of Torts famously codified the tort of strict liability for defective products. As Friedrich Kessler noted, the adoption of § 402A reflected an explicit recognition that the law of torts was moving in to correct the formal obstacles to warranty liability that existed in the law of contracts.[31] To do this, it eliminated various procedural obstacles to warranty liability like notice and disclaimer, and made any person who sold the product liable if the product proved defective. Further, it addressed the emergence of standardized consumer products sold along a long supply chain by eliminating the requirement of privity.[32] To offer a final example, even Article 9 of the UCC, generally understood to be the most "prescriptive" of the UCC articles, embraces substance over form in its definition of "security interest." Section 1-201(37) (now §1-201(35)) united a congeries of "title retention" devices into the single unitary "security interest."[33] Further, Article 9 enlisted the concept of "commercial reasonableness" as the measure of a conforming foreclosure on collateral.[34] Indeed, later, Grant Gilmore (the principal drafter of Article 9) later bemoaned the excesses of their realism in his comments on the scope of the purchaser protections granted to the secured creditor.[35]

II. COMMERCIAL CERTAINTY AND THE REVISIONS

The mid-century Restatements and Model Laws shared a principles-based approach to drafting, highlighted and discussed in Stephen Sepinuck's contribution to this symposium. The next wave of Restatements and

30. As virtually every law student in the last half century has recognized, § 2-207 was not a model of drafting clarity, due in large part to the confusion introduced by the "merchants' exception" of § 2-207(2). The result has been thousands, if not millions, of § 2-207 flowcharts. The result has been confusion about the enforceability of boilerplate, particularly in consumer transactions. Compare Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) with Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643 (3rd Cir. 1990) and Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000).

31. Friedrich Kessler, *Products Liability,* 76 YALE L.J. 887, 900 (1967).

32. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

33. UCC § 1-201(37) (AM. L. INST. & UNIF. L. COMM'N 1963) (now §1-201(35)). *See also,* Edward J. Janger, *The Death of Secured Lending,* 25 CARDOZO L. REV. 1759, 1762–63 (2003).

34. U.C.C § 9-610(b) (AM. L. INST. & UNIF. L. COMM'N 1977).

35. Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 620 (1980).

Revisions, by contrast, lean in the opposite direction, ostensibly updating, but also reflecting a subtle change in approach – from articulating general principles that reflected commercial reality to providing specific answers in search of commercial certainty.

In the 2000 revision to Article 9, the definition of "accounts" went from simple – "a right to payment arising from goods sold or services rendered, whether or not earned by performance" – to complex.[36] The revised definition, on the one hand, expanded "accounts" to cover sales of real estate, but also closed loophole after loophole, going from a few sentences to several long and convoluted paragraphs, to remove any uncertainty as to what collateral might be covered.[37] The same can be said of the definition of "proceeds," which grew from a few sentences to multiple paragraphs, as subparts were added to reverse decisions that were thought to be wrong.[38] Other examples include the narrowing of the definition of "defect" in the Restatement (Third) of Torts: Product Liability.[39]

The most interesting examples, though, can be found in the recent history of the Restatement of Consumer Contracts, and the failed attempts to revise Article 2 of the UCC. Both demonstrate that the mid-century form of realism is under attack.[40] Participants in this symposium are all, I think, familiar with the story of how Dick Speidel and Linda Rusch prepared an ambitious revision of Article 2 that clarified the approach to boilerplate, embraced reasonable expectations as a limit, and incorporated consumer protection provisions. That version was not approved by the Uniform Law Commission (then the National Conference of Commissioners on Uniform State Laws), and the reporters resigned.[41] A new reporter, Henry Gabriel, was named, and a more modest revision was approved, but even that version received no adoptions, and was ultimately withdrawn. At least part of the reason for its non-adoption was concern by business interests that it would clarify the

36. UCC § 9-102(2) (AM. L. INST. & UNIF. L. COMM'N 1977).

37. *Id.*

38. UCC § 9-102(64) (AM. L. INST. & UNIF. L. COMM'N 1977). For example, § 9-102(64)(B) was adopted specifically to reverse *Hastie v. FDIC*, 2 F.3d 1042 (10th Cir 1993). That decision held that stock dividends declared after the debtor had filed for bankruptcy were not proceeds. *See Revision of Uniform Commercial Code Article 9 – Secured Transactions*, THE AM. L. INST. (Jul. 24, 1998), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=dda1c586-28e2-9a84-f0e5-5cafb3eb6f10&forceDialog=1.

39. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 (1998) (a design is "[defective] when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe"). Michael J. Toke, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J. L. & PUB. POL'Y 239, 244 (1996).

40. The initial draft of this essay said, "in decline." But that relied on the view that the Restatement of Consumer Contracts was on its death bed. As discussed below, events belied that prediction.

41. Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 790–91 (2001).

tenuous state of boilerplate in contracts of adhesion and undercut commercial certainty.[42]

The explanation here is a bit convoluted as to why this was evidence of an anti-realist counterrevolution. The point is that the Speidel version of the UCC embraced the realist roots of Article 2, imposing, for example, a reasonableness limitation on boilerplate. Both the Speidel draft and the final version of Revised Article 2 contained revisions to the provisions relating to the battle of the forms. That version reinforced the idea of fidelity to the underlying deal by codifying the so-called "knockout rule." That rule renders unenforceable any standardized terms not included in both exchanged forms or otherwise agreed to. As Bill Henning has pointed out, those features foretold its doom.[43]

III. PRODUCT LIABILITY AND BOILERPLATE CONTRACTS

The drafting process is not the only place where the "realism" of the UCC and the Restatements have been challenged. Judges and law professors have done their bit to impose formalism where they can. Recent cases under § 402A of the Second Restatement of Torts have used a hyperformal approach to the term "seller" to limit the applicability of strict products liability as it applies to internet platforms. Judges have done the same thing with regard to interpretation of boilerplate in consumer contracts, and that has in turn fed back into the Restatement drafting process.

A. PRODUCT LIABILITY

The retreat to formalism and commercial certainty can be observed in the context of product liability and warranty, as judges have allowed formal transaction structures to override the contract and tort principles that should otherwise govern. § 402(a) of the Restatement (Second) of Torts provides:

> § 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer
>
> > (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> >
> > (a) the seller is engaged in the business of selling such a product, and
> >
> > (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

42. William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L. J. 131, 137 (2009) ("The reconstituted drafting committee found itself in a box. It had to deal with all the hot-button issues that had plagued the prior committee").

43. *Id.*

Amazon has sought to insulate itself from product liability in tort under § 402A of the Restatement by arguing that it is not a "seller" because it never takes formal title to the goods sold over its website.[44] William Prosser, the Reporter of the Second Restatement of Torts, was both a realist and a functionalist.[45] The term "seller" was adopted in § 402(a) to reject the requirement of contractual privity, and to expand the scope of liability for the sale of defective products beyond the manufacturer.[46] Both the Second and Third Restatement of Torts make clear that liability should apply to any person in the distribution chain.[47] Nonetheless, courts, with a few exceptions, have bought into Amazon's formal reliance on lack of title as a defense.[48]

B. CONSUMER CONTRACTS

The discussion of boilerplate above shows that the UCC and the Second Restatement took the concept of assent seriously in consumer contracts. The UCC defines an "agreement" as "the bargain of the parties in fact."[49] Interpretation starts with text but is not limited to it. Judges have frequently missed this point. Cases like *Hill v. Gateway* (and *Pro-CD* on the common law side) manufacture assent to boilerplate terms from assent to the transaction.[50]

The story of the Consumer Contracts Restatement begins with this judicial confusion, and the Restatement process it generated. The first draft of this essay had a different title. It was called (before the colon), "The Death of the Realist Restatements and the Common Law Codes." The essay's alarm, with regard to the Restatement process, was based on the initial trajectory of the proposed Restatement (Third) of Contracts – Consumer Contracts. The early versions of that Restatement relied on a fictionalized account of assent to presumptively enforce boilerplate terms and contained a

44. Edward J. Janger & Aaron Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 272 (2019). *See also*, Edward J. Janger & Aaron D. Twerski, *Warranty, Product Liability and Transaction Structure: The Problem Of Amazon*, 15 BROOK. J. CORP. FIN. & COM. L. 49, 50 (2020).

45. Arthur Ripstein, *Theories of the Common Law of Torts*, THE STAN. ENCYCLOPEDIA OF PHIL. (June 2, 2022), https://plato.stanford.edu/entries/tort-theories/ ("The rise of functionalism in tort theory interacted with the rise of legal realism with its more general skepticism about the ability of legal rules to generate determinate . . . . Some realist-inspired writers suggested that the function of tort law was to achieve both deterrence and compensation; others emphasized one or the other of these goals (Prosser 1941)").

46. William L. Prosser, *The Fall of the Citadel* (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966).

47. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 1 (1998). Section 1 of the Restatement of Product liability provides: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."

48. *See, e.g.* Amazon.com, Inc. v. McMillan, 625 S.W.3d 101, 108 (Tex. 2016).

49. UCC §1-201(3).

50. Hill v. Gateway 2000, 105 F.3d 1147, 1149 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

version of unconscionability that focused on process rather than substance. The story that emerges from this year's annual meeting, and the version of the Restatement that was ultimately approved, gives more reason for hope. It manifests the tension between transactional realism and the formalist search for commercial certainty, but it also highlights the resilience of the Restatement process. I had to change the title.

Consumer contracts crystalize the tension inherent in the law of contracts between liability based on assent, and the contractual focus on text. Where transactions are fully lawyered, it makes sense to impose a duty to read. Parties can be presumed to review the contracts they sign, either themselves, or because they are reviewed by counsel. Assent to the terms can be inferred from assent to the transaction – by signing on the dotted line. Where consumer contracts are involved, this assumption breaks down in myriad ways. First, many consumer contracts are accompanied by mountains of boilerplate on the top of the box, inserted in shrink wrap, or hidden behind the words "terms of service." Regardless of the medium, it is universally understood that consumers do not read the terms of the contracts that they ostensibly agree to when they purchase goods or services. Further, the manifestation of assent may be obscured. Boilerplate may appear on the back of a ticket.[51] Or, it may be incorporated by reference when the consumer clicks "submit." In larger consumer contracts like mortgages or other consumer finance transactions, the act of assenting may be serious and understood, but the terms and even the structure of the transaction may be beyond the comprehension of the consumer.

The Reporters of the Restatement of Consumer Contracts acknowledged throughout the project, that the assumption of reading was a fiction, saying:

> As the length and incidence of standard-form contracts grew, it became less plausible to expect consumers to read the disclosed terms, and more sensible to permit formation processes that do not rely on consumer readership . . . [B]ecause consumers simply do not read the disclosed terms, the "opportunity to read" technique has been losing much of its attraction . . .[52]

They were faced with a stark choice about how to respond: (1) enforce written terms, while recognizing that they were not based on meaningful assent, and then subjecting those terms to some degree of *ex post* review; or (2) rely exclusively on default terms and usage.[53]

The approach the drafters originally chose was described as a "grand bargain," under which assent to boilerplate terms would be presumed, subject to *ex post* review. While this approach has a logical structure, the balance struck in the early drafts of the Restatement leaned strongly toward enforcing

51. Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585, 587 (1991).

52. RESTATEMENT (THIRD) OF CONTRACTS (Reporters' Note) (Preliminary Draft Number 2 October 20, 2015) at 3.

53. *Id.*

purely formal assent to boilerplate terms. As the Reporters put it, "[C]onsumer-contract law entails fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going too far."[54] The centerpieces of this bargain were a broad and permissive view of "assent," contained in § 2 of the proposed Restatement, and a process focused definition of "unconscionability," contained in § 5. Section 5 required both procedural *and* substantive unconscionability and measured procedural unconscionability through the concept of market "salience." The result of these two terms, taken together, would have resulted in a broad validation of consumer boilerplate, subject to a high standard for *ex post* review. This so called "bargain" was widely criticized, particularly because consumers have very limited access to the costly judicial process to remedy small dollar complaints.

Particularly troubling about the fledgling Consumer Contracts Restatement was that it took a more favorable view of boilerplate than either the Second Restatement of Contracts or the UCC. As discussed above, under § 211 of the Second Restatement surprising terms contained in boilerplate are not part of the agreement, and under § 2-207 of the UCC, conflicting or unintegrated contract terms fall away. Revised § 207 would have confirmed this view. Nonetheless, the definition of assent in early drafts of the new Restatement would have made boilerplate terms presumptively enforceable, subject only to the limited defense of unconscionability.[55]

The initial responses to the Reporters' drafts were not favorable.[56] Concerns were raised about the reporters' methodology, about whether the law was ripe for codification, about the accuracy of the draft as a restatement, and about the inconsistency between rules as stated in the UCC that might create confusion.[57] The overarching criticism was that the draft leaned too far in favor of a willingness to incorporate boilerplate terms in service of commercial certainty.

But then, something remarkable happened. When the next version of the Restatement was presented to the membership of the American Law Institute in 2022, the nature of the "grand bargain" had shifted. The Reporters Introduction invoked Llewellyn but with a different feel:

> Llewellyn recognized that the manifestation of assent to a consumer contract often results also in the adoption of standard contract terms even if the vast majority of consumers are not meaningfully informed of the content of those terms. This recognition has become all the more relevant and

54. *Id.*

55. RESTATEMENT (THIRD) OF CONTRACTS § 2, 7 (AM. L. INST., Tentative Draft Apr. 18, 2019).

56. Adam J. Levitin, Nancy Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 69 YALE J. ON REG. 447, 452 (2019).

57. *Id.*

> concerning in the digital era, when businesses can draft longer lists of terms and attempt to incorporate them into the transaction more often. Llewellyn recognized that common-law courts enforce the standard contract terms only if they "do not alter or eviscerate the reasonable meaning of the dickered terms."[58]

Prior to the annual meeting in May of 2022, the draft itself took a functional turn. Words like "reasonableness" were added in various places.[59] The definition of unconscionability was fleshed out to specify that procedural and substantive unconscionability were factors that could each independently form the basis for a finding of unconscionability.[60] Further, the concepts of procedural and substantive unconscionability were made more concrete and meaningful through the addition of examples in § 5(c).[61] Each of these improvements constituted a nod toward the realities of consumer contracting. In particular, § 5(d) encouraged the court to acknowledge the realities of consumer contracting, stating:

> A contract term is procedurally unconscionable if a reasonable consumer in the circumstances is not aware of the term or does not understand or appreciate the implications of the term, and as a result does not meaningfully account for the term in making the contracting decision. Factors relevant to making such a determination include:
>
> (1) the legal and financial sophistication of a consumer who enters into such transactions;
>
> (2) the complexity of the term or of the agreement as a whole;
>
> (3) pressure tactics and manipulation employed by the business in soliciting the consumer's assent; and
>
> (4) the process by which the term was introduced.[62]

So, by the time the new draft made it to the 2022 annual meeting, it was already much improved – at least on the realism axis.

But the process was not done. Two additions were added at the annual meeting – one with the acquiescence of the reporters and one over their objection. Most importantly, the term "reasonableness" was given a definition.[63] Reasonableness is now to be measured by the "totality of the circumstances," in light of "the ordinary behavior and perspective of

58. RESTATEMENT OF THE LAW -- CONSUMER CONTRACTS 6 (AM. L. INST., Tentative Draft No. 2 April 2022) (citing Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960) (available at https://www.ali.org/projects/show/consumer-contracts/#_drafts).

59. RESTATEMENT OF THE LAW -- CONSUMER CONTRACTS § 2, 5 (AM. L. INST., Tentative Draft No. 2 April 2022).

60. *Id.* at § 5(b).

61. *Id.* at § 5(c).

62. *Id.* at § 5(d).

63. RESTATEMENT OF THE LAW -- CONSUMER CONTRACTS § 1(a)(8) (AM. L. INST., Tentative Draft No. 2 June 2022).

consumers engaged in the transaction."[64] Given what we now know about the likelihood that adhesive boilerplate will be read, it is hard to imagine that any boilerplate, other than that intrinsic to the transaction, would be deemed assented to. Finally, a motion from the floor describing: (1) a non-waivable duty of good faith and fair dealing in the consumer contract; and (2) interpretation of consumer contracts in light of reasonable expectations and against the drafter.[65] With these changes, the latest Restatement was adopted.[66]

As noted above, the original outline for this essay listed the Consumer Contracts Restatement as marking the death knell for realism in Restatements. What started out as a draft strongly influenced by assumptions about rational markets and behavior ended up moderating over time and now reflects the realities of consumer product markets, as well as the realities of consumer transactions. It is difficult to tell, at this writing, whether this is the beginning of a promising trend, or a one-time occurrence. Formalism and functionalism are the yin and yang of both the common law and uniform law drafting. The late developments in connection with the Restatement of Consumer Contracts suggest hope for a return to restatements that facilitate Karl Llewellyn's "Grand Style" of deciding common law appeals (and drafting common law codes).

The grand style, according to Llewellyn, required the judge to consider not just prior precedents, but also the realities of the particular case and the transactional context, to go beyond the formal application of precedent and instead apply "sense," "wisdom," and "reason" to the case at hand.[67] The additions to the Restatement of Consumer Contracts permit judges to consider the realities of consumer behavior, the purposes and exigencies of consumer transactions, and the inequalities of power inherent in contracts of adhesion.

The point of this essay, so far, is to show that the recent Revisions and Third Restatements have been characterized by pressure to backtrack on the more open ended "realist" nature of the mid-century versions in favor of predictability and certainty. These efforts have not always been successful, and my sense is that Neil has played an important part in retaining the integrity of the instruments. More about that in the next section.

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64. *Id.*

65. *Id.* at § 4.

66. At the close of the June 2022 Annual Meeting, Tentative Draft was approved, subject to the addition of a new section 4, and pursuant to a Boskey Motion to make the other changes described at the meeting. These changes are reflected in Revised Tentative Draft No. 2 (June 2022). *Id.* at xiii-xv.

67. KARL LLEWELLYN, THE COMMON LAW TRADITION – DECIDING APPEALS 60 (1960).

IV. NEIL

So what does all of this have to do with Neil? The answer is that Neil's role in this story presents a puzzle. For anybody who has watched Neil perform in a law reform process, it does not take long to identify Neil's two superpowers. First, he is the consummate draftsman. He writes with precision and care; he is a master at reducing a negotiated agreement to text. Second, he also works with very little ego. One is hard pressed to figure out what Neil thinks. He works in service of the document. It would be tempting to see Neil, through that lens, as a servant of the counterrevolution. Incrementally drafting away Llewellyn's calculated indeterminacy. This would be deeply unfair. A richer picture of Neil's important and constructive role emerges from his role in the Revision of Article 9 of the UCC.

Consumer protection was a hot topic in the UCC Revisions well before it surfaced in connection with the Consumer Contracts Restatement. Ed Rubin and others bemoaned the failure of the UCC Revisions to consider the interest of consumers as they updated those statutes.[68] Famously, Article 9 of the UCC revision nearly foundered on the shoals of consumer protection. Consumer advocates were successful at having numerous consumer borrower protections incorporated into early drafts of revised Article 9 of the UCC. These included the "absolute bar rule," which would deprive consumer lenders of their deficiency if their foreclosure did not comply with Article 9 of the UCC's requirements, as well as consumer protective rules regarding strict foreclosure. The result was that the consumer lenders revolted and withdrew from the project. On the one hand, the success of consumer advocates might be applauded. However, without buy-in from the consumer credit industry, the project was a dead letter.

Enter Neil – tasked with mediating the dispute. Others at this symposium were present for this negotiation. I was not. I only know what emerged – a peace treaty, and Neil's typically self-effacing description of how the deal was struck. To hear Neil describe it, his method was simple – to get each side of the conversation to explain their concern – not in drafting terms, but in functional ones. What was the abuse that concerned them? What was the change in the law that they feared? The deal Neil brokered was simple in principle. The parties agreed to a reciprocal principle of "do no harm." Assure that the revised Article did not make things better or worse for either side. The content of the deal was simple. Implementing it was not. The revision was a moving target. Putting things "back the way they were" was anything

68. Edward L. Rubin, *Efficiency, Equity and the Proposed Revisions of Articles 3 and 4*, 42 ALA. L REV. 551, 557 (1991); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 Loy. L.A. L. REV. 743 (1993), (available at: https://digitalcommons.lmu.edu/llr/vol26/iss3/18); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 103-105 (1993); Robert E. Scott, The Politics of Article 9, 80 VA. L REV. 1783, 1822-47 (1994).

but simple – especially in an environment of distrust. To get there without going into excruciating detail required all of Neil's diplomatic and drafting skills. Without them, we would not now have a revised Article 9 of the UCC adopted in all 50 states.[69]

A second example of Neil's drafting prowess can be seen through his role as a reporter of Article 1 of the UCC. One of the most important and frustrating provisions of old Article 1 was § 1-201(37), the definition of a security interest. On the one hand, that provision defined what a security interest was – "an interest in property that secured an obligation." But it also contained language that policed the boundaries between true sales and sales intended as security, as well as true leases and leases intended as security. The task assigned to Neil was to straighten out the mess without disturbing commercial lending patterns. The results (new § 1-201(35) and § 1-203) were again quintessential Neil – elegantly clarifying without changing the substance.

It is this skill that makes Neil the consummate drafter for a statutory harmonization effort. Statutory harmonization requires consensus. Consensus sometimes minimizes the scope of what can be done. This can be frustrating but knowing the bounds of the possible is an essential skill.

The signs of Neil were decidedly absent from the Consumer Contracts Restatement. Reporters with a vision bumped hard into consumer advocates with a competing vision. Substance was changed, on the floor, sometimes over the objection of the Reporters. This is not necessarily a flaw. As I described above, in my view, the ultimate product was improved by the debate. But it reflects a difference between restatement projects and Uniform Law projects. They are different institutions. There is more room for dispute and disagreement in a restatement project than in a statutory reform project. But even in restatement projects, there is a need for an honest broker and a trusted scribe, capable of "precision of expression but not precision of policy," in short, for Neil.

69. These events are described in Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 572 n. 9, 613 (1998).