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HARPOONING WHALES, OF WHICH KARL N. LLEWELLYN IS THE HERO OF THE PIECE; OR SEARCHING FOR MORE EXPANSION JOINTS IN KARL'S CRUMBLING CATHEDRAL*

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To The Courts: [You] must . . . take the music of any statute as written by the legislature; [you] must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and [your] duty is to play it well, and in harmony with the other music of the legal system.¹

Although it has been effective in many states for only a few years, the Uniform Commercial Code² (U.C.C.) is being attacked with increasing frequency. Charges are made of bias against consumers and of favoritism toward merchants,³ and angry rhetoric often erupts in classrooms from new law students, highly sensitive to the injustice and business bias they perceive in the Code.⁴ Indeed, the official de-

* As to whales, see *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), discussed *infra*. As to cathedrals, see the extended metaphor in Llewellyn, *On the Good, the True, the Beautiful*, in *Law*, 9 U. Chi. L. Rev. 224, 230-34 (1942).

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¹ 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, 399 (1950), citing Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947).

² All citations to the Uniform Commercial Code in this article will be to the 1962 Official Text unless otherwise indicated.

³ Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U.L. Rev. 433, 442 (1969).

⁴ Typical of Code provisions which evoke such reactions are §§ 3-302 and 3-305

scription of the informal consultants who advised the draftsman of the Code would discourage the most sanguine consumer advocate:

In this latter class were included practicing lawyers, hard-headed businessmen and operating bankers, who contributed generously of their time and knowledge so that, not only current business practice, but foreseeable future developments would be covered.⁵

General assertions to the effect that the Uniform Commercial Code was an experiment in democracy in legislative drafting apparently ignore the fact that the drafters comprised a virtually homogeneous "democratic group" of businessmen, bankers and their lawyers.⁶ Gilmore's commentary concerning the drafting history of Article Nine (including the elimination of the chapter on Consumer Financing from the final draft), recounts that discussions of possible consumer protection provisions "led to violent controversy,"⁷ and that ultimately the Commissioners decided to take no position on consumer protection,⁸ thus leaving this entire area of regulation to the courts and the legislatures of the various states.

Taking no position on these questions, however, involved, in actuality, taking a quite definite position adverse to consumer interests.

which set forth the "holder in due course" doctrine, often invoked to preclude consumer defenses arising out of a transaction which gives rise to a negotiable instrument. Others include § 2-718(2)(b), which, in the absence of a contrary agreement, limits restitution of a defaulting buyer's equity in goods being purchased to 20% of the "value of total performance for which the buyer is obligated under the contract or \$500, whichever is smaller," irrespective of whether the seller has actually been damaged to this extent. Another example is the inconsistency between § 9-302(1)(d), which permits perfection of a purchase money security interest in consumer goods without the necessity of filing a financing statement, apparently on the theory that no one ever checks to see whether a financing statement has been filed, and § 9-307(2), which declares that a security interest in consumer goods is valid against a good faith purchaser of the goods so long as a financing statement has been filed, despite the tacit recognition in § 9-301(1)(d) that such financing statements afford no genuine "notice" in cases involving consumer goods. Still another example is § 9-206(1), which embodies a general approval of a contract clause waiving the buyer's defenses against assignees of the contract, and creates an implied-in-law waiver of defenses against assignees in transactions in which the buyer signs a negotiable note and a security agreement. This provision also expressly relegates the problem of improving the lot of consumers to the courts and legislatures. For a revealing discussion of the drafting history of the Secured Transactions Article of the Code (Article 9) and the ultimate abandonment of attempts to regulate consumer transactions, see Gilmore, *The Secured Transactions Article of the Uniform Commercial Code*, 16 *Law & Contemp. Prob.* 27, 44-48 (1951).

⁵ Introductory Comment to the U.C.C. 9.

⁶ See generally Mentschikoff, *The Uniform Commercial Code; An Experiment in Democracy in Drafting*, 36 *A.B.A.J.* 419 (1950).

⁷ Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 *Yale L.J.* 217, 232 (1964).

⁸ 1 G. Gilmore, *Security Interests in Personal Property* § 9.2, at 293-94 (1965).

This non-action, for example, afforded financial institutions ease and simplicity in perfecting security interests in consumer goods;⁹ it rendered holders in due course of consumer paper immune to most of the legitimate defenses which might be raised by consumer-buyers;¹⁰ it permitted inclusion in consumer contracts of blanket waivers of defenses against assignees;¹¹ and it generally left the consumer-buyer subject to a host of other provisions substantially weighted in favor of business interests. The inclusion of such provisions in the Code, while simultaneously relegating consumer problems to the piecemeal processes of the courts and legislatures, belies any assertion that the drafters of the Code took no position on the question of consumer protection. In addition, this assertion disregards the practical realities of the state legislative process, in which banking and business interests generally possess a disproportionate amount of power. Given the additional fact that in some state legislatures even the tattered remnants of consumer protection which managed to survive the drafting process were either curbed or stricken,¹² it is not surprising that consumer groups and advocates criticize the Code, tend to ignore it, and rush to the legislatures with proposals to reform it.¹³

The purpose of this article, therefore, will be to evaluate this criticism; to examine Karl N. Llewellyn's legal philosophy for guidance in interpreting the U.C.C.; to suggest additional provisions in the U.C.C. which may provide for flexibility of legal development and the implementation of consumer-interest values; to urge the effectiveness of the common law, the U.C.C. and the case system in effectuating a more favorable business-consumer balance; and to make some

⁹ U.C.C. § 9-302(1)(d). See the discussion in note 4 *supra*.

¹⁰ U.C.C. §§ 3-302 and 3-305. See the discussion in note 4 *supra*.

¹¹ U.C.C. § 9-206(1). See the discussion in note 4 *supra*.

¹² See, e.g., the California and North Carolina versions of the U.C.C., which eliminated § 2-302 (the "unconscionability" provision) in its entirety. 1 W. Willier & F. Hart, U.C.C. Reporter-Digest § 3-302, at 1-77 (1970) [hereinafter cited as Willier & Hart]. Also, the version of § 9-307 enacted in California omits subsection 2 of the Official Text, relating to the protection of buyers of consumer goods which are subject to a pre-existing security interest. Willier & Hart, § 9-307 at 1-751.

¹³ Examples of such proposals attempting in varying degree to "reform" various provisions of the U.C.C. include the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-677 (Supp. IV, 1969); the Uniform Consumer Credit Code, recently promulgated by the Commissioners on Uniform State Laws and adopted in Oklahoma, as Okla. Stat. Ann. tit. 14A, §§ 1-101 to 9-103 (Supp. 1969), and in Utah, as Utah Code Ann. tit. 70B, §§ 1-101 to 9-103 (Supp. 1969); the comprehensive National Consumer Act, drafted by the National Consumer Law Center at Boston College Law School; and bills currently pending in Congress which would give consumers the right to bring class actions for the redress of illegal or unscrupulous business practices, e.g., S. 3092 and companion bill H.R. 14,585, 91st Cong., 1st Sess. (1969), as well as bills intended to regulate warranties on goods sold in interstate commerce, e.g., S. 3074 and H.R. 18,758, 91st Cong., 2d Sess. (1970).

specific suggestions concerning section 1-205, regarding trade usage and customary commercial law.

I. SOME COMMENTS AND DISCUSSION CONCERNING THE LEGAL PHILOSOPHY OF KARL N. LLEWELLYN¹⁴

A. *A Hypothetical Reconstruction of the Evolution of the U.C.C.*

Our law teaching has gained breadth and depth from the employment of full time teachers who have had time to work out systematic synthesis on a larger scale than is commonly possible for the judge or the practitioner. To this development we owe perspective in legal doctrine. For it, we have paid a price, increasingly heavy, of academic abstraction and remoteness from life.¹⁵

Legal literature currently contains discussions of the substantive content of virtually every section of the Uniform Commercial Code. However, a general discussion of the legal philosophy underlying the Code would seem to be warranted. Karl Llewellyn, as the Code's chief architect, more than any other person provided the broad legal perspective which resulted in the U.C.C. "Karl Llewellyn watching" is thus becoming an increasingly popular method of U.C.C. interpretation.¹⁶

It is a possible, albeit depressing, hypothesis that in the above-quoted excerpt from the Introduction to his 1930 casebook on Sales, Karl Llewellyn prophesied his own future failure regarding the Uniform Commercial Code. Since an evaluation and analysis of this hypothesis will serve as the structure for the succeeding consideration of some of Karl Llewellyn's views, and also as the basis for some suggestions regarding a possible interpretation of Section 1-205 of the U.C.C., it will be useful to set forth this hypothesis in detail:

In 1949 a group of naive academics completed a draft of a proposed Uniform Commercial Code in which they attempted to propose direct legislation which would result in a proper economic and social balance between mercantile and consumer interests. It might even be suggested that the professors did not thoroughly consider consumer or societal interests, but merely copied provisions of existing consumer legisla-

¹⁴ The following discussion surveys only limited aspects of Llewellyn's legal philosophy. Hopefully, a forthcoming volume entitled "The Karl Llewellyn Papers," will reveal much more on this subject. See the reference to this forthcoming work in Twining, *Pericles and the Plumber*, 83 L.Q. Rev. 396, 411 n.35 (1967).

¹⁵ K. Llewellyn, *Cases and Materials on the Law of Sales* ix (1930).

¹⁶ See, e.g., Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1 (1969), and Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967). Both authors cite Llewellyn's works extensively.

tion.¹⁷ No consideration was given to the relative strength, organization, or political effectiveness of any of the special interest groups which would be directly affected by the proposed Code. Then the Code obtained "influential friends"—the business and financial interests—who succeeded in completely out-negotiating the professors. These "hard-headed" business types proceeded in subsequent drafts to eliminate all general provisions imbuing the Code with principles of justice and business morality, and to delete most of the specific sections providing protection or relief to the consumer. The "remote-from-life" professors were not equipped to negotiate with experienced legal practitioners, were awed by their "practice mystique,"¹⁸ and were persuaded by such academic abstractions as the conception that no position should be taken on social matters because they could better be considered separately, or the notion that providing businessmen and lenders with certainty and simplicity of obtaining legal rights would ultimately result in lower costs to the consumer. The possibility that the Code would worsen the existing legal balance did not come to mind, and no one thought of the possibility that if the business and financial interests obtained all of the legislative changes that they desired, it would be more difficult to bargain with them for subsequent legislative concessions benefitting consumers. The professors were duped into lending an air of legitimacy to what was in effect a piece of special interest legislation. The public was misled by the belief that legal scholars would not lend support to unfair legislation. Finally, the business and banking lobbies were able in some states to eliminate most of whatever remnants of consumer protection provisions survived the drafting process.¹⁹ The result was a relatively rigid, legalistic, pro-business commercial code.

B. Llewellyn's Legal Philosophy

Three aspects of Karl Llewellyn's thinking should be emphasized in evaluating the foregoing hypothesis concerning the development and content of the U.C.C.:

¹⁷ See generally Article 7, pt. 6 (Consumer's Goods Financing) of the May 1949 Draft of the U.C.C. Perusal of the various comments to this subpart, which was later deleted, indicate that most of its provisions were adopted from pre-existing practices or statutory provisions.

¹⁸ Llewellyn himself occasionally evidenced a tendency to be overly-impressed with practitioners. See, e.g., 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, 396-97 (1950); Llewellyn, Why a Commercial Code?, 22 Tenn. L. Rev. 779, 784 (1953):

I may say that nowhere [in the course of drafting the U.C.C.] did we receive finer, more constructive and suggestive criticisms than from the bar associations.

¹⁹ See note 12 *supra*.

1. He was aware of the danger of law teachers becoming remote from the realities of life.²⁰
2. He foresaw and favored the economic and legal trends which would increasingly benefit consumer and societal values as opposed to the interests of the business and financial community.²¹
3. He studied and considered not only the pressures exerted by sub-groups to obtain selfish ends through the law, but also the need to counter these pressures in order to further the welfare of the entire society.²²

The counter-pressure mentioned in point three would have to be exerted by persons concerned about the common weal, and it seems reasonable to assume that he viewed himself in this role. More specifically, he was acutely sensitive to the tremendous influence of the business and financial sub-groups throughout the legal system, and seemed to favor a reduction of this influence.²³ Llewellyn himself summarized his legal philosophy as follows:

My faith is a different faith. I proceed upon the assumption that clear seeing and clear statement, to the extent to which it can be achieved, is a long-range greater gain. I hold the hard authority-aspect of the legal imperative, and the hard regularity-aspect, to be worth isolating for work and note, that they may be seen sharply as Not Enough for any decent system to rest content with. I deny, flat, any inherent tendency of hard seeing to drown the drive for the good and for the better. I hold the responsibility for working toward the Right and the Just within the hard legal frame to be better pinned on the official if it becomes common knowledge that to be Legal is not enough. I hold the jurists' job to remain undone until we can discover and make clear how far our officials *can* be controlled, and how far not, and, until we then devise means to control them effectively where they can be controlled, to be to give them some guidance in the remaining area, and to help them distinguish the arbitrary from the

²⁰ See quotation on p. 142 *supra*.

²¹ See Llewellyn, *On Law and Our Commerce*, 1949 *Wis. L. Rev.* 625, 631-33 (1949); Llewellyn, *On the Good, the True, the Beautiful*, in *Law*, 9 *U. Chi. L. Rev.* 224, 254-58 (1942).

²² Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L.J.* 1355, 1362-363, 1382-383, 1388-389 (1940).

²³ Llewellyn, *On Philosophy in American Law*, 82 *U. Pa. L. Rev.* 205, 208-09 (1934); Llewellyn, *On the Good, the True, the Beautiful*, in *Law*, 9 *U. Chi. L. Rev.* 224, 264 (1942).

wise. The most fruitful angle of approach to accomplishing this task which I can see, is to *defuse* and *deconfuse* the merely authoritative, the merely regular, the merely incidental to the accepted System, from the Just or Right, and to get into spotlighted pillory so much of Law as has no business to be Law, so much of the Legal as should be made Unlawful, so much of Jumble as should be made into clear, guidesome Leads. . . . I hold the dulling of conscience and ideals among too many men of law to be a result not of hardening of the eye, but, in good part, of a confused tradition that if it is Legal, it is *therefore* Right enough.²⁴

This statement provides some insight into the type of codification of a general area of law which Llewellyn would favor and, at the same time, serves as a reminder of the complexity of the man. It also points up the difficulty of summarizing his views on justice, the common law system and codification. His apparent approval of strict legal rules, and the view that these legal rules may be in substantial conflict with the ethical and moral values of the society to which they relate is the one aspect of Llewellyn's writing which is the most difficult to explain and reconcile with his other views. He termed himself a legal realist.²⁵ To him, the identifying characteristics of a legal realist were an ability, for the purpose of temporary study, to separate what the legal system was actually doing from what the system ought to be doing; a distrust for the theory that traditional legal rules are *the* heavily operative factor in producing court decisions; a belief in more narrow categories of cases for study and analysis; an insistence upon finding and evaluating the effects of any part of the law; and a penchant for the sustained and programmatic study of law.²⁶ Llewellyn strongly denied, however, that legal realists were not interested in justice.²⁷ He particularly denied that commercial law realists were interested more in the business aspects of the law, for business purposes, than in the values of society as a whole.²⁸ Justice, in Llewellyn's view, would be obtained through a smoothly operating, economical, efficient and accurate fact-finding legal system, which would consistently provide the most balanced result for the welfare of *all* the people

²⁴ Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L.J.* 1355, 1372-373 (1940).

²⁵ Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222 n.* (1931).

²⁶ *Id.* at 1236-238.

²⁷ *Id.* at 1231.

²⁸ *Id.* at 1231-232, 1261-262.

in a constantly evolving society,³⁹ and in the area of commercial law, justice would result from the growing tendency of the courts to exercise equitable control over transactions involving parties of unequal bargaining power.⁴⁰

C. Llewellyn's Concept of the "Sociology" of Law

Llewellyn's views on the "sociology" of law⁴¹ and his conclusions deriving from his observation of primitive legal systems,⁴² are extremely important both in evaluating the hypothesis set forth above³³ and in considering the proposals for interpretation of the Uniform Commercial Code which will later be suggested. He conceived as the basic function of the law the regulation of human interaction.⁴⁴ Law would develop from a regular pattern of human interaction through various carefully defined stages of legal incipency⁴⁵ until it would finally emerge, probably in the wake of a trouble case, as a formal legal principle.⁴⁶ The legal imperative resulting from this process is not necessarily equivalent to the normative, which he defined as the correct standard in a moral and ethical sense.⁴⁷ As a result of the need he felt to classify carefully the various stages of legal incipency, and to separate the legal from the normative for purposes of analysis, he rejected the use of the term "custom" as being too blunt and confused to serve in careful analysis.⁴⁸ This rejection should not be taken to suggest, however, that he did not believe that the emergence of legal rules in a customary law system was highly relevant to the structuring of a modern legal system. He expressly stated the contrary,⁴⁹ and his views on the common law system reflect a strong customary law flavor.⁴⁰

Llewellyn believed the law served the function of channeling hu-

³⁹ See Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. Chi. L. Rev. 224, 254-55 (1942), and the quotation excerpted on pp. 144-45 *supra*.

⁴⁰ Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 Colum. L. Rev. 167, 177-78 (1946).

⁴¹ Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1355-356 (1940).

⁴² See generally K. Llewellyn and E. Hoebel, *The Cheyenne Way* (1941), which details Llewellyn's studies of the legal system evolved by the Cheyenne Indians.

⁴³ See pp. 142-43 *supra*.

⁴⁴ K. Llewellyn & E. Hoebel, *The Cheyenne Way* 20 (1941).

⁴⁵ Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1358 (1940).

⁴⁶ *Id.* at 1360-361.

⁴⁷ *Id.* at 1359.

⁴⁸ *Id.* at 1359 n.1.

⁴⁹ *Id.* at 1378-379.

⁴⁰ See generally Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 Colum. L. Rev. 167 (1946).

man behavior, and therefore, the law had to be flexible enough to accommodate itself to shifting societal concepts of justice.⁴¹ In order to accomplish the channeling and re-channeling functions reasonably, while maintaining the flexibility necessary to react to societal reorientation, Llewellyn emphasized the need to develop regularity of pattern through several legal incipency stages before a new practice or pattern became law:

The degree of regularity needed is: enough to be perceived, so that it can be adjusted to—so that it can both found expectations and lay a basis for their recognition: call it *going expectations*.⁴² (Emphasis in original.)

The exact limits and scope of the new legal pattern or practice could thereafter be refined on a case-by-case basis. Llewellyn describes this process of evolution and refinement of legal principles in the following passage which outlines what will be designated, for purposes of this article, as his "purpose-line theory":

In view, moreover, of the tendency of the concept "rule" to suggest some definiteness and fixity, we shall do well to recall that much useful charting of travel can be done by way of indicating merely direction, across a country whose boundaries and even detailed landscape may still be blind to us. If the lines of proper cleavage be moderately clear, detail can then be accumulated as we go, and mistaken judgment on detail (as in the case of principle) can then be left behind. But for a rule or concept to take more definite shape, or to expand, intelligently and intelligibly, the care of *purpose* must be clear—and must be just to the situation. Out of the root of this *purpose*-line of significance, the other—that of what facts call the rule into application—can be left to grow and change; this, as I understand it, is what is being said by those who urge that case-law depends on Principle.⁴³

Llewellyn, therefore, would obviously attempt to incorporate this "regularity of pattern" concept in the commercial code. He was acutely aware of rapid movement and change in society, and he believed that the law had to adjust to and provide for this change. He assumed that most societies would tolerate a reasonably wide gulf

⁴¹ Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L.J.* 1355, 1376-383 (1940).

⁴² *Id.* at 1368.

⁴³ Llewellyn, *On Our Case Law of Contract: Offer and Acceptance*, I, 48 *Yale L.J.* 1, 31 (1938).

between their current concepts of justice and their laws, but that well-selected legal officials in an efficient legal system would constantly be moving the law closer to the society's view of justice.⁴⁴ He did not propose carefully defined tests for measuring the permissible degree of elasticity between law and justice in a society, but it seems reasonable to suggest that Llewellyn would have found that the loss of trust and confidence in American legal institutions between 1940 and 1970 substantially narrowed the permissible dichotomy. His great confidence in the common law judicial system led him to believe that one of the most effective ways in which the differences between law and justice could be eliminated or reduced was through judicial "rekindling" of the law on a case-by-case basis. Furthermore, he postulated blocs of "Net Drive"⁴⁵ which brought into the law ethical and moral concepts which hopefully would force the law to look to the long-term welfare of the entire society. Although he believed that substantial gulfs between law and justice could exist, he saw his own role and that of the entire legal system as being to reduce, and, if possible, to eliminate these differences, while simultaneously allowing for changing societal concepts of justice.⁴⁶

D. *Llewellyn's Views on the Common Law System*

Llewellyn was a student of the common law system. As such, he was particularly interested in understanding the real reasons for appellate court decisions, and he perceived historical trends in the appellate decisional process:

In 1820-1850 our courts felt in general a freedom and duty to move in the manner typified in our thought by Mansfield and Marshall. "Precedent" guided, but "principle" controlled; and nothing was good "Principle" which did not look like wisdom-in-result for the welfare of All-of-us. In 1890-1910, on the other hand, our courts felt in general a prime duty to order within the law and a duty to resist any "outside" influence. "Precedent" was to control, not merely to guide; "Principle" was to be tested by whether it made for order in the law, not by whether it made wisdom-in-result. "Legal" Principle could not be subjected to "political" tests; even legislation was resisted as disturbing. Since 1920 the earlier style (the "Grand Style") has been working its way

⁴⁴ See Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 Colum. L. Rev. 167, 177-78 (1946).

⁴⁵ Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1387-395 (1940).

⁴⁶ See quotation on pp. 144-45 *supra*.

back into general use by our courts, though the language of the opinions moves still dominantly (though waningly) in the style (the "Formal Style") of the late 19th Century.⁴⁷

Llewellyn obviously favored the justice-seeking, principle-oriented style, and believed that the law had to be simple, readily available, and widely understood so that society could develop the wise and capable judges necessary for the "Grand Style" to function properly. He had a strong and abiding faith in the common law system and in the principle that, in a particular case, the "just" decision would usually be reached. He doubted, however, that strict legal rules had much effect on the outcome of most cases. He was intrigued by the "fact" content of many common law legal terms and felt that an examination of fact patterns provided more insight into the operation of the common law system than the passages of opinions which set forth the law.⁴⁸ It delighted him to take a single day's opinions from a state appellate court and to point out the variety of rules of construction employed by the court and the lack of pattern or explanation for the court's use of precedent.⁴⁹ Nonetheless, he consistently maintained his confidence in the societal effectiveness of the common law system applied to individual cases, and this attitude formed the nucleus of his legal philosophy.

E. *Llewellyn on Uniform Legislation*

Llewellyn favored uniform, flexible, clear and long-lived commercial legislation for the United States.⁵⁰ Discussing the proposed Federal Sales Act, he observed:

A *codificatory* Act covering a large body of private law must not be treated as ordinary legislation. It is not ordinary legislation. It is not legislation capable of easy or frequent amendment; errors in it, if any, are rather to be suffered than amended, over very considerable periods. Such a codificatory

⁴⁷ 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, 396 (1950).

⁴⁸ Llewellyn, On Our Case Law of Contract: Offer and Acceptance, I., 48 Yale L.J. 1, 29 (1938).

⁴⁹ Llewellyn, Speech On the Status of the Rule of Judicial Precedent, reprinted in 14 U. Cinn. L. Rev. 208-17 (1940); 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, 396 (1950).

⁵⁰ See generally Llewellyn, The Needed Federal Sales Act, 26 Va. L. Rev. 558 (1940); Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224 (1942); Llewellyn, Problems of Codifying Security Law, 13 Law & Contemp. Prob. 687 (1948); Llewellyn, Why a Commercial Code?, 22 Tenn. L. Rev. 779 (1953); Llewellyn, Why We Need the Uniform Commercial Code, 10 Fla. L. Rev. 367 (1957).

Act is in a peculiar sense *permanent* legislation; it enters into the commercial structure of the country. . . . [It is] legislation which is declaratory of principle, which is in essence and intent the laying down of rules *to be developed by the courts* as common law rules are themselves developed by the courts, and molded to the succession of unforeseen circumstances. . . .⁵¹

We may safely conclude that Llewellyn's goals of Code clarity, simplicity and accessibility were not achieved. Major revisions and amendments have resulted in ambiguities and inconsistencies in language. It is an understatement to suggest that the Code is not artfully drawn, and it seems reasonable to suggest that courts should either avoid or approach with great caution interpretations based upon technical grammatical constructions. Llewellyn's dream of a single small volume replacing a large law library was also crushed in the early drafts of the U.C.C. Related legislative enactments such as retail installment sales acts, small loan acts and motor vehicle certificate of title laws were not integrated into the Code but were left on the books. This resulted in both non-uniformity and a plethora of other problems. Furthermore, the apparent failure of the Code to respond to "social legislation" problems has resulted in a mass of collateral legislation and legislative proposals which directly apply to Code-type questions. In a relatively short period of time, a jungle of interrelated, and often overlapping, statutes in the commercial law of many states has reappeared. It seems apparent that the hope of drafting a simple code which would be easily understandable and usable by lay businessmen engaged in Code-type transactions was, in the final analysis, a myth. Apart from the need to understand non-Code legal materials in order to apply the Code correctly, the fact remains that the Code itself is too complex to be readily understood. It contains seemingly endless definitional problems, and interpretation of several different sections, sometimes located in different articles, is usually required in order to arrive at the proper Code solution to a particular problem.⁵²

⁵¹ Llewellyn, *The Needed Federal Sales Act*, 26 Va. L. Rev. 558, 561-62 (1940).

⁵² The extent of the failure to achieve simplicity and lay participation in Code use can best be illustrated by the fact that a general evaluation of U.C.C. appellate cases will lead one to the conclusion that attorneys very often fail to cite or argue the appropriate Code provisions and courts very often either fail to recognize or intentionally ignore the appropriate sections in their decisions. A typical case illustrating this point is *McKone v. Ralph's Wonder Market, Inc.*, 27 Mass. App. Dec. 159 (1963), an "exploding bottle" case in which the plaintiff was denied recovery under § 2-314 of the U.C.C. (the implied warranty of merchantability section) on the grounds that § 2-314 applied only to the *goods* and not to the *container*. Apparently, the majority of the court failed to note subsection (e) of § 2-314 which provides that in order for the goods to be merchantable they must be "adequately contained, packaged, and labeled as the agreement may re-

NEW PERSPECTIVES ON "USAGE OF TRADE"

A look at Llewellyn's thinking about pre-Code uniform commercial statutes may also afford some insight into the structure of the Code and its proper interpretation. His ideas concerning changes in the law of sales were largely formulated in the 1930's. The implementation of these ideas in Article Two resulted in the major departures in that Article from the prior provisions of the Uniform Sales Act. He believed that the Negotiable Instruments Law was the best of the uniform acts. He admired its longevity, flexibility, the ease of teaching it to bank employees and the pride they took in their "law."⁵³ It seems plausible to suggest that his long-term technical expertise and his largely mercantile experience may, perhaps, have blinded him somewhat to the societal problems created by the negotiability concept of Articles Three and Four. However, the change in the definition of "good faith"⁵⁴ which came about during the "businessmen's purge" of the Code obviously had an adverse effect on the balance he was attempting to achieve in Articles Three and Four. Llewellyn's principal connection with personal property security statutes resulted from his drafting of the Uniform Trust Receipts Act in 1935. This act is principally intra-mercantile in its application and may explain in part why Article Nine appears to be the most "out-of-balance" article with respect to recognition of societal values.

The most difficult aspect of defining the relationship between Llewellyn and the Code and of evaluating the hypothesis posited earlier,⁵⁵ stems from the fact that it is impossible to assess accurately the degree to which Llewellyn lost control of the Code or the extent to which his purposes were frustrated. Unfortunately, he did not write in detail on this subject. He did emphasize the fact that the Uniform Commercial Code was not the work of one man:

But of course, in all these matters, personal views remain personal. The staff and the controlling organizations go their way, sometimes persuading the individual that he is wrong, sometimes overruling him, never controlled by him.⁵⁶

Some of his writings indicate that he harbored some disappointment concerning the final draft:

quire. . . ." In any event, if lawyers and judges encounter difficulty in using the Code, it seems likely that laymen would have even greater problems.

⁵³ Llewellyn, *Meet Negotiable Instruments*, 44 *Colum. L. Rev.* 299, 300 (1944).

⁵⁴ U.C.C. §§ 1-201(19), -203, -103(1)(b); King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title and Good Faith Purchaser*, 11 *St. Louis L.J.* 15, 22-27 (1966). See generally Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 *U. Chi. L. Rev.* 666 (1963).

⁵⁵ See pp. 142-43 *supra*.

⁵⁶ Llewellyn, *Problems of Codifying Security Law*, 13 *Law & Contemp. Prob.* 687, 702 (1948).

A great deal of what is wrong with it now has been put in during the past three years in an effort to pacify the bar; but on the whole just between ourselves, they really aren't quite ready for the best kind of law. That is a fair statement and all of you know it down in your own souls. You all have a hang-over from law school; you feel that the proper way to draw a statute is to mark it out as if it was written for dumbbell judges whom you are trying to corral. Of course, that isn't the way to write good law. The way to write good law is to indicate what you want to do, and you assume within reason that the persons the law deals with will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in, which means that every statute ought to have two essential bases, one to show where the law wants you to go, and one to show where we will put you if you don't.⁵⁷

* * * *

I am ashamed of it in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.⁵⁸

* * * *

There are upwards of a hundred material places on which as Chief Reporter I was outvoted on a position I believed in and was fighting for. I doubt if time and thought have brought me round on as many as one sixth of such points; a good twenty and more still cause grief which is acute. But it should give any person comfort in regard to the probable wisdom even of details which he finds bothersome to realize that such details represent, regularly, repeated majority votes of different but highly intelligent bodies of lawyers, after informed and sustained meditation and discussion.⁵⁹

It is unfortunate that he was not more explicit about his disappointment. In the final analysis, however, it is probably only rel-

⁵⁷ Llewellyn, *Why a Commercial Code?*, 22 *Tenn. L. Rev.* 779, 782 (1953).

⁵⁸ *Id.* at 784.

⁵⁹ Llewellyn, *Why We Need the Uniform Commercial Code*, 10 *Fla. L. Rev.* 367, 374 n.2 (1957).

evant to attempt to determine whether, from Llewellyn's standpoint, the U.C.C. has or ever will have an overall beneficial effect on the societal balance of the legal system. On this point, Professor Gilmore had this to say about the effect of the revisions on Llewellyn:

It was, I believe, Karl's non-systematic, particularizing cast of mind and his case-law orientation which gave to the statutes he drafted, and particularly to the Code, their profound originality. He was a remarkable draftsman and took a never-failing interest in even the minutiae of the trade. His instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law. He had clearly in mind the idea of a case-law Code: one that would furnish guidelines for a fresh start, would accommodate itself to changing circumstances, would not so much contain the law as free it for a new growth. The tastes of the practicing lawyers who advised the draftsmen were, in most cases, opposed to the flexible ideas of the Chief Reporter: they preferred, they insisted on, a tightly-drawn statute, precise, detailed and rigid. Among the many drafts of the Code which appeared, beginning in 1946, the early drafts were in many ways closer to Karl's conception of the Code than were the final drafts. In the concluding phase of the drafting, concessions were inevitably made to what might be called political pressures; I do not mean to suggest that these pressures were in any sense evil or malevolent. I have come to feel that Karl saw more clearly than his critics and that the Code as he initially conceived it might better have served the purposes of the next fifty years. Yet Karl never lost sight of the fact that his job was to produce, not the best Code which could ideally be put together by a band of scholarly angels, but the best Code which stood a chance of passage in the imperfect world of man. He cheerfully gave ground when he had to: the final product was indubitably his and will remain an enduring tribute to his memory.⁶⁰

I personally believe that the hypothesis concerning the U.C.C. posited earlier in this article⁶¹ should be rejected. For Karl Llewellyn was far too honest and idealistic to continue supporting legislation which was completely contrary to his own ideals and legal values. At the very least, in view of the great wisdom of its Chief Reporter and

⁶⁰ Gilmore, *In Memoriam: Karl Llewellyn*, 71 *Yale L.J.* 813, 814-15 (1962).

⁶¹ See pp. 142-43 *supra*.

the nature of his legal philosophy, the U.C.C. should be minutely scrutinized before it is rejected as an unfair, unbalanced piece of legislation. In conducting this scrutiny and in applying the Code, scholars, advocates and judges should always be mindful of the "Grand Style" common law legal tradition which Karl Llewellyn trusted and loved.

II. U.C.C. SECTION 1-205 AS A GENERAL, AFFIRMATIVE, REASONABLENESS PROVISION⁶² AND AS A JUSTIFICATION FOR THE APPLICATION OF CONSUMER-DEVELOPED USAGES OF TRADE

A general and basic functional analysis does indeed bring light to the phenomenon of modern official Law, reminding us, for instance, that the more articulately elaborate the recorded machinery of The Law gets to be, the more essential to health of the system is the careful provision, as part of the system, of a penumbra of those legally recognizable, but not yet clearly "recognized" lines of normation which I have called the "jurid"; and reminding us that if we try (as we do) to provide such a penumbra by way of a dozen different make-shift and quite uncoordinated devices (from admission of usage in commercial cases on up) we shall then find it working only sometimes and missing often enough when it is most needed.⁶³

A. The Limited Utility of Currently Recognized Code "Flexibility Provisions"

The sections of the Code which most reflect the flexible, case-method philosophy of Karl Llewellyn are the provisions relating to good faith,⁶⁴ reasonableness,⁶⁵ unconscionability,⁶⁶ modification of the Code by agreement,⁶⁷ and the recognition of usage of trade and custom.⁶⁸ These provisions, however, are not of equal utility in encouraging flexible interpretation of the Code, nor have they been consistently utilized by the courts. The change in the general definition of "good faith" from "honesty in fact" combined with "reasonable

⁶² See Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 Vill. L. Rev. 213, 250-53 (1966) [hereinafter cited as Mooney] for a general suggestion of using § 1-205 of the U.C.C. as a reasonableness provision.

⁶³ Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1378-379 (1940).

⁶⁴ See the Code provisions cited in note 54 *supra*.

⁶⁵ See, e.g., U.C.C. § 1-102(3); Mooney, *supra* note 62.

⁶⁶ U.C.C. § 2-302.

⁶⁷ U.C.C. § 2-102(3).

⁶⁸ U.C.C. §§ 1-102(2)(b), -201(3), -205, 2-202(a), -208(2), -301, Comment.

commercial standards,"⁶⁹ to mere "honesty in fact,"⁷⁰ reduced the effectiveness of good faith as a flexibility provision. However, some courts have been ignoring this ostensibly subjective test of good faith, and have applied an objective test.⁷¹ The definition of good faith which applies to Article Two transactions involving merchants requires "the observance of reasonable commercial standards of fair dealing in the trade."⁷² Thus, all consumer-merchant transactions within the scope of Article Two are circumscribed by the concept of commercial reasonableness. As to reasonableness, the assertion that section 1-102(3), which provides that "the obligations of good faith, diligence, *reasonableness* and care *prescribed by this Act* may not be disclaimed by agreement . . ." (emphasis added), embodies an affirmative reasonableness provision seems unduly strained. This section seems merely to provide that specific reasonableness sections of the Code may not be eliminated by agreement, although they may be somewhat modified by agreed definitions of what constitutes reasonable action. Section 2-302 of the Code, however, thrives in the courts as a case law flexibility provision in Article Two cases, and has recently been applied in Article Nine transactions.⁷³ The modification by agreement provision in Code Section 1-102, while permitting some flexibility, only compounds the apparent social imbalance created by the Code, because it is usually the businessman or financier who is aware of unfavorable Code provisions, who has professional advice, who has time to contemplate the transaction, who has the superior bargaining position and who will draft any formal or written agreement. However, this section also authorizes broad legal effect to be accorded to usages of trade.⁷⁴

B. *Ghen v. Rich as an Example of Common Law Flexibility Resulting from Trade Usages*

Once, in concert with a group of suffering law students, I had the misfortune of teaching the first year course in property. However, one highlight in this difficult time was the case of *Ghen v. Rich*.⁷⁵ For those who do not recall the case, the libellant, a Provincetown fisherman, shot with a bomb lance and killed a fast-swimming, fin-back whale, which immediately sank to the bottom of the sea. Three days later the

⁶⁹ U.C.C. § 1-201(16) (May 1949 Draft).

⁷⁰ U.C.C. § 1-201(19).

⁷¹ See, e.g., *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (Super. Ct. 1968).

⁷² U.C.C. § 2-103(1)(b).

⁷³ Comment, Unconscionable Security Agreements: Application of Section 2-302 to Article 9, 11 B.C. Ind. & Com. L. Rev. 128 (1969).

⁷⁴ See discussion on pp. 158-59 *infra*.

⁷⁵ 8 F. 159 (D. Mass., 1881).

whale was discovered on a beach and was sold at auction by the finder to respondent. The libellant heard of these events and sued to recover the value of the whale. The court held for the libellant on the basis of a longstanding Cape Cod usage to the effect that "the first iron holds the whale," contrary to the general common law rule requiring continued possession for ownership of wild animals. *Ghen v. Rich* is a wonderful case for illustrating the flexibility of the common law and the manner in which trade practice, usage, and community values and standards become part of the legal system! *Ghen v. Rich* thus indicates that community-developed usages of trade may override common law legal rules in cases involving personal property transactions.

C. *A Suggested New Approach to the Interpretation of U.C.C. Section 1-205*

A man attempting to push through socially balanced commercial legislation in the 1950's would realize that the strongest special-interest pressure groups would be those representing business, commercial and financial interests; that their attack would be highly sophisticated and well organized; and that their efforts would be augmented by substantial legislative influence and power. He would, therefore, exert great effort on behalf of the less-organized, politically ineffective consumer and community interests. He would take full advantage of an opportunity to compose the first draft of the Code, leaving it to the special-interest groups to comb through it and attempt to cull out all of the material which was objectionable to their interests. It would be essential to provide a large number of obvious consumer and community protective provisions which could easily be found and stricken out by the business, commercial and financial interest groups. In addition, less conspicuous consumer protection and social-balancing sections would be included which, hopefully, would survive the endless negotiations, re-drafts, revisions, hearings, and legislative enactments which were sure to come. Because the organized legal opposition was principally occupied in dealing with narrow legal problems, Article One, with its general rules and principles of construction, would appear to be the best place to insert these subtle provisions, *which would ultimately provide and maintain the desired social balance.*

What better place to "hide" a consumer-protection concept than in a section which was highly desired by the business, commercial and financial interests. Businessmen disliked previous commercial law codifications because their rigidity inhibited and blocked development of business practices and methods. They abhorred the development of the commercial law in England where there is little connection between the statutes and modern commercial methods and where most

business transactions and disputes are handled outside the usual legal structure, without regard to the content of the commercial statutes. Business interests would, therefore, seize upon an opportunity to have legal recognition accorded to changing trade usage and custom as a basic provision in the general long-term commercial code. This would be conducive to predictability and certainty of result to aid them in business planning and analysis, but at the same time would not impede the development of new business ideas, methods and procedures.

Ideally, businessmen desire complete flexibility in their own activities and complete certainty and predictability of the rights and duties of the persons with whom they deal. But, by and large, businessmen are realists and willing to accept reasonable solutions when the most desirable result cannot be achieved. It may safely be assumed that one central desire of businessmen is that they be reasonably able to predict legal developments and that they be furnished sufficient time to adjust to them. Section 1-205, therefore, appears to be an ideal instrument for maintaining social balance in the Uniform Commercial Code.⁷⁶ It is a general Article One provision highly desired by the business, commercial and financial interests; it involves "customary" law theories, an area in which Karl N. Llewellyn was an expert but which is unfamiliar to most business-types; and it affords the sort of controlled flexibility of legal development coupled with predictability of legal

⁷⁶ U.C.C. § 1-205 provides:

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

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

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

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

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

change which was one of Llewellyn's principal goals for a legal system which would conservatively accommodate itself to the changing values of society.

My theory, then, is that section 1-205 encompasses commercial practices and methods created and developed by *consumers and the community* as well as businessmen. Thus, if certain consumer groups or the "community" created or developed commercial patterns, either complementing or conflicting with the Code, these patterns could, after sufficient recognition for adequate commercial predictability, be applied by a court in a "trouble case."⁷⁷ The "community" in question would include *all persons* in the relevant place, including persons engaged in vocations and trades; however, it is the implicit premise of this concept that, in some situations, the interests of the whole community will be in conflict with the special interests of a particular trade or vocation.⁷⁸

This view of Code Section 1-205 derives considerable support from the fact that other sections and comments stress the significance of customary law in the interpretation and flexible development of the Code. For example, section 1-102(2)(b) provides that one of the underlying purposes and policies of the Code is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." Section 1-205 must be interpreted and construed in accordance with this underlying purpose and policy. The use of the word "custom" in section 1-102(2)(b) and its absence from section 1-205 might suggest that the former section is broader in its coverage than the latter, and that counsel advancing any customary law theories should base their arguments on both sections. The New York Law Revision Commission, which suggested most of the changes made in section 1-205, felt that section 1-102(2)(b) had independent significance beyond section 1-205 so far as statutory interpretation is concerned.⁷⁹ Notwithstanding the likelihood that this conclusion is

⁷⁷ This view is consistent with Llewellyn's views on "juristic method." See Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L.J.* 1355 (1940).

⁷⁸ It is clear that usages of trade developed in particular trades and vocations are admissible. See *Levie, Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 *N.Y.U. L. Rev.* 1106-109 (1965); *Comment, Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 *Colum. L. Rev.* 1192, 1206-208 (1955). Accordingly, this well-established principle will be mentioned only as necessary to assist in the analysis and evaluation of the suggestions set forth in this article. There will also be no thorough consideration of the requirement of notice of a trade or vocational usage to persons not engaged in the vocation or trade. See in this connection, *Franco v. Bank of Forest Park*, 118 *Ga. App.* 700, 165 *S.E.2d* 593 (1968).

⁷⁹ 1 *New York Law Revision Commission Reports* 141 (1955).

incorrect,⁸⁰ it logically follows that the New York Law Revision Commission viewed the two sections as co-extensive in the matter of construction and interpretation of agreements. This deduction is not expressly rejected by the New York Law Revision Commission and precludes the possibility that the revised wording of section 1-205, suggested by the Commission, was intended to incorporate into the Code the rationale of the leading New York case of *Walls v. Bailey*,⁸¹ which ascribes a narrow characterization to usage of trade and a broad classification to custom. Furthermore, the purposes and policy set forth in section 1-102(2) and the broad language of section 1-205⁸² tend to negate such an interpretation. Even if usage of trade as defined in section 1-205 were to be narrowly construed, section 1-102(2)(b) should authorize the introduction of a broad scope of custom, including custom created and developed by consumers and the community. The elimination of consumer frustration and loss of confidence resulting from defective products, excessive prices or interest, and deceptive trade practices would inescapably lead to "commercial expansion." Since the word "custom" is not defined by the Code, it is submitted that in giving meaning to the term we should refer to the legal philosophy of Karl Llewellyn, consider the nature of customary law, and look at common law cases discussing custom. I would urge that the word custom suggests flexibility, reasonableness and a constant pressure upon the law to adapt to the ever-changing values of society.⁸³

Customary commercial law is also recognized by Section 1-103 of the Code which includes the "law merchant" in its recitation of relevant external principles. Section 1-103 further provides that common law principles apply unless displaced by particular provisions of the Code. In addition to supporting the position that the provisions of the Code are similar to common law principles, this reference in the Code to the common law is relevant to the suggestions made in this article in two other ways. First, if it should be decided that the language of section 1-205 should be narrowly construed in accordance with the definitions of usage of trade appearing in pre-Code case law, then it might successfully be argued that the legislature in enacting section 1-205 merely intended to codify the common law rules which existed at that point in time, and that future developments in the area of trade usage should parallel the development of non-statutory common law rules.⁸⁴ Secondly, if a particular usage of trade is declared by

⁸⁰ See discussion on pp. 160-65 *infra*.

⁸¹ 49 N.Y. 464 (1872), discussed on p. 164 *infra*.

⁸² See text of § 1-205 excerpted in note 76 *supra*.

⁸³ The need for an "interaction element" in customary law is discussed on pp. 161-65 *infra*.

⁸⁴ See discussion on pp. 146-48 *supra*.

the courts to be unreasonable, a "rule vacuum" would result which could be filled by the application of common law principles.⁸⁵

Section 1-205 has been amended only once since the final draft of the Code was promulgated. The revisions reportedly followed the recommendations of the New York Law Revision Commission "for clarification," and former subsection (3) was eliminated because of an objection by the American Bankers Association.⁸⁶ "Usage of trade" is defined in the current section 1-205(2) as follows:

A usage of trade is any *practice or method of dealing* having such regularity of observance in a place, vocation or trade as to *justify an expectation* that it will be observed with respect to the transaction in question. The *existence* and *scope* of such a usage are to be *proved as facts*. If it is established that such a usage is embodied in a written trade code or *similar writing* the interpretation of the writing is for the court. (Emphasis added.)

Moreover, subsection (3) of present section 1-205 indicates that "any usage of trade in the vocation or trade in which they are engaged or *of which [the parties] are or should be aware*" may be utilized in interpreting an agreement. (Emphasis added.) The original draft of section 1-205(2) provided:

A usage of trade is any practice or method of dealing currently recognized as established in a particular place or among those engaged in trade or in a particular vocation or trade. Its existence and scope are questions of fact.⁸⁷

The original subsection (3) was not substantially different from the present version on the issue of what constitutes a usage of trade.⁸⁸

The most difficult aspect of supporting the theory that section 1-205 encompasses consumer- or community-developed "usages of trade," emerges upon analysis of the clause in section 1-205 which requires of such a usage "such regularity of observance . . . as to justify an expectation that it will be observed" The difficulty presented in reconciling this clause with the above theory is suggested by the following recommendation of the New York Law Revision Commission which proposed the present wording of the clause:

It was recommended that the first sentence of subsection (2)

⁸⁵ See discussion on pp. 171-73 *infra*. In addition to the Code provisions mentioned above, a number of others embody a distinct "customary law" flavor. See, e.g., §§ 2-202, -208(2), -301, Comment, -314(3), -316(3)(c).

⁸⁶ 1 Willier & Hart, *supra* note 12, § 1-205, at 1-41.

⁸⁷ U.C.C. § 1-205(2) (May, 1949 Draft).

⁸⁸ *Id.* § 1-205(3).

be revised to embody the idea that a practice or method of dealing, in order to qualify as usage of trade, must have regular observance *in practice* (as distinguished from "recognition" as a mental process) and that the kind and degree of regularity of observance required are *related to* the question whether expectations based on the assumption that it will be observed are justified.⁸⁹ (Emphasis added.)

Thus, those opposing the concept of consumer- or community-developed usages of trade would argue that the substitution of "observed" for "recognized" added a requirement of actual previous application. Therefore, it would be argued that, in order to establish a usage of trade, previous commercial transactions in which the usage was applied must be shown, and there would, of necessity, have to be at least one businessman party to each of the previous transactions. Therefore, it would be impossible for consumers or the community unilaterally to create and develop usages of trade, because they would be unable to show actual application of the usage of trade in previous commercial transactions.

The argument that the development of customary law requires interaction is a strong one. Malinowski's famous example of a man repeatedly walking across the village green at the same place and in the same direction, as illustrating the manner in which customs develop, is questionable because ordinarily customs evolve from relationships between two or more persons. The behavior of a single individual unrelated to another person ordinarily does not become a custom. This recognition that societal relationships and patterns play a major role both in the development of customs and in their ultimately acquiring the status of legal principles is central to Llewellyn's philosophy of law.⁹⁰ However, the idea that customs may sometimes develop unilaterally should not be rejected. Trade-oriented customs and usages regularly applied in the community often become, to the full knowledge of the businessman, less and less acceptable to the buyers and the consumers. This dissatisfaction displays itself in many different ways and ultimately precipitates a trouble case, as a result of which a new pattern emerges. This process comports favorably with Llewellyn's theory of the sociology of law,⁹¹ and I believe it provides the requisite element of "interaction" to give rise to a legitimate trade custom or usage. Moreover, it must be remembered that the traditional usage of trade was almost exclusively developed by the unilateral action of the

⁸⁹ New York Law Revision Commission Reports 363-64 (1956).

⁹⁰ See quotation on p. 147 *supra*.

⁹¹ See discussion on pp. 146-48 *supra*.

businessman and then imposed upon consumers who had no understanding of the usage and did not participate in its creation.

The word "observed" does not of necessity include the requirement of previous application. It can reasonably be interpreted as requiring merely some degree of "cognition." The New York Law Revision Commission's explanation for the recommended change in section 1-205 added the phrase "in practice,"⁹² but this phrase does not appear in the revised statutory language nor in the official comments. The following comparison of the original and present wording of comment 5 to section 1-205 illustrates this point:

ORIGINAL	PRESENT
A usage of trade under subsection (2) must be "currently recognized as established." The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial," "universal" or the like. Under the requirement of subsection (2) full recognition is thus available for <i>new usages</i> and for usages " <i>currently recognized</i> " by the great majority of decent dealers as " <i>established</i> ," even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage <i>agreed upon by merchants</i> in trade codes. ⁹³ (Emphasis added.)	A usage of trade under subsection (2) must have the "regularity of observance" specified. The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial," "universal" or the like. Under the requirement of subsection (2) full recognition is thus available for <i>new usages</i> and for usages <i>currently observed</i> by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage <i>agreed upon by merchants</i> in trade codes. ⁹⁴ (Emphasis added.)

It must be remembered that although the present language in section 1-205, calling for "regularity of observance," originated with the New York Law Revision Commission, that Commission did not draft the Code, and the reasons for their recommendations did not become part of the official comments. It is the language of the Code itself, and not the intent of the New York Law Revision Commission, which controls. The actual draftsmen of the revisions to Section 1-205 of the Code were the Editorial Board of the Commissioners on Uni-

⁹² New York Law Revision Commission Reports 364 (1956).

⁹³ U.C.C. § 1-205, Comment 5 (Official Draft 1952).

⁹⁴ U.C.C. § 1-205, Comment 5.

form State Laws and, as noted earlier, their legislative intent in rewording the section was "clarification."⁹⁵ Official comment 5 to the revised section was also reworded and where, as here, the official comments are modified in conjunction with revisions to the text, the comments should be given particular preference in statutory interpretation. Although the present official comments to section 1-205 do not explain in detail what "regularity of observance" entails, neither the term "in practice" nor any similar term imposing a requirement of actual previous application is used. Quite the contrary, the comments state that full recognition may be given to "new usages." This immediately raises the question of how a usage could be "new" if it has been previously applied. Note that the term "new" cannot be interpreted as recent, because "new usages" is used in conjunction with the language referring to usages "currently observed" by decent dealers. A comparison of the original and present wording of the official comments to section 1-205⁹⁶ suggests that "observed" means "currently recognized as established." This would lead to the conclusion that the term "observed" embodies the concepts of "cognition" plus reasonable predictability of legal application. In this connection it should be noted that the second reference to "observance" in section 1-205(2) speaks of justifying "an expectation that [the usage of trade] will be *observed* with respect to the transaction in question." (Emphasis added.) "Observed" in this context seems to connote an expectation that *legal recognition* will be given to the usage of trade. If the word "observed" includes prior legal application, it would be logically impossible to give effect to a usage not previously accorded legal recognition—a patently absurd conclusion. However, use of the term "observed" does embody some element of application, even though only prospective in effect. The first reference to "regularity of *observance*" is tied to the second provision that the observance be such as to "justify an expectation" of application. Even the recommendations of the New York Law Revision Commission, quoted above,⁹⁷ state that observance is "related to" expectancy, and the following summary of previous New York law by the Commission lends additional support to this position:

However, the New York cases do not give a very clear-cut picture of what constitutes the "existence" of a usage, and frequently content themselves by saying that its existence is a question for the jury. Since usage, like prior course of dealing, is evidence of a common consent and expectation of the

⁹⁵ Willier & Hart, *supra* note 12.

⁹⁶ See the parallel comparison on p. 162 *supra*.

⁹⁷ See excerpt on pp. 160-61 *supra*.

parties, it would seem that the usage should have such regularity of observance as to constitute a part of the expectations of both parties.⁹⁸ (Footnotes omitted.)

Furthermore, the Commission made reference to the leading New York case of *Walls v. Bailey*⁹⁹ on the question of "regularity of observance." The court in that case distinguished custom from local usage, a distinction which was not made in the Code,¹⁰⁰ and then considered whether a local usage was so widely and clearly known as to have become part of the common law, thus rendering irrelevant the question of whether one party actually knew of the usage. The court held that the existence, duration and other characteristics of a custom or usage were to be determined by the jury, and that therefore it was error to refuse a party the right to show whether he actually knew about the usage. The direct question presented in the case, however, involved expectancy of application of the usage and the need for notice of its existence, not the frequency with which the usage had been applied in previous transactions. Thus, the 1955 analysis of the Commission, based upon *Walls v. Bailey*, emphasized expectancy, and expectancy may develop through a "mental process," without actual prior application. Therefore, most of the analysis of even the New York Law Revision Commission emphasizes cognition plus commercial predictability.

Furthermore, as indicated earlier, the revisions to section 1-205 were reportedly for purposes of "clarification" and were not intended to effect major substantive changes. Finally, the language of comment 5 virtually compels a cognition-plus-predictability-of-application approach. The language of the revised clause retains a "Llewellyn-like" quality, calling for a flexible, predictable development of usages of trade. Giving a broad customary law treatment to the clause, instead of treating it as a provision solely for the benefit of business, commercial and financial interests, is completely in accord with the underlying purpose and policy of the Code to encourage commercial expansion through custom and usage.¹⁰¹ As noted earlier, a business climate which fulfills the legitimate expectations of consumers as well as merchants can only encourage "commercial expansion." This analysis supports the conclusion that the "justify an expectation" clause of Code Section 1-205 adds a certainty and predictability factor to practices which have already been defined as trade usages. However,

⁹⁸ 1 New York Law Revision Commission Reports 322 (1955).

⁹⁹ 49 N.Y. 464 (1872).

¹⁰⁰ The Commission recognized this fact. See 1 New York Law Revision Commission Reports 323 (1955).

¹⁰¹ U.C.C. § 1-102(2)(b).

since the extant definitions of usage of trade are rather vague, the operative tests in determining what constitutes a usage of trade may ultimately focus upon party awareness,¹⁰² commercial predictability, certainty and expectancy.¹⁰³

On this point, it should be noted that the last sentence of comment 5, regarding trade codes, calls into question the necessity of prior application as well as the requirement of "interaction" between the mercantile and consumer sectors for the development of new trade usages, because it at least implies that new trade rules may immediately become usages upon their inclusion in a code and may be given legal recognition in a case involving a non-assenting party. This is not to suggest, however, that a consumer group may promulgate a rule, give it wide publicity, and then have the rule applied as a usage of trade by a court. The consumer group should first be required to show that, as a result of a rule applied in numerous commercial transactions, widespread discontent has developed, and that the obvious means of correcting the unacceptable rule has become basically defined and widely acknowledged. The new usage should be reasonable and accepted by the community as being just. Nevertheless, counsel attempting to establish a usage of trade should place substantial emphasis in his preparation upon the "expectancy of application" of the new usage.

The revised section 1-205(2) adds the provision that if "such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court." This language suggests that there may be both usages and non-usages contained in trade codes. Accordingly, rules contained in trade codes would have to meet the other requirements of section 1-205(2) for usages in order to be given effect as such. However, comment 5, which states that full recognition will be given to "new usages," also states that "there is room also for proper recognition of usage agreed upon by merchants in trade codes." Arguably then, new rules agreed upon by merchants may be usages. But what of the non-usages embodied in trade codes? In accordance with the interpretation of section 1-205 suggested in this discussion, these will be the rules which are not reasonable, which have not been widely recognized and which have not attained sufficient predictability of application to be given effect. The "trade code" provision of comment 5, therefore, supports the thesis advanced in this article.

The phrase "similar writings," as used in section 1-205(2) suggests something broader than a trade code, and raises the possibility

¹⁰² See U.C.C. § 1-205(3).

¹⁰³ This apparently was the pre-Code situation in New York. See discussion on p. 164 *supra*.

that a consumer lawyer might introduce, in support of a proffered new usage of trade, industry guides, advisory opinions, trade regulation rules or deceptive trade practice regulations embodied in "writings" issued by the Federal Trade Commission, or by state or local consumer protection agencies. Such trade regulation rules are much akin to trade codes, since businessmen do participate in their preparation. These writings would, of course, have to meet the other requirements for a usage, and the "agreed upon by merchants" language of comment 5 would arguably have to be limited to trade codes. While this may be a difficult argument to sell to a court, the importance of obtaining private sanctions for FTC deceptive trade practice regulations makes it worth the attempt. I, therefore, suggest that the trade code clause of section 1-205(2) presents two consumer law possibilities, to wit:

1. Consumer groups should work with legitimate merchant groups in the drafting and publicizing of "just" trade codes. Such codes could be used pursuant to a reasonable interpretation of section 1-205 to curb the dishonest practices of corner-cutting merchants.

2. Consumer advocates should contend that Federal Trade Commission industry guides, advisory opinions, trade regulation rules and deceptive trade practice rules and regulations are "similar writings" embodying trade usages which should be given effect by the courts.

None of the other revisions to Code Section 1-205 are inconsistent with these possibilities. The deletion of the language "among those engaged in trade" from revised section 1-205(2) should not be taken as an indication that businessmen of different trades and vocations cannot together develop a usage of trade. The language change to the effect that usages of trade may be developed in a "place, vocation or trade" appears to be merely a stylistic change, for if a usage actually may be developed in a "place," all of the businessmen in a given locale could band together and develop a usage of trade. Such strict linguistic constructions of the U.C.C. should be avoided in view of the loose drafting employed in the original Code and subsequent carelessness in integrating revisions. The possibility that this language change was intended to narrow the scope of usage of trade by eliminating the concept of "custom" has already been rejected.¹⁰⁴

A tangential matter arising out of the necessity that usages, other than those embodied in trade codes and similar writings, must be proved as facts should be mentioned. Since the existence of the usage

¹⁰⁴ See discussion on pp. 158-59 *supra*.

is a question of fact, no matter how often the existence of a particular usage has been demonstrated in the past, it must be proved anew in every subsequent case. The usage does not become law by way of *stare decisis*, and it may even be that a court should not be able to take judicial notice of a frequently proven usage of trade. This position is supported by the change of the applicable language of the original draft of section 1-205(2), which characterized questions of the existence and scope of usages as "questions of fact," to the present wording, which requires existence and scope "to be proved as facts."¹⁰⁵ Although this requirement of continuous proof of a proffered trade usage might be viewed as placing an undue burden upon already overworked and overcrowded courts, it should be remembered that the very purpose of recognizing usages is to permit commercial flexibility. Usages may change rapidly in a dynamic economy, and it would be most undesirable to "freeze" the legal status of any particular usage of trade. Moreover, allowing a court to take judicial notice of the "fact" of a usage of trade from other cases involving different parties would raise complicated and disturbing questions analogous to the arcane intricacies of collateral estoppel.

D. *The Connotation of the Terms "Place," "Practice," "Method" and "Dealing" in Section 1-205*

The Code does not define the words "place," "practice," "method" or "dealing." These terms must be read in light of the context of section 1-205, the fundamental objectives of the Code, the explanatory material contained in its official comments, its legislative history, the legal philosophy of its Chief Reporter, the current values of society in the "place" in question, common law doctrines, and the particular fact situation presented. Basically, these words are typical of the traditional, imprecise terms of the common law, whose principal purpose was to activate and impart guidance to the processes of the common law system. I suggest that each of these terms has three separate, but related contents: (1) a law or rule content, (2) a fact content, and (3) a justice content. It is the function of the courts to define, delineate and balance the content of these words and, thus, to use their in-

¹⁰⁵ This was not the specific purpose of the change as declared by the New York Law Revision Commission:

It was suggested that the second sentence of subsection (2) is not precisely accurate as a statement of present law, since it suggests that the determination is always to be made by the jury in a case tried by jury. It was suggested that the subsection should recognize as a question for the court the interpretation of a written trade code or similar writing.

New York Law Revision Commission Reports 364 (1956). The Commission's 1955 report suggests that a New York court could take judicial notice of a trade usage. See 1 New York Law Revision Commission Reports 329 (1955).

herent ambiguity as a means of flexibly adapting the law to changes in the values of society.

1. *The Connotation of "Place"*

At no point in section 1-205, nor in the comments thereto, is there any limitation placed upon the persons or groups of persons who may develop, promulgate or create a trade usage. The section does not suggest or even imply that only professionals or persons directly engaged in a vocation or trade may develop a usage of trade. A usage may be developed in a *place* as well as in a vocation or trade. Section 1-205(5)¹⁰⁶ is merely an interpretational provision and may not logically be applied to limit the conclusion that usages develop in places as well as in vocations and trades. This section may even be used to suggest that usages developed at a place have interpretational preference over usages developed within vocations and trades. This position is also supported by section 1-205(3), which states that usages shall be given the prescribed effect if the party was, or should have been, aware of them. The argument that this applies only to usages developed by other vocations and trades is unsound, since this restriction could easily have been included in the section, and also because such an interpretation would conflict with the "place" provision of section 1-205(2) and with a number of specific statements in the official comments. Comment 4 to section 1-205 provides in pertinent part:

The language used 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*. . . .
(Emphasis added.)

Comment 7 to U.C.C. Section 1-205 states that a usage "may be either *general to trade* or particular to a special branch of trade." (Emphasis added.) These statements provide strong support for the position that community usages, after they have developed sufficient recognition and predictability, may acquire the status of general usages, applicable to all conduct of business in a given *place*. The geographical limits of the "place" in a given situation may present an extremely complicated question of fact, but this sort of fact finding is the "heart and life" of the common law system. The size of the "place" may vary from issue to issue in a single case. For example, if the usage involved pricing policies in a ghetto situation, it might be found that the "place" was exclusively the ghetto area; however, if the usage in-

¹⁰⁶ U.C.C. § 1-205(5) provides:

An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

volved adequacy of disclosure or explanation, deceptive trade practices, general notions of fairness or similar questions, no reasonable argument could be made that "place" should be so narrowly circumscribed. This would also be true because the economic requirements of the ghetto businessman are arguably quite different from those of the general merchandiser. On the other hand, the disparity in business sophistication between the ghetto merchant and his customer as compared to the general merchandiser and his customer will, in all probability, be considerably greater, thus requiring the application of at least equal, if not greater, standards of fairness, reasonableness, disclosure and explanation.

2. *The Connotation of "Practice"*

The term "practice" contains a definite customary law flavor. Black's Law Dictionary defines "practice" as "[r]epeated or customary action; habitual performance; a succession of acts of similar kind; habit; custom; usage; . . . the exercise of any profession."¹⁰⁷ This definition is certainly broad enough to support the proposition that consumers and the general community could, indeed, develop "practices." Such an interpretation is consistent with the remainder of the section and the whole Code. The problem with the word "practice" is that it may be found to contain some requirement of actual prior application. As noted earlier, this prior application may well be found in prior commercial transactions, in which an emerging pattern of commercial behavior, characterized by friction, dissatisfaction and discontent on the part of consumers, became sufficiently defined as to be recognized as a usage of trade. Certainly the word "practice" is not a precise legal word, and it affords substantial interpretational latitude to a common law court.

3. *The Connotation of "Method"*

Although a rather mechanical meaning could be ascribed to the term "method,"¹⁰⁸ the context of section 1-205 would seem to require that this word be viewed as connoting the broad, general methods of conducting business operations and of obtaining commercial objectives. Used in conjunction with the term "practice," "method" could be interpreted as covering basic business theory, as opposed to prior practical application. The principal obstacle to developing broad, flexible definitions of these terms will be the predictable tendency of courts to limit recognition of usages to fact situations paralleling those in pre-Code usage cases, and consumer- or community-developed usages will

¹⁰⁷ Black's Law Dictionary 1335 (rev. 4th ed. 1968).

¹⁰⁸ See, e.g., *Id.* at 1142.

seem to be entirely different. Furthermore, most courts will, in all likelihood, have definite preconceived notions about what constitutes a usage. Hopefully, emphasis upon the justice of the particular case, the common law tradition, the underlying purposes and policies of the Code, and thorough analysis of section 1-205 and its accompanying comments will overcome these obstacles.

4. *The Connotation of "Dealing"*

"Dealing" suggests a content broader than trading. A "deal" has been defined as "an arrangement to attain a *desired* result by a combination of interested parties. . . ."¹⁰⁹ (Emphasis added.) The interested parties in a consumer sales transaction are the manufacturer, wholesaler, retailer, financing agency, the purchaser and his family or other consumers or persons exposed to the goods, and the community. "Dealing" would thus seem to include an element of reasonableness.

5. *Basic Elements Common to All of These Terms*

All of these terms, consistent with the underlying purposes of the Code, contain the following elements:

1. Common law flexibility;
2. Broad-scope relevance permitting the examination of a transaction in its total socio-economic setting; and
3. Reasonableness.

While the first of these, common law flexibility, has been discussed in some detail, the latter two elements deserve additional mention. A broad-scope relevance approach is suggested by the comments to section 1-205, which employ such phrases as "surrounding circumstances,"¹¹⁰ "commercial context,"¹¹¹ "commercial meaning,"¹¹² "furnish the background"¹¹³ and "the framework of common understanding."¹¹⁴ The relevancy of the "commercial setting" is recognized in the unconscionability section,¹¹⁵ and "other circumstances" may be considered under the Code's definition of "agreement."¹¹⁶

If a case in which a trade usage is urged involves a merchant, as it must, and is within the scope of Article Two of the Code,¹¹⁷ the

¹⁰⁹ Id. at 487.

¹¹⁰ U.C.C. § 1-205, Comment 1.

¹¹¹ Id.

¹¹² U.C.C. § 1-205, Comment 4.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ U.C.C. § 2-302(2).

¹¹⁶ U.C.C. § 1-201(3). Comment 3 to this section also speaks in terms of the "surrounding circumstances."

¹¹⁷ The scope of Article 2 is delimited in U.C.C. § 2-102.

whole transaction will be circumscribed by "the observance of reasonable commercial standards of fair dealing in the trade."¹¹⁸ A court might also imply a "reasonableness" requirement in a usage case involving other articles of the Code.¹¹⁹ Section 1-205(2) provides that the existence and scope of usage are to be proved as facts. One of the favorite tricks in the common law is to classify an issue as a question of fact in order to permit flexibility and justice in the individual case, and then leave it to the jury to provide the "justice" ingredient. Treating usage as a question of fact buttresses the reasonableness content of usages of trade and should assist consumer lawyers because of the increased likelihood that juries will be a receptive audience for their contentions. Moreover, judges should be hesitant to take the issue of existence of the usage away from the jury, and, in doubtful cases, should always submit the issue to the jury on proper instructions. The comments to section 1-205 also support the reasonableness ingredient both in their specific language¹²⁰ and in their general customary law tone.

E. *The "Affirmative Reasonableness" Aspect of Section 1-205*

Reasonableness has both a negative and affirmative aspect with respect to usages of trade, that is, unreasonable usages will *not* be recognized and reasonable usages *will* be recognized. The negative aspect is spelled out in comment 6 to section 1-205.¹²¹ In addition, by definition, the term "agreement" includes applicable usages,¹²² and agreements governed by Article Two are limited by the unconscionability section.¹²³ As indicated above, agreements beyond the scope of Article

¹¹⁸ U.C.C. § 2-103(1)(b).

¹¹⁹ See U.C.C. § 1-204 which establishes a flexible concept of "reasonable time" for actions by the parties to a transaction.

¹²⁰ U.C.C. § 1-205, Comment 6.

¹²¹ U.C.C. § 1-205, Comment 6 provides:

The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. *But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.* (Emphasis added.)

¹²² U.C.C. § 1-201(3) provides:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103).

¹²³ U.C.C. § 2-302.

Two may also be circumscribed by unconscionability or closely analogous common law doctrines relating to contracts of adhesion.¹²⁴ It is therefore clear that a usage of trade, no matter how clearly established, will not be given effect if its application in the particular case would be unreasonable. The dynamics of this process consist of the following three phases:

1. Establishment of the usage of trade;
2. A change in community values making the usage unreasonable; and
3. The usage ultimately being no longer recognized.

The concept of affirmative reasonableness is supported both by the underlying policy of the Code¹²⁵ and by the comments to section 1-205.¹²⁶ It also follows as a logical consequence of recognizing the concept of negative reasonableness. The dynamics of the process by which an old usage is rejected as being unreasonable and a new, more reasonable usage adopted in its place would be as follows:

1. Establishment of a usage of trade;
2. A change in community values making the usage unreasonable;
3. The usage no longer being recognized;
4. A resulting rule vacuum;¹²⁷
5. Application of the common law to fill the vacuum;¹²⁸ and
6. Recognition of a new usage by the court, employing the common law method in order to reach a just and reasonable result in the particular case.¹²⁹

This sequence of development results in the affirmative reasonableness concept becoming a part of the common law. If this is possible, then the possibility of affirmative reasonableness being recognized in the form of a usage of trade would also seem to follow. The first three steps of the foregoing sequence seem, of necessity, to be part of the process leading to the establishment of any new concept of reasonableness. A new reasonable method of doing business always displaces an old business method, the latter, of necessity, becoming unreasonable because it conflicts with the new reasonableness. There-

¹²⁴ See generally *Unconscionable Security Agreements: Application of Section 2-302 to Article 9*, 11 B.C. Ind. & Com. L. Rev. 128 (1969).

¹²⁵ See U.C.C. § 1-102(3).

¹²⁶ U.C.C. § 1-205, Comment 6.

¹²⁷ Assuming that this vacuum has not been filled by an express contractual term under U.C.C. § 1-205(4), and further assuming that no other specific U.C.C. provision applies. See discussion on pp. 174-76 *infra*.

¹²⁸ In accordance with U.C.C. § 1-103.

¹²⁹ See U.C.C. § 2-204(3).

fore, the establishment of a new rule of commercial reasonableness always includes the first three steps of the foregoing sequence, and makes specific proof of their occurrence in each case unnecessary. I have, therefore, concluded that section 1-205 may be interpreted as containing both an affirmative and a negative reasonableness content. If this conclusion is correct, section 1-205 may supply the general reasonableness rule of construction which, at first blush, appears to be missing from Article One.

F. *The "Purpose-line" Theory and Section 1-205*

Comment 9 to section 1-205, which has remained unchanged since the final draft, is a valuable aid to interpretation of that section. This comment provides:

In cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

It does not require a great deal of acumen to deduce that this comment is strikingly similar to what I have chosen to call Llewellyn's "purpose-line theory."¹⁸⁰ This comment thus indicates how closely related section 1-205 is to Karl Llewellyn's legal philosophy: it supports the position that persons other than tradesmen and persons engaged in vocations may create and develop usages of trade; it encourages a broad-scope relevancy treatment of usage; it supports the refutation of a distinction between custom and usage; it implies an affirmative concept of reasonableness; and it suggests liberality and flexibility in determining the observance necessary to justify an expectation of application. Consumer groups which have undertaken to disseminate information and to educate all members of the community on consumer protection, may be able, with respect to many aspects of these programs, to contend successfully that these aspects should be accorded the legal recognition permitted by section 1-205. The vast quantity of publicity concerning consumer protection emanating from all levels of government provides a substantial basis for awareness,

¹⁸⁰ See discussion on pp. 147-48 *supra*.

expectancy of application and, accordingly, commercial predictability of the effect of these writings.

Notwithstanding the revision of section 1-205, the section still embodies the legal philosophy of Karl Llewellyn. This is indicated by the presence of broad, direction-indicating fact-law terms; the heavy reliance upon the courts to implement the "purpose-line theory;" the inherent flexibility; the continuum of development from social recognition to legal recognition in a manner permitting predictability and expectation of application; and the basic concept of reasonableness. It would therefore appear that a party may, upon giving the required notice¹⁸¹ to the other party and offering sufficient evidence of the usage to the trier of fact, establish a reasonable and community-accepted usage of trade, created, established or developed by persons in the community, whether engaged in a trade or vocation or not, provided that the other party is or should be aware of the usage, so long as the application of the usage is justifiably to be expected.

G. *The Legal Effect of Usages of Trade*

The legal effect to be given to a usage of trade, proved and established in accordance with section 1-205, is outlined in the section itself. Present section 1-205 provides in part:

[A]ny usage [s] of trade in the vocation or trade in which they [the parties to a transaction] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement. (Emphasis added.)

The earlier version of section 1-205 provided:

(3) The parties to a contract are bound by any course of dealing between them and by any usage of trade of which both are or should be aware and parties engaged in a particular vocation or trade are bound by its usages.

(4) Unless contrary to a mandatory rule of this Act:

(a) A course of dealing or usage of trade gives particular meaning to and supplements or qualifies terms of the agreement.¹⁸²

At first glance, these two provisions appear to be substantially different. The original section provided that a recognized usage of trade would be treated both as a binding rule of law and also as a rule of construc-

¹⁸¹ U.C.C. § 1-205(6) provides:

Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

¹⁸² U.C.C. §§ 1-205(3) and -205(4)(a) (May, 1949 Draft).

tion or interpretation, while the current section provides that a recognized usage of trade is effective only as a rule of construction or interpretation. However, upon further analysis, it is apparent that there is no real difference in the legal effect ascribed to usages of trade by the two provisions, and that the present version is merely a better drafted statement of the desired result. Comment 4 to the original provision provided that a usage of trade could not abrogate a mandatory rule of law such as the Statute of Frauds,¹³³ and it is most likely that this interpretation would have been given to the original provision if the issue had been raised. Thus, under the original section an established usage of trade would have abrogated non-mandatory provisions of the Code and would have supplemented, qualified or given particular meaning to the terms of the agreement. Under the current section, "give particular meaning," "supplement" and "qualify" are extremely broad terms which, by themselves, could be interpreted as permitting usages to change non-mandatory provisions of the U.C.C. In any event, the Code definition of "agreement," as indicated earlier, includes usages of trade,¹³⁴ and U.C.C. Section 1-102(3) provides:

The effect of provisions of this Act *may be varied by agreement*, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement. . . . (Emphasis added.)

There can be no doubt, therefore, that a usage of trade under the Code as presently worded may be used to vary non-mandatory Code provisions. The possibility of a situation in which usage would be urged in a consumer transaction where there was no "agreement" seems too remote for speculation. Given the fact that there is no distinction between a rule of law and a rule of construction in this situation and in view of the awkwardness of having the mandatory rule proviso applicable only to sub-section (4) of the original draft, the result of the amendment is a mere stylistic improvement providing more accurate expression, notwithstanding the intentions of the "revisors."

"Give particular meaning," "supplement" and "qualify" are the same sort of broad-scope, common law terms as are contained in section 1-205(2) and are intended to be accorded particular meaning in ever-changing circumstances through the processes of the common law system. They each should be found to have a law, fact and justice content. The comments to section 1-205 support this position. Com-

¹³³ The Statute of Frauds provisions of the Code include §§ 1-206, 2-201, 8-319, 9-203(1)(b).

¹³⁴ See the text of U.C.C. § 1-201(3) excerpted in note 122 supra.

ment 4 imparts a customary law flavor to the effect to be given a usage of trade:

By adopting in this context the term "usage of trade" this Act expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law."¹⁸⁵

The broad effect to be given usage of trade is also expressed in comment 5:

Under the requirement of subsection (2) *full recognition* is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.¹⁸⁶ (Emphasis added.)

Finally, the "purpose-line theory" embodied in comment 9¹⁸⁷ suggests that effect should be given to a wide scope of usages, and that usages may be recognized and applied if the "expectancy" requirement is met, even though the precise scope and details of the usage are not yet clearly defined.

H. *Suggested Rules of Construction for Application in Trade Usage Cases*

In view of the foregoing suggestions, the following rules of construction are proposed for application in cases involving a proffered trade custom or usage under section 1-205:

1. Full effect should be given to the underlying Code policy of permitting continued expansion of commercial practices through custom and usage;
2. Substantial reliance should be placed upon the official comments to the section;
3. The section should be construed as encompassing both affirmative and negative reasonableness;
4. The objectives of overall social balance and maximum social adaptability for the Code should be promoted;
5. The just result in the particular case should, as nearly as possible, be attained; and
6. Doubtful questions of trade usage should be resolved in favor of consumer and community interests and against the business, com-

¹⁸⁵ U.C.C. § 1-205, Comment 4.

¹⁸⁶ U.C.C. § 1-205, Comment 5.

¹⁸⁷ See U.C.C. § 1-205, Comment 9.

mercial and financial interests which exercised such disproportionate pressure and influence during the evolution and enactment of the Code.

A possible limitation on the legal effect to be accorded a usage of trade emerges from the rule of construction contained in U.C.C. Section 1-205(4):

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

If the parties, either expressly or by implication from their actions, freely bargain to an agreement contrary to a usage of trade, that agreement should control. A problem arises when the agreement purports to exclude all usages of trade. This type of general exclusionary clause is a classic example of "lawyers' terms" which are not understood by either party to the agreement and are not really a part of the "bargain of the parties in fact."¹⁸⁸ Such blanket exclusionary clauses should be held to be unconscionable, since, without a clear explanation, the average layman would have no comprehension whatsoever of the effect of such a clause on his rights. I think most businessmen would be hesitant to exclude all usages of trade in any event, since usages are often beneficial to them. An attempt by a merchant dealing with a non-merchant to exclude all usages of trade except those applicable to his trade, would most likely also be stricken as unconscionable. Even if the court should find that an exclusionary clause were effective, usages of trade should still be admissible in order to clear up any "ambiguities" in the agreement.¹⁸⁹ According proper treatment to rules of construction in delimiting the effect of general exclusionary clauses is a familiar challenge to the common law art, and I am confident that the challenge will be met by the courts in such a way as to obtain just results in particular cases.

CONCLUSION

The critics, who have completely rejected the Code and rushed to the legislatures, have acted precipitously. Remembering the greatness of Karl Llewellyn and of his legal philosophy, scholars, judges and members of the practicing bar should carefully re-examine the Code. Properly applied, the Code contains many common law expan-

¹⁸⁸ See text of U.C.C. § 1-201(3) excerpted in note 122 *supra*.

¹⁸⁹ See U.C.C. § 2-202.

sion joints, and positive legal and societal results may be achieved by litigating Code issues in the common law system. It has become apparent that attempts to solve Code problems through additional legislation inevitably result in a plethora of piecemeal, ill-conceived statutes which serve only to compound the problems they were intended to resolve. A potential vehicle for Code flexibility and expansion in consumer transactions is afforded by section 1-205, the usage of trade provision. Consumer groups could use section 1-205 to great advantage in at least five general ways:

1. As a general affirmative reasonableness provision applicable to all Code transactions;
2. As a specific reasonableness provision, circumscribing and limiting business usage and practice by requiring that all such usages and practices be reasonable;
3. As a basis for urging the development of trade codes and other usages of trade by honest businessmen in a given place, vocation or trade, as a means of curbing their less ethical brethren;
4. As a basis for urging upon courts industry guides, advisory opinions, trade regulation rules and deceptive trade practice regulations issued by the Federal Trade Commission or other agencies as "similar writings" embodying evidence of "usage of trade" under section 1-205(2); and
5. As an incentive for consumer and community groups to develop, publicize, and thus establish reasonable usages of trade which would be of benefit to consumers.