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U.C.C. METHODOLOGY: TAKING A REALISTIC LOOK AT THE CODE

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I. INTRODUCTION

Recently, critics of the Uniform Commercial Code¹ have proposed either revisions or federal enactment of the Code.² These critics have perceived the Code as failing to produce uniformity, thereby creating unpredictable case law.³ Some commentators blame these problems on textual ambiguity in the Code,⁴ whereas others suggest that Code language is inconsistent.⁵ If such lack of uniformity exists, however, its principal cause is the failure to employ a standard or uniform methodology for both interpreting and applying the Code.

Most lawyers are familiar with the numerous problems involved in statutory interpretation. Two major problems that are sometimes understated in importance, however, are defining what is involved in statutory interpretation and recognizing and describing the various judicial methods of interpretation. This Article focuses on the methodology for statutory interpretation of the Code. Specifically, the Article describes the various methodologies employed at the time the Code was adopted, examines whether non-uniformity and inconsistency have in fact occurred in Code decisions, and addresses the sources of the potential lack of uniformity. Examination of Code decisions discloses that most academic writ-

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1. U.C.C. (1952). The subject of this Article is article 2 (sales) of the Uniform Commercial Code, hereinafter referred to as the Code.

2. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 8 (2d ed. 1980); Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 338 (1978); Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 U.C.C. L.J. 237 (1984).

3. See, e.g., Taylor, *supra* note 2, at 343; Thatcher, *supra* note 2, at 240.

4. For example, one critic suggests that although the Code looks comprehensive, it invites significant differences in interpretation. Taylor, *supra* note 2, at 355.

5. Thatcher, *supra* note 2, at 240-41.

ers, the practicing bar, and the judiciary have failed to apply a standard Code interpretational methodology. The various methodologies that have been applied have resulted in inconsistent decisions.

The failure of the profession to follow a uniform methodology has been unfortunate for two reasons. First, a uniform methodology in interpreting and applying a statute is a necessary condition for producing uniformity in judicial decisions involving that statute.⁶ Second, the drafter of the Code, Karl N. Llewellyn, developed a theory and a process of statutory interpretation that he incorporated into the Code. This "built-in" methodology, which grew out of Llewellyn's efforts as a legal realist⁷ to develop an effective theory of statutory interpretation, is the key to moving toward a uniform interpretation of the Code.

Llewellyn's approach to the Code involved the use of two techniques: the use of the code form, and a particular drafting style that grew out of his theory of statutory interpretation. First, Llewellyn's choice of the code form in revising commercial law had important methodological consequences. This Article will develop the thesis that a code requires a special methodology for interpretation simply because it is generically a code rather than a "normal" statute. Although continental legal thinkers associate code methodology with a different set of interpretational devices that are part of the civil law, this Article does not advocate continental or civil law methodology for Code interpretation. The author's position is that the structure and form of codes make them different in kind from most other statutes, thereby requiring a different methodology of interpretation. In the case of the Code, not only did Llewellyn choose that particular form, but he joined it to his new legal realist theory of statutory drafting and interpretation. The resulting Code is utterly unique, even among codes.

Second, Llewellyn's articles, memoranda, and speeches disclose the evolution of a general theory about statutory interpretation and the legal process. Llewellyn's drafting style evolved from his theories about law and the legal process. His drafting included a definite set of objectives, values, and procedural assumptions about

6. See *infra* notes 11-14 and accompanying text.

7. See *infra* notes 102-14 and accompanying text.

statutory interpretation and application. These assumptions, objectives, and values did not enter the Code indirectly or covertly; Llewellyn expressly and purposely incorporated them in his drafting efforts. The Code is thus the first and perhaps the only statute that incorporates legal realist notions of statutory drafting and interpretation. *It is the first legal realist statute.* Legal realism, through Llewellyn, produced the most distinctive feature of the Code: a new, utterly unique methodology. If the legal profession and the courts recognize and adopt that methodology, much of the nonuniformity and unpredictability in judicial decisions interpreting the Code will disappear.

II. DEFINING THE PROBLEM OF INTERPRETATION

A. Requirement of a Standard Methodology

The statutory nature of the Code furnishes an important reason for using a standard methodology. The Code, like all statutes, is not self-executing. Courts must apply its language to specific disputes. Prior to this application, however, the court must determine the meaning of the statute. Merely reading a statute does not always yield its meaning.⁸ A court uses the process of interpretation as one of the first, crucial steps in applying that statute to a dispute.⁹ Interpretation is difficult, however, because it usually involves finding another person's meaning from written words that often "elude and betray meaning."¹⁰

Interpretation is closely related to statutory methodology.¹¹ Lack of a common methodology for interpreting and applying a statute, especially a long and complex one, leads to nonuniformity in judi-

8. See Frankfurter, *Statutory Construction*, 3 VAND. L. REV. 365, 367 (1950).

9. See Beutel, *Interpretation, Construction, and Revision of the Commercial Code: The Presumption of Holding in Due Course*, 1966 WASH. U.L.Q. 381, 386. Interpretation has been described as "the process of determining the meaning of the words as they appear in the statute as applied to the problem at hand." *Id.* at 386.

10. Frankfurter, *supra* note 8, at 366.

11. One meaning of the term statutory methodology is the customary technique courts have used to interpret a statute. See F. BEUTEL, *BRANNAN'S NEGOTIABLE INSTRUMENTS LAW ANNOTATED*, 60-102 (7th ed. 1948). The term has also been used to describe canons or rules for interpretation. *Id.* at 93.

cial decisions involving that statute.¹² Put another way, uniformity in a particular area of the law requires two things: statutes with the same wording, and court decisions in which cases on all fours reach the same result.¹³ Uniformity of decision under a code especially requires uniform interpretation.¹⁴

B. Code Nonuniformity: Judicial Hostility Toward Relinquishing the Common Law Tradition

Unfortunately, few analysts or courts have attempted to develop an appropriate methodology for using the Code. Most commentators writing about the Code after it was enacted failed to even mention the problem of methodology. Instead, they focused on whether codification was needed at all,¹⁵ on textual exegesis of specific code sections,¹⁶ on changes from the common law of contracts and the Uniform Sales Act,¹⁷ on reactions to specific cases decided under the Code,¹⁸ and on explaining "how to" accomplish specific goals under the Code.¹⁹ Analysts who have examined substantive law usually have developed narrow subject areas, often just a single

12. See Beutel, *The Necessity of a New Technique of Interpreting the N.I.L.—The Civil Law Analogy*, 6 TUL. L. REV. 1, 2 (1931).

13. *Id.* at 3.

14. See Hart, *UCC Brief No. 2: Interpreting the Uniform Commercial Code*, PRAC. LAW., Nov. 1986, at 39, 40; Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361, 382 (1968).

15. Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951); Hawkland, *Article 9 Methodology*, 9 WAYNE L. REV. 531 (1963); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321.

16. Hawkland, *Major Changes Under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, PRAC. LAW., May 1964, at 73; Weeks, *Battle of the Forms Under the Uniform Commercial Code*, 52 ILL. B.J. 660 (1964).

17. Gilbride, *The Uniform Commercial Code: Impact on the Law of Contracts*, 30 BROOKLYN L. REV. 177 (1964); Hawkland, *supra* note 16.

18. Comment, *A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code from the Seller's Point of View or What's So Bad About Roto-Lith?*, 8 AKRON L. REV. 111 (1974); Case Comment, *Sales—Uniform Commercial Code—"Acceptance" Varying Terms of Offer*, 42 B.U.L. REV. 373 (1962); Note, *Uniform Commercial Code: Variation Between Offer and Acceptance Under Section 2-207*, 1962 DUKE L.J. 613.

19. Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptance and New Concepts in Contract Law*, 19 BUS. LAW. 75 (1963); Kove, *The "Battle of the Forms": A Proposal to Revise Section 2-207*, 3 U.C.C. L.J. 7 (1970).

code section.²⁰ The closest approach to examining appropriate methodology for use and application of the Code has been a general analysis of the drafter's jurisprudence.²¹

The courts have paid even less attention to developing a Code methodology. This lack of attention is not surprising. Lawyers had done the same thing with the Negotiable Instruments Law, the predecessor of the Code.²² The refusal to abandon common law case methodology or to consider that another methodology might be necessary in interpreting the Negotiable Instruments Law was one reason for the enactment of a reform statute—the Code.²³

Many experts have observed the deep hostility of the common law toward statutes,²⁴ which is manifested by courts treating statutes merely as innovations or exceptions to case law.²⁵ Some analysts have observed that the source of this viewpoint was the

20. E.g., Duesenberg, *Exiting from Bad Bargains Via Section 2-615: An Impractical Dream*, 13 U.C.C. L.J. 32 (1980); Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979); White, *Allocation of Scarce Goods Under Section 2-615 of the Uniform Commercial Code: A Comparison of Some Rival Models*, 12 U. MICH. J.L. REF. 503 (1979).

21. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). Professor Danzig's article is one of the classics on Code jurisprudence.

22. UNIF. NEG. INSTR. ACT, 5 U.L.A. 2 (1943). The Negotiable Instruments Act has been superseded by the U.C.C. in all states.

23. Beutel states the problem:

On first blush the [Negotiable Instrument Law] itself may seem responsible; but, as long as the courts and legal scholars continue to pursue the haphazard method of seizing upon the first available technique of interpretation to reach the result desired in a particular case, with no thought of the effect of such practices upon the science of interpretation as a whole, and as long as the courts stubbornly continue to rely upon the doctrine of stare decisis, just so long may we expect to see all efforts at uniformity through codification lost in a seething mass of conflicting cases.

Beutel, *supra* note 12, at 16-17 (emphasis in original).

24.

Indeed, statutes are in the main regarded as innovations on case law, to be limited in their application; and after their enactment case law provides both the wherewithal to fill gaps in their subject matter and the technique of interpreting what they cover—so much so that it is a legal commonplace that no man knows what a statute means until the courts have “construed” it.

Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1132 (1982) (quoting Llewellyn, *Case Law*, in 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249, 249 (1930)).

25. “A code is intended to replace the earlier common law. How can one ensure that the judges, brought up on the common law and familiar with it, will wipe out their knowledge of

profound conservatism of judges, which led them to treat codes, absent an unequivocal legislative intent to change the common law, as merely modifications of the common law and equity. Judges were particularly uncomfortable with problems involving statutory interpretation because of their heavy orientation toward case analysis.²⁶ Before enactment of the Code, several commentators recognized these prejudices and attachments to the common law methodology as serious hurdles that could obstruct successful application of the Code.²⁷

1. *The 2-207 Examples*

As the commentators had predicted, the courts employed common law methods of statutory interpretation in Code cases.²⁸ The well-known case *Roto-Lith v. F.P. Bartlett & Co.*²⁹ exemplifies this process. In *Roto-Lith*, the seller responded to an order form with an acknowledgment form that disclaimed all warranties for the goods sold. When a dispute arose because the goods were defective, the court had to determine whether the disclaimer in the seller's acknowledgment form relieved the seller of liability.³⁰ The United States Court of Appeals for the First Circuit, applying Massachusetts law, determined that section 2-207 governed this "battle of

the cases from their memories and concentrate on the statutory words?" Diamond, *supra* note 14, at 375-76.

26. There is an "undoubted prejudice against legislation felt by common lawyers." Diamond, *supra* note 14, at 379. Statutes are seen as "enemy invaders." K. LLEWELLYN, *THE COMMON LAW TRADITION* 39 (1960).

27.

There is some reason to be apprehensive about the fate of the Uniform Commercial Code as it enters judicial arenas. . . . The great talent and skill that Anglo-American lawyers and judges exhibit in the very difficult art of discovering and using case law makes their general ineptitude in using statutory material difficult to understand.

Hart, *supra* note 14, at 40. "Standard code methodology does not use the doctrine of stare decisis, but that doctrine is so heavily entrenched in this country and has worked so well that it undoubtedly will be used in construing the U.C.C." Hawkland, *supra* note 15, at 535.

28. The review of the several cases which follows is not intended to be exhaustive, but is meant to illustrate some of the different ways in which the courts avoided the changes the Code made to the commercial law.

29. 297 F.2d 497 (1st Cir. 1962). The intention is not to rehash that case, but rather to show that it was decided incorrectly because the court used common law methods to resolve a problem of statutory or code interpretation.

30. *Id.* at 498-99.

the forms.”³¹ The court decided that the purpose of section 2-207 was to modify the common law “mirror image” rule, which provides that in order to constitute an acceptance, an offeree’s reply must agree with each and every term of the offer.³² Accordingly, a response that did not in all particulars exactly match the offer would constitute an acceptance as to the items that matched, and a “counteroffer only as to the differences.”³³ The court reasoned that if the additional terms were “unilaterally burdensome” on the offeror, and if the offeror was free to assent to them or not, then the Code “would lead to an absurdity” because “[o]bviously no offeror will subsequently assent to such conditions.”³⁴ The court concluded that “[t]o give the statute a practical construction we must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an ‘acceptance . . . expressly . . . conditional on assent to the additional . . . terms.’ ”³⁵

This case is a perfect example of judicial hostility to a new statute changing the common law. It also illustrates several of the judicial devices for avoiding statutory changes in the law which the commentators noted had been used in the past.³⁶ First, the court applied a fundamentally erroneous assumption to define the issue. According to the court, the effect of section 2-207 is that a response that does not correspond in all particulars to the offer becomes an acceptance as to the matching items and a “counteroffer only as to the differences.”³⁷ The court did not ask whether the language of section 2-207 justifies the conclusion that the additional material automatically becomes a counteroffer.

Subsection (2) of section 2-207, however, provides that “[t]he additional terms are to be construed as *proposals* for addition to the contract.”³⁸ Obviously, a proposal for addition to the contract is not the same as a “counteroffer only as to the differences.”

31. *Id.* at 499.

32. J. MURRAY, MURRAY ON CONTRACTS § 54, at 110-11 (2d rev. ed. 1974).

33. *Roto-Lith*, 297 F.2d at 500.

34. *Id.*

35. *Id.* (quoting U.C.C. § 2-207(1)).

36. See *supra* notes 24-27 and accompanying text.

37. *Roto-Lith*, 297 F.2d at 500.

38. U.C.C. § 2-207(2) (1952) (emphasis added), cited in *Roto-Lith*, 297 F.2d at 499.

Moreover, comment 2 appears to address directly the status of the additional material: "Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and *must* be regarded as a *proposal* for an added term *unless the acceptance is made conditional on the acceptance of the additional terms.*"³⁹ Arguably, this language, which appears to be mandatory or nearly so, was intended to mean that so long as the acceptance is definite and seasonable, then additional material is a proposal for addition, unless the acceptance is expressly made conditional. Why did the court fail to consider this interpretation, except to note that its decision was required by "practical" considerations?⁴⁰

An examination of the opinion reveals that the court used several of the devices often used by common law courts to ignore or avoid statutes. First, the court assumed, without considering relevant statutory language, that any term in the response that was not identical to the offer was automatically a counteroffer. The common law response to the *Roto-Lith* facts would be that any variance, no matter how minute, converted the entire response from an offer into a counteroffer. A common law court, begrudgingly responding to a statute that changed this law, would retain the use of the automatic counteroffer rule for all material that did not fit exactly into the new statutory acceptance concept. This is precisely what the court in *Roto-Lith* did. Despite the clear language of subsection (2) and the reinforcement of comment 2, the court gave the scope of the counteroffer concept exactly the same breadth and strength that it had at common law.

In fact, as to additional terms in the response under 2-207, the court in *Roto-Lith* employed the last shot doctrine. That doctrine, a corollary of the common law mirror image rule, provides that if the original offeror acted in connection with the transaction that was the subject of the offer and counteroffer, he would be held to have accepted the counteroffer.⁴¹ According to the court in *Roto-Lith*, the addition of terms that favored the offeree converted the

39. U.C.C. § 2-207 comment 2 (emphasis added).

40. *Roto-Lith*, 297 F.2d at 500.

41. Hawkland, *supra* note 16, at 82.

entire acceptance into a counteroffer.⁴² If the parties thereafter acted as though there were a contract, then it was on the terms of the counteroffer.⁴³ In reaching this result, the court employed common law statutory methodology and gave the narrowest possible scope to the language of the Code.

Roto-Lith was not the only section 2-207 case to reflect this type of reasoning in interpreting the Code. In *Gilbert & Bennett Manufacturing Co. v. Westinghouse Electric Corp.*,⁴⁴ the seller's form acknowledgment contained a warranty disclaimer and limitation of remedy clause. When the goods did not function according to their description, the buyer brought an action for breach of warranty. The seller responded that, based on the language of his disclaimer, no warranties had been given. After acknowledging that section 2-207 controlled, the United States District Court for the District of Massachusetts held that the seller's response was a counteroffer and the buyer had to give notice of objection to the seller's terms in order to avoid them.⁴⁵ *Roto-Lith* was the only authority cited to support this conclusion.⁴⁶ Evidently, the court in *Gilbert & Bennett* believed that no explanation was necessary. Instead of considering the language of the Code, as it was required to do, the court simply found an invalid precedent and relied on it.⁴⁷ This was one more device to avoid the surrender of earlier concepts of contract formation and methodology.

42. *Roto-Lith*, 297 F.2d at 500.

43. *Id.*

44. 445 F. Supp. 537 (D. Mass. 1977).

45. *Id.* at 545-46.

46. *Id.* at 546.

47. At this preliminary stage of analysis and explanation, analyzing this case in terms of the methodology suggested in this Article is inappropriate. The court nonetheless should have made some obvious inquiries suggested by the plain language of section 2-207. First, the court should have asked whether under subsection 2-207(1) the seller had made a seasonable acceptance or had expressly made acceptance conditional on assent to the seller's terms. Second, the court should have asked whether the change was material under 2-207, and it should have explored whether the comments provide a means to define "material." The court ignored these issues plainly posed by the statutory text and comments and relied instead on a precedent that assumed the continued existence of the pre-code common law of contract formation.

In *Beech Aircraft Corp. v. Flexible Tubing Corp.*,⁴⁸ the United States District Court for the District of Connecticut, in dicta,⁴⁹ went one step further than the *Gilbert & Bennett* opinion. In *Beech Aircraft*, the buyer sent an order to which the seller responded with an acknowledgment form that contained a warranty disclaimer. The goods were defective, and the seller took the position that the warranty disclaimer relieved him of liability. Relying on the *Roto-Lith* decision, the court stated:

The Uniform Commercial Code today expressly provides that a confirmation which contains additional terms may constitute an acceptance unless the new terms materially alter the offer. An additional clause negating standard warranties is considered to "materially alter" the offer. *A confirmation similar to that in the instant case would accordingly constitute a counteroffer even under the Code.*⁵⁰

After reciting the language of 2-207, the court announced, without explanation, that the Code language meant the same as the common law on the subject of counteroffers.⁵¹ Although the court relied on the holding in *Roto-Lith*, it also assumed the broadest imaginable interpretation of that precedent in order to support its assertion that the new Code and earlier common law were indistinguishable.

2. Code Coverage Examples

Many courts have retained old methodologies of statutory interpretation in cases that involve the scope or coverage of the Code.⁵² For example, the test for whether a contract involves goods or ser-

48. 270 F. Supp. 548 (D. Conn. 1967).

49. The parties conceded that the Uniform Sales Act controlled. *Id.* at 557 n.3.

50. *Id.* at 558 n.4 (citations omitted) (emphasis added).

51. *Id.* The *Beech Aircraft* opinion gives every indication of the court's belief that the *Roto-Lith* decision merely restated the common law. In the text of the opinion, the court announced that a purported acceptance with new warranty terms "constitutes a rejection and a counteroffer." *Id.* at 558 (citing *Riverside Coal Co. v. Elman Coal Co.*, 114 Conn. 492, 159 A. 280 (1932); *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915)). Shortly thereafter the court cited *Roto-Lith* for the same proposition. *Id.* at 558-59 & 559 n.5. The inescapable conclusion is that the court equated the law as to counteroffers in the *Riverside Coal* and *Poel* cases, both of which are classic common law offer-acceptance-counteroffer cases, with the law announced in *Roto-Lith*.

52. The intended scope of the Code is found in §§ 2-102, 2-103, 2-105, and 2-106.

vices was stated in *Bonebrake v. Cox* as “whether [its] predominant factor, [its] thrust, [its] purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. . . .”⁵³ This method of dealing with issues of Code coverage involves stereotypical common law thinking; that is, the transaction is characterized, pigeonholed, or labeled as a certain type. The type determines the outcome. Conflicts of laws scholars have almost unanimously denounced this characterization process.⁵⁴ Most conflicts scholars agree that the characterization device creates two serious problems. First, its deceptive simplicity of use lends it a false air of certainty and consistency, when in fact it is limited or useless as a test and leads to unpredictable and inconsistent results.⁵⁵ Second, the device conceals the true basis for the decision by permitting choices based on other considerations to be made as part of the characterization device, so that the true reason for the decision is not apparent.⁵⁶

In *Epstein v. Giannattasio*,⁵⁷ the Connecticut Court of Common Pleas explained the rationale for this approach to Code scope cases. The court stated that the “determinant [of whether the

53. 499 F.2d 951, 960 (8th Cir. 1974). *Accord* *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977); *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977). All three cases involved the purchase of flooring that the seller was to install.

54. R. LEFLAR, *AMERICAN CONFLICTS LAW* 205-16 (1968) (“characterization is . . . employed to cover up actual choice-of-law reasons”); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 39-64 (1971) (describing the characterization process as a pervasive problem).

55. R. WEINTRAUB, *supra* note 54, at 40-45.

56. According to Leflar,

It is evident . . . that the characterization process is not in practice a purely mechanical one, nor one which is complete within itself If more than one characterization is logically available for a set of facts, and constitutionally permissible, the choice between the characterizations may turn on a judicial desire to achieve justice in the particular case, on a public policy preference for one rule of law over another, on a preference for the forum state's own rule of law, or on something else other than pure logic.

. . . [I]t is apparent that the characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons exist cannot be doubted. The only questions that remain are what the real reasons are, and why a cover-up device should be manipulated to conceal them.

R. LEFLAR, *supra* note 54, at 212-13 (footnote omitted).

57. 25 Conn. Supp. 109, 197 A.2d 342 (1963).

Code applies] is . . . the intention of the parties. . . . That intention is to be ascertained from the language used, interpreted in the light of the situation of the parties and the circumstances surrounding them.”⁵⁸ This test—the standard contract formation baseline, or the intent of the parties—is clearly irrelevant in this context. That is, the parties do not think in terms of goods or services, and hence have no intent at all on the subject of whether they are formulating a contract for goods or one for services. In this context, intent is a fiction. This test, in its assumption that the parties have such an intent, furnishes a rationale for the characterization device imposed by the courts.

Other courts have openly stated their preference for earlier law. For example, in *Carroll v. Grabavoy*,⁵⁹ the court concluded that because the language of the Code was “similar” to that of the Uniform Sales Act, the predecessor of the Code, it saw “no basis” to change the test for the scope of the Code’s coverage.⁶⁰ The court failed to consider the structure of the Code, the other applicable sections, the comments, or the policy enunciated in the Code. Instead, it simply assumed, on the basis of the “similarity” of some statutory language, that the Code test and the Uniform Sales Act test were the same.⁶¹ The most cursory examination of these sources would have revealed that the Code was not intended merely to reenact the provisions on coverage of the Uniform Sales Act.⁶²

A more obvious example of retention of common law reasoning and refusal to employ a modern statutory methodology occurred in *Allen v. Ortho Pharmaceutical Corp.*⁶³ The United States District

58. *Id.* at 113, 197 A.2d at 344 (quoting *United Aircraft Corp. v. O'Connor*, 141 Conn. 530, 107 A.2d 398 (1954)).

59. 77 Ill. App. 3d. 895, 396 N.E.2d 836 (1979).

60. *Id.* at 899, 396 N.E.2d at 839.

61. *Id.*

62. For example, comment 1 to § 2-101 states that article 2 is a complete revision of the Uniform Sales Act and that the coverage of this article “is much more extensive than that of the old Sales Act.” U.C.C. § 2-101 comment 1 (1952). This comment directly contradicts the court’s conclusion in *Carroll*. It is difficult to understand how the court could overlook this language without even inquiring whether it might effect some change in coverage. The effect of this comment language under any theory of statutory interpretation should have been to prompt a court to inquire whether the new statute had changed the scope of coverage of the sales law.

63. 387 F. Supp. 364 (S.D. Tex. 1974).

Court for the Southern District of Texas had to decide whether a drug given as a sample to a physician and subsequently dispensed to a patient fell within the Code. In determining whether the transaction constituted a sale for purposes of the Code, the court used a traditional common law test for consideration: whether the promisor had received a benefit or the promisee had incurred a detriment.⁶⁴ The Code defines a sale as "the passing of title from the seller to the buyer for a price,"⁶⁵ but whether the Code intended to retain the common law consideration test as the equivalent of the term "price" is a fair question. The court in *Allen* simply assumed that price was synonymous with consideration. It assumed that the common law test was the best way to resolve a question under the Code, without considering whether the Code intended to retain this test.⁶⁶

The observations made in connection with the *Carroll* case are also applicable here.⁶⁷ More specifically, section 2-304 and comment 2 address the specific issue of the *Allen* case.⁶⁸ Why then did the court fail even to mention this section and its comment? The answer is that common law habits of interpreting statutes resist change.

The criticism of the cases analyzed thus far has focused principally on specific errors in interpretation made by each court. However, the courts also committed a common error. They failed to perceive that in addition to substantive changes in the content of

64. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 134-35 (2d ed. 1977); E. FARNSWORTH, *CONTRACTS* 41-42 (1982). The court in *Allen* ruled that "[a]ny benefit incurred by the defendant is fortuitous only" and that there was no evidence that "by accepting the sample the plaintiff incurred any legal detriment." *Allen*, 387 F. Supp. at 368.

65. U.C.C. § 2-106(1) (1952).

66. Another area in which the courts have maintained common law methods of interpretation is in determining whether a farmer is a merchant under the Code. Several of these cases are analyzed in McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978). McDonnell found that the plain meaning rule was the major common law device used by the courts in such cases. *Id.* at 801-09.

67. See *supra* note 62 and accompanying text.

68. "The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer." U.C.C. § 2-304(1). "Under subsection (1) the provisions of this Article are applicable to transactions where the price of goods is payable in something other than money." *Id.* comment 2.

commercial law, the new Code included and required a new methodology for interpreting and applying it.

III. LLEWELLYN'S INFLUENCE ON THE CODE

The fact that the Code was drafted almost entirely by Karl N. Llewellyn is profoundly significant. His influence was so pervasive that the Code has been referred to as the "Lex Llewellyn."⁶⁹ The assistant reporter for the Code described the degree to which the Code reflected Llewellyn's ideas as "startling."⁷⁰ Other Code experts agree that Llewellyn's ideas are the most fundamental and formative influence on the Code.⁷¹ Llewellyn rejected traditional legal thinking about case and statutory methods, and after years of studying and teaching commercial law and jurisprudence, he also rejected the substance of the commercial statutes of his time. One of his principal reactions was rejection of existing commercial case and statutory method.⁷²

A. *Llewellyn's Use of the Code Form*

The use of the code form was in itself one of the most important aspects of Llewellyn's drafting. Codification has certain important procedural implications.⁷³ Moreover, in the case of the U.C.C., Llewellyn's efforts produced a code with many features that were unique, even for a code.

Before the Code was adopted, a controversy arose over what form the new commercial law should take. Many recognized that the code form used in Europe entailed major differences in methodology.⁷⁴ Only after considerable debate over the merits and demerits of codification did Llewellyn draft in code form.⁷⁵ He did so

69. Franklin, *supra* note 15, at 330.

70. Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n.3 (1964).

71. Danzig, *supra* note 21, at 621-23.

72. W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 303-04 (1973).

73. 1 STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE, 41 (1955). Many experts maintain that the Code differs generically from both common law decisional and common law statutory methodology. *See id.*

74. J. JACKSON & L. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY 141-52 (2d ed. 1980).

75. *See* Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and Code Methodology*, 18 B.C.L. REV. 655, 655-60 (1977).

deliberately, in order to resolve problems associated with then-existing commercial law.⁷⁶

A code has been defined as an "orderly and authoritative statement of the leading rules of law on a given subject."⁷⁷ It is selective, comprehensive, and unified.⁷⁸ These are terms of art. Authoritative means that a code is legislatively enacted; selective means that it states only the leading rules; comprehensive means that it states all of the leading rules; and unified means that it speaks completely on a given subject.⁷⁹

The most important attribute of the code form is probably orderliness, which is also one of its most distinctive features. Orderliness means the reduction of an entire area of law to a complete system, which requires orderly arrangement of principles and rules, and maintenance of consistency among various sections of the statute relative to the subject area covered.⁸⁰ In a code, this orderliness and systemization are so strongly maintained that individual code sections are only "relatively independent" of each other.⁸¹ Orderliness in a code can be established in several fashions.

First, most codes either state exceptions to specific rules within the text of that rule or refer to exceptions in cross references to other sections. Second, many codes have supereminent or "safety valve" provisions to modify the harsh results that the general rules within a code periodically produce. Third, to maintain orderliness in a code, the underlying policies of the various provisions and sections usually are compatible with each other.⁸² Fourth, orderliness requires that the code provide for keeping the subject area of the statute current and for filling gaps in the statute.⁸³

76. 1 STATE OF NEW YORK LAW REVISION COMMISSION, *supra* note 73, at 37, 87. "[I]n his approach were certain attitudes towards and ideas about codification, and in other contexts, notably in teaching jurisprudence, he often discussed the ideas of Savigny, Carter, Field, and other leading participants in debates about codification." W. TWINING, *supra* note 72, at 308.

77. Goodrich, *Restatement and Codification*, in FIELD CENTENARY ESSAYS 241, 243 (1959).

78. 1 STATE OF NEW YORK LAW REVISION COMMISSION, *supra* note 73, at 37.

79. *Id.*

80. *Id.* at 65-66.

81. Franklin, *supra* note 15, at 337.

82. 1 STATE OF NEW YORK LAW REVISION COMMISSION, *supra* note 73, at 66.

83. Hawkland, *Uniform Commercial Code Methodology*, 1962 U. ILL. L.F. 291, 299-300.

The most distinctive devices used to achieve orderliness are coordination and superordination.⁸⁴ Coordination means that provisions of a code refer to one another and remain consistent when more than one statutory provision may be applicable.⁸⁵ Superordination provides methods for handling competing and conflicting principles or rules in the text of the code.⁸⁶ This type of conflict between more than one potentially applicable portion of a statute is especially likely to occur in a code because the code attempts to deal comprehensively with an entire area of law.

Although Llewellyn supported codification, he did not become embroiled in the controversy on that subject.⁸⁷ His approach was pragmatic and treated codification as a tool to solve a particular problem at a particular historic moment.⁸⁸ The clear defects of the prior commercial statutes, such as the Uniform Sales Act, were a principal source of Llewellyn's support for codification.⁸⁹ Llewellyn's long study of commercial law and his practical experience with the problems of business made him critical of the fairness and effectiveness of existing commercial law, of the proficiency of the bar practicing in that area, and of the ability of existing commercial law to meet the needs of the business community. He argued that lack of knowledge about commercial law was so widespread that many "expert" commercial lawyers' knowledge consisted of "smug, flat ignorance."⁹⁰

84. *Id.* at 301.

85. *Id.*

86. *Id.*

87. W. TWINING, *supra* note 72, at 310-11.

88. *Id.* at 311.

89. Memorandum of Karl N. Llewellyn to Executive Committee on Scope and Program of the NCC Section on Uniform Commercial Acts [hereinafter Llewellyn Memorandum], reprinted in W. TWINING, *supra* note 72, at 524-26.

90. Statement of Karl N. Llewellyn to New York Law Revision Commission (1954) [hereinafter Llewellyn Statement], reprinted in W. TWINING, *supra* note 72, at 537.

No person associated with the undertaking had at the outset any remotest suspicion of how deep, how widespread was ignorance of our commercial law among both our bar and our business community; still less did any man have suspicion of how much of the "knowledge" of many "experts" was smug, flat ignorance—ignorance dangerous also to their clients.

Id.

Moreover, Llewellyn realized that the existing source of commercial law, the Uniform Sales Act,⁹¹ had become totally outdated.⁹² He argued that commercial statutes pose a particular problem: they must be kept current, but the legislature does not have the time, energy, or means of reaching agreement on such changes on a frequent basis. Further, if the legislature does amend the commercial statute, it does a patchwork job.⁹³ Llewellyn perceived that enacting a new commercial statute in code form could help solve this problem.⁹⁴

91. U.L.A., vols 1 & 1A, Sales (1950). The Uniform Sales Act was produced by the National Conference of Commissioners on Uniform State Laws. The National Conference, founded in 1889, has as its objective "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practical." *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 35TH ANNUAL MEETING* (1925). The conference has written and continues to produce uniform statutes on a variety of subjects, which are then adopted one at a time by states that choose to do so.

Prior to the time the U.C.C. was first promulgated, the National Conference had produced seven commercial statutes that had been adopted by numerous states. At the time the U.C.C. was drafted, it had been "recognized for some years" that these commercial statutes needed substantial revision to keep them in step with commercial practice and to integrate them with one another. *GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE*, 1 U.L.A., at xvi (master ed. 1976).

92.

The actual historical reasons for undertaking the Code have their own further and independent powerful punch.

Much of the law, whether embodied in the original Uniform Commercial Acts or not, has become outmoded as the nature of business, of technology, and of financing has changed. Such law needs to be brought up to date.

Llewellyn Statement, *supra* note 90.

93.

The third thing which our Acts have not yet done, is to recanvass their own work, each in the light of the other and of all experience since the drafting. . . .

. . . .

If one sets the pending Amendments to the Negotiable Instruments Act against such a background, he finds their whole theory to be unwise. They were intended as, and were prepared as, patchwork.

Llewellyn Memorandum, *supra* note 89, at 527.

94.

Yet the great fact of policy remains: if American enterprise is to develop as a free economy, then the rules of the game must be known, and they must therefore be made readily knowable. They must be made as simple (though adequate) and also as easy to know, as the best legal engineering can make them. That the Code does.

Llewellyn Statement, *supra* note 90, at 537.

Llewellyn also argued forcefully that the existing uniform commercial statutes were deeply flawed in conception and structure.⁹⁵ Much of this problem arose because the various Uniform Acts were prepared one by one. This process resulted in a lack of coordination, manifested by conflicts and discrepancies between the Acts, and by gaps in coverage.⁹⁶ The cumulative result of these deficiencies was problems that "leaped across the 'boundaries' of the traditional 'fields' of law."⁹⁷

Llewellyn also argued that the Uniform Acts were needlessly complex in the areas of law they did cover.⁹⁸ He identified two aspects of the problem of complexity. First, the Uniform Acts were so complex that they were useless except to specialized lawyers.⁹⁹ Second, the verbal formulas used in the Uniform Acts did not fit situations that usually occurred in areas governed by the Acts.¹⁰⁰ This led to uncertainty, unpredictability, and confusion. Llewellyn

95. *Id.* at 538-39.

96. *Id.* at 539.

97. *Id.*

But why in the form of a Code? In the first place, experience has shown wide and unhappy gaps to exist between the existing Acts Sound revision anywhere proved to call for thinking through and for testing out the bearings on all other sectors . . . (Such thinking through would never have occurred save in the process of a whole-job. . .).

. . . .
The Code, therefore, calls for adoption as an integrated whole, whose parts supplement, support, mutually affect and balance one another.

Id. at 538-39.

98. *Id.* at 538.

99. Llewellyn Memorandum, *supra* note 89, at 526. "By this I mean the heaping up of technical language and of qualifications. I speak with conviction of sin: no man working for the Conference has ever produced a more complex piece of wording than the Trust Receipts Act." *Id.* Llewellyn was also concerned that this drafting for specialists meant that "the law which governs our commerce and commercial finance is *substantially unknown to most lawyers*, whether they need to know it or not, and is almost wholly unknown to most business men." Llewellyn Statement, *supra* note 90, at 536 (emphasis in original).

100. Llewellyn Statement, *supra* note 90, at 538.

[T]he existing law can sometimes point up clearly how *not* to make law, wherever simplicity has been sought by way of some mere *word-formula which does not fit the situation and the situation's set of problems*. . . .

Where operation and results are today scrambled and unreliable even though the word-formula *looks* simple, then what is needed is to re-examine the problems and the material and to come out with language which *really fits the need*.

Id. (emphasis in original).

concluded that codification of the commercial law would eliminate these problems.¹⁰¹

B. Llewellyn and Legal Realism

1. The Legal Realists

Llewellyn's philosophy and his theory of statutory drafting were important factors in his decision to draft in code form. Llewellyn was one of the major thinkers in the mode of legal analysis known as legal realism.¹⁰² Legal realism was a reaction to the jurisprudence of the nineteenth century, and was the successor to the sociological school of jurisprudence.¹⁰³ The realists rejected the nineteenth-century idea that law consisted of a complete, symmetrical set of general and self-contained doctrines or premises. They also objected to the corollary of that view, which held that the correctness of a judicial decision should be measured by its consistency with some set of overarching general premises.¹⁰⁴ The realists argued that this notion of law as an abstract, fixed body of general rules or doctrines was incorrect and misleading. They maintained instead that law was dynamic and reflected social fact. Thus, as society changed, law would also change, and any equilibrium reached between existing law and social fact was only temporary. The realists also believed that the traditional view of law was misleading, because it purported to explain decisions in terms of general rules in judicial opinions. The realists argued that this style of explanation concealed the true reasons for the outcome. They contended that in most cases, the decision was the reaction of a particular judge to a particular set of facts.¹⁰⁵ According to the real-

101. "Thus, regardless of the history, the result is clear: With the Code, the law of commerce and commercial finance becomes relatively quick to find, to understand, and to use. This is a typical example of the point made above about the unplanned values of good tools." *Id.* at 537.

102. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1017 (1972).

103. *Id.* at 1020-26.

104. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038-39 (1961).

105.

A judge's holding in a case is an *ad hoc* response to a unique state of facts, rationalized, after the event, with a dissimulation more or less conscious, and fitted willy-nilly into the Procrustean bed of approved doctrine. The motiva-

ists, the principal value of a case was in the actual decision—given a particular set of facts, Smith won and Jones lost—and not in the court's after-the-fact rationalization in the form of a judicial opinion.¹⁰⁶

This description identifies several important themes or concerns of the legal realists. One was the necessity for a narrowing of focus in the study of legal decisions. This change in focus had several important consequences. First, it led the realists to emphasize the significance of the study of individual cases.¹⁰⁷ Quite naturally, this study of single cases drew attention to concrete instances of rules in action, as applied by the courts.¹⁰⁸ This focus, in turn, led the realists to concentrate on what courts actually do, as opposed to what they ought to do, and to focus on the specific result in a case rather than on abstract general doctrine or rule formulation.¹⁰⁹ Realists also attempted to identify subjective, psychological elements in judicial decisions.¹¹⁰

The second result of the realists' study of specific cases was recognition of the importance of factual matters in judicial decisions, especially in understanding how a rule of law was applied. Emphasizing the importance of this insight, Llewellyn explained:

A further line of attack on the apparent conflict and uncertainty among the decisions in appellate courts has been to seek more understandable statements of them by grouping the facts in new—and typically but not always narrower—categories. The search is for correlations of fact-situation and outcome which (aided by common sense) may reveal *when* courts seize on one rather than another of the available competing premises.¹¹¹

A third aspect of realism emphasized the study of judicial decisions. This realist focus combined with a consciousness of judicial

tions of the judicial response are buried, obscure, unconscious, and—even to the judge—unknowable.

Id.

106. *Id.*

107. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707 (1931).

108. *Id.* at 710.

109. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-41 (1931).

110. *Id.* at 1238-39.

111. *Id.* at 1240 (emphasis in original).

motivations and psychology to produce an awareness of judicial creation and change of law.¹¹² The perception that judges consciously or unconsciously manipulated rules in specific cases led to a conception of law in flux.¹¹³ According to the realists, not only was law continually changing, but it was absolutely essential that such change occur. They explained that law had to be continually re-examined to ascertain its compatibility with changing economic conditions.¹¹⁴ It is a small step from this position to the position that, in applying the law, the courts were peculiarly well adapted to keep that law abreast of changing social and economic conditions in a way that was simply not possible for a legislature.

2. *Llewellyn's Realist Approach to Commercial Law*

Although Llewellyn shared many of the ideas and concerns common to all realists, he developed his own unique realist approach from his work as a teacher and writer on commercial law. He expounded his own approach to commercial law in a series of major law review articles on the subject in the 1930s and early 1940s. A major theme of those writings was exposition of the realist idea that common law approaches to commercial law were flawed because they were overly concerned with legal doctrine and abstract ideas about obligation.¹¹⁵

First, Llewellyn argued that this approach was static and failed to explain the outcomes in many cases.¹¹⁶ Second, he asserted that the approach led courts to create legal doctrine that was inconsistent with commercial reality, and that the business community perceived that inconsistency. For example, Llewellyn perceived major differences in how businessmen and lawyers approached the idea of obligation and contract enforceability. He demonstrated this divergence by contrasting a businessman's understanding of the performance due under a contract with the understanding of a

112. *Id.* at 1236.

113. *Id.*

114. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 705, 710-14 (1931).

115. Llewellyn, *Our Case-Law of Contract: Offer & Acceptance II*, 48 YALE L.J. 779, 780-81 (1939).

116. Llewellyn, *supra* note 109, at 1239.

judge or lawyer.¹¹⁷ Llewellyn perceived that legal understanding of obligation due under a contract was unidimensional; it identified a single, usually exclusive method and quantity of services or goods required by the contract terms, and only that precise performance would satisfy the obligor's duty. On the other hand, business thinking about contract obligation stressed that the obligation created by a contract was flexible, even after agreement had been reached. Thus, instead of thinking in terms of a single, fixed performance, businessmen tended to think in terms of several flexible alternatives. A business understanding usually encompassed a range of permissible satisfactory performances.¹¹⁸ This business understanding of contract obligation was diametrically opposed to that of the legal system.

Llewellyn argued that the ignorance of judges, lawyers, and legal writers about business custom and usage was a disastrous shortcoming, because he believed that business thinking, custom, and practice were inherently one of the principal sources of commercial law. He wrote:

"Every fact-pattern of common life . . . carries within itself its appropriate, natural rules, its right law. This is a natural law which is real. It rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place . . . indwelling in the very circumstances of life."¹¹⁹

117. Contrasting the two interpretations, Llewellyn wrote:

What the law official will enforce is what he sees as the legal obligation. An agreement that to a business man calls for shipment of goods as close as conveniently possible to those described, with . . . price adjustment for defective deliveries, and return only of unusables, and replacement of those—this agreement means to a court that the seller is to comply with the description precisely, or have no rights at all.

Llewellyn, *supra* note 114, at 722.

118. *Id.* at 722-23 n.45.

119. K. LLEWELLYN, *supra* note 26, at 122 (quoting Goldschmidt, *Preface to Kritik des Entwurfs eines Handelsgesetzbuchs*, 4 KRIT. ZEITSCHR. F.D. GES. RECHTSWISSENSCHAFT, No. 4). This excerpt is from a later book, but it fairly summarizes a basic theme in Llewellyn's writing after 1930. Llewellyn also stated:

The prior installment moved upon the premise that case-law doctrine in Contract is built around the facts of adjudication, and is likely both to reflect life-conditions and to stay moderately close to them. When in doubt whether a given body of Contract doctrine is case-law doctrine, one very hopeful approach is to examine the fact-conditions to which that doctrine purports to

Thus, Llewellyn reasoned that law was "immanent" in business practice, and that legal decisions ignoring this reality lost touch with one of the most important sources of law in a mature commercial or industrial economy.¹²⁰ He argued that the legal system's failure to recognize business reality in the form of trade custom, practice, and business modes of thinking about obligation and contract would cause commercial law to become irrelevant and useless—irrelevant because businessmen would ignore it and refuse to use it in planning, useless because businessmen would not use it to settle disputes.¹²¹

Llewellyn argued that if legal principles did not change concomitantly with commercial practice, the law would become hopelessly outmoded¹²² and would soon operate as an impediment to commercial activity instead of as a tool to promote and enhance it.¹²³ He offered the distinction made by the first *Restatement of Contracts* between unilateral and bilateral contracts¹²⁴ as a perfect example of the effect of this failure to integrate commercial law and business reality.¹²⁵ Llewellyn argued that no one in business, commerce, or industry had ever thought about agreements in the man-

apply. If it fits those conditions, it is likely to fit the cases, more or less roughly; if it does not, it is not. This installment moves upon the hypothesis that the orthodox analysis of Offer and Acceptance (even in the business field). . . does not well fit the fact-conditions.

Llewellyn, *supra* note 115, at 779-80.

120. Llewellyn, *supra* note 115, at 779-80.

121. *See id.* at 779-80, 788-89.

122. Llewellyn, *supra* note 114, at 722 n.45. "Today's policy and principle will be outdated, doubtless, within a generation. But guidance it gives when, and as long as, it fits the facts. And surely the lesson remains that policy and principle must fit the facts, and must be rebuilt to fit the changing facts." Llewellyn, *On Warranty of Quality and Society*, 37 COLUM. L. REV. 341, 409 (1937).

123. *See* Llewellyn, *supra* note 114, at 751.

124. The first *Restatement* adopted the common-law distinction: "A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee." RESTATEMENT (FIRST) OF CONTRACTS § 12 (1932). For brief descriptions of the terms "bilateral" and "unilateral," see J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 17-18 (3d ed. 1987); E. FARNSWORTH, *supra* note 64, at 109-110; J. MURRAY, *supra* note 32, at 9-11.

125. "Meantime the Great Dichotomy continues in classroom practice to divide the supposed problems of formation . . . into two mutually exclusive categories, 'unilateral' and 'bilateral'. But with this difference: that the classical dichotomy. . . has little relation to the living fact of the business contracting which it divides." Llewellyn, *supra* note 115, at 789.

ner of the *Restatement*, and that it was unlikely anyone ever would.¹²⁶

Llewellyn's rejection of broadly formulated doctrine also led him to realize the importance of factual matters in the decision and analysis of cases. Like the other realists, Llewellyn argued that the common law and the *Restatement* had totally ignored the significance of facts in legal analysis.¹²⁷ Other realists had recognized that this omission was the result of the sweeping, doctrinal analysis emphasized in the common law approach,¹²⁸ but Llewellyn explained how this doctrinal emphasis, coupled with the common law method of case-by-case development, resulted in a complicated and overblown elaboration of basic rules. He also demonstrated that overelaboration contributed to confusion and lack of predictability.¹²⁹

Llewellyn argued that the common law treatment of offer and acceptance was an example of this confusion. He maintained that both concepts had been elaborated in countless cases to the point that they were of no explanatory or predictive value at all.¹³⁰ Judi-

126. "In the bilateral situation the first and outstanding fact of life is that outside of lunatic asylums real people do not in good faith offer 'a promise for a promise.'" Llewellyn, *supra* note 115, at 789. "At the other pole is the approach which common horse sense would urge, on business facts. It does not look for any single line of acceptance." *Id.* at 788. "[T]he classical dichotomy in Offer and Acceptance has little relation to the living fact of the business contracting which it divides." *Id.* at 789.

127. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 YALE L.J. 1, 1-17 (1938).

128. Llewellyn, *supra* note 114, at 750.

129. *See id.*

130.

And the chief reason why this phase [offer and acceptance] of the law of business agreement continues unnecessarily obscure, and troublesome, and more often unpredictable than Reason would allow, is that the sustained illumination of point after point after point has been presented with a certain almost desperate regularity as a series of minor qualifications of basic theories and of a basic analysis which have not for a century or so rested on either case-law or on sense, and yet have not been re-examined in the light of their incessant and effective partial challenges. When the qualifications needed to make a supposedly simple basic structure of theory give accurate results in practice reach the point where the simplicity is overwhelmed by its own qualifications, and when the qualifications are not made to cohere in theory, though they do in meaning, then a fresh start becomes over-due.

Llewellyn, *supra* note 127, at 1.

Perhaps it is time to recanvass the [cases]. . . .

cial opinions that involved those concepts simply selected from the numerous and often inconsistent versions of the doctrines available in hundreds of reported cases. Because those precedents were usually couched in broad doctrinal terms, opinions that drew on these holdings often confused or concealed the operative factors that influenced the court to render a particular decision.¹³¹

Llewellyn maintained that the traditional approach failed to explain the significance and effect of the facts,¹³² and he stressed that because of this shortcoming, common law opinions failed to explain or justify many decisions in spite of purporting to do so.¹³³ He argued that apparently identical cases that reached divergent outcomes under the *Restatement's* approach could be explained and distinguished on the basis of differences in their facts that were not apparent or were not stated in the opinion.¹³⁴ He also noted that even where the facts were not grossly different as between two cases that reached divergent results, a judge's percep-

This will not be easy doing. The rules of Offer and Acceptance have been worked over; they have been written over; they have been shaped and rubbed smooth with pumice, they wear the rich deep polish of a thousand class rooms; they have a grip on the vision and indeed on the affections held by no other rules "of law," real or pseudo.

Id. at 32.

131. *Id.* at 17-27.

132. "[E]ven if the lawyer surmounts such obstacles as these to a true, full synthesis, he finds his mind riveted on law and legal obligation Preoccupation with the niceties of doctrine almost compels such straightjacketing of interest." Llewellyn, *supra* note 114, at 705.

133. Llewellyn, *supra* note 115, at 780-83.

134. Llewellyn, *supra* note 127, at 17. Llewellyn also said:

Doctrine can *seem* to solve the problem of reexamination by setting up a pair or more of diverse legal consequences for use in the problem situation—and let it go at that. At which point one recalls the requisites of meaningfulness for a rule: it must signal and sharpen the real issue, and it must give indication to the judge as to what facts are to fall, to the counsellor indication of what facts will fall, on either side. Any rule which merely defines a term of art *in terms of legal consequence* (rather than in terms of operative fact) will, be it repeated, remain without significance in life until it is accompanied and supplemented by other rules which root it in the soil of fact; the same holds true of any pair of rules which define two categories covering a field of fact, but which speak only in terms of diverse legal consequence; or indeed of any rule which lays down merely that one legal consequence follows from another. As soon as, and to the extent to which, such rules acquire rooting in fact, they become well-nigh indispensable tools for handling a complex legal life; but only then.

Id. at 28 (emphasis in original).

tion of the facts could account for the different outcomes.¹³⁵ Llewellyn maintained that a court's application of a legal rule or doctrine determined the outcome of a particular case, and that this application depended on the facts.¹³⁶ What was needed, Llewellyn argued, was for the court to explain in the opinion the significance of particular facts in relation to the outcome.¹³⁷

Emphasis on the treatment and development of fact in judicial opinions led Llewellyn to another important insight. He perceived that common law rules were inadequate predictors of case outcome, not only because they emphasized doctrine, but also because they were formulated so broadly.¹³⁸ This problem occurred in judge-made case law as well as in statutes. An example of the former was the doctrinal emphasis of the *Restatement*, which encouraged the formulation of rules of law in the broadest possible

135. See K. LLEWELLYN, *supra* note 26, at 60. Twining gives an excellent description of the process:

Facts: (a) In interpreting a reported case, or in approaching a current case, start by studying the facts as a layman familiar with their general context might see them. . . .

(b) Try to fit the facts into some socially significant category or pattern, separating clearly irrelevant "fireside equities" peculiar to this case from potentially relevant elements in the situation. In seeking for appropriate categories the following guidelines should be observed: (i) in categorizing the facts choose "situational concepts"—i.e. categories which clearly refer to fact situations only and do not straddle facts and legal consequences; (ii) terms used and distinctions drawn by persons familiar with the context of the dispute (either as experts, observers or participants) may provide appropriate categories; (iii) the practices and expectations of such persons may also be of use; (iv) one aspect of the problem is to characterize the facts at an appropriate level of generality. No general formula exists for this but: (a) the facts should be characterized as a type; (b) in first instance, the facts should be characterized fairly narrowly (e.g. hospital employing a doctor rather than employer-employee) and movement up the ladder of abstraction to broader categories should proceed with awareness of the dangers of lumping together disparate social situations under one head.

W. TWINING, *supra* note 72, at 226-27 (footnotes omitted).

136. W. TWINING, *supra* note 72, at 459-60; Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 722-23 (1936).

137. "But what needs note is that until even the most precise of expressions about legal consequence is guided to the facts which may emerge, the supposed role can acquire no meaning. . . ." Llewellyn, *supra* note 127, at 13-14. See *supra* note 136.

138. "It is a second thesis that the concepts in vogue in Sales law are repeatedly overbroad for intelligent use. . . ." Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 160 (1938).

terms. A good example of the latter was the use of the title concept under the Uniform Sales Act.¹³⁹ Llewellyn reasoned that the title concept employed in the Act was static.¹⁴⁰ The concept was both too broad and too blunt, because it lumped numerous policy choices together.¹⁴¹ This idea that broad rules and generalizations in contract and commercial law were unworkable is a consistent theme in all of Llewellyn's writing and thinking about law.¹⁴² In one of his major insights, Llewellyn explained that a less sweeping viewpoint, one that focused on exact issues and was designed to handle particular transaction types, parties, and markets, was necessary in order to satisfy the needs of commerce for an efficient and workable commercial law.¹⁴³ Llewellyn explained:

139. Discussing the concept of title under the Uniform Sales Act, Llewellyn said: The quarrel thus is, first, with the use of Title for purposes of decision as if the *location* of Title *were* determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the problems between seller and buyer—and even in regard to third parties.

Why is a one-lump Title not determinable with certainty in Sales cases? It is because such a Title is a static concept, a something which is conceived as continuing in somebody.

Id. at 166-67 (emphasis in original).

140. *Id.* at 167.

141. *Id.* at 171. Llewellyn explained:

[I]n Sales cases, no static concept is at home. The essence of the Sales transaction is dynamic. Lump-title fits only in that rare case in which our economy resembles that of three hundred years ago: where the whole transaction can be accomplished at one stroke, shifting possession along with title, no strings being left behind—as in cash purchase of an overcoat worn home. But the contract for sale on credit, the shifting of goods to market via a factor, the shipment against draft, the installment sale, the delivery or shipment on approval, the agreement to sell goods lying in warehouse under non-negotiable receipt—these are not one-stroke transactions. . . . They involve a period, often an extended period, during which matters are in temporary suspension or are in active flux between the parties; over considerable periods of time there is no such Title in *either* party as the static picture of Title suggests. . . . But I do not want to linger on one illustration. The important point is to see the seller-buyer relation, save where a single stroke severs it utterly, as dynamic movement to which the Whole-Title concept applies on *neither* side. . . . Where the transaction proceeds in a series of lesser actions, often long-drawn-out, no static legal whole-hog concept can fit comfortably. . . .

Id. at 167-68 (emphasis in original).

142. *E.g.*, Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167 (1946); Llewellyn, *supra* note 136, at 723.

143. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 457 (1930).

What is to be striven for, if it can be produced, is some other and different integrated base-line concept which does fit the normality of the seller-buyer relation. I greatly doubt that such a single concept can be produced; today I find too many kinds of seller in contact with too many kinds of buyer in too many kinds of transaction. But what I am clear on is that we *can* isolate *types*, either of transaction, or of party, or of issue, and get light on how better to deal with those *types*.¹⁴⁴

One important element of his more precise focus would consist of "problem situation thinking" and formulation of the law in terms of the "law of the situation."¹⁴⁵

These terms lead to several concepts that have been a major source of criticism of Llewellyn philosophy.¹⁴⁶ Llewellyn frequently used the terms "situation-sense" and "type-situation" to describe certain factual matters or the way decisionmakers dealt with them. Although neither of these terms was well-defined in Llewellyn's writings,¹⁴⁷ he defined "type-situation" more clearly. He wrote that in making decisions regarding factual matters,

[t]here is a sense of the type of situation to be contrasted with the sense of a *particular controversy between particular litigants*. . . . Response primarily to the sense of the particular controversy is, in the first place, dangerous because a particular controversy may not be typical, and because it is hard to disentangle general sense from personalities and from "fireside" equities. . . .

If on the other hand the type of situation is in the forefront of attention, a solving rule comes in for much more thoughtful testing and study. Rules are thrust toward reasonable simplicity, and made with broader vision.¹⁴⁸

144. Llewellyn, *supra* note 138, at 169-70 (emphasis in original).

145. Llewellyn, *supra* note 142, at 175. See also K. LLEWELLYN, *supra* note 26, at 121-57, 268-74.

146. Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 2255 (1961); Rohan, *Common Law Tradition: Situation Sense, Subjectivism, or "Just-Result Jurisprudence"?*, 32 FORDHAM L. REV. 51 (1963).

147. Clark & Trubek, *supra* note 146, at 260-61.

148. 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, 398 (1950).

The term "type-situation" appears to be used here to mean that in resolving factual matters, courts must take into account commercial and mercantile custom, practice, and relationships. Some years later, Llewellyn explained that the use of this "type-situation" sense helped courts create principles of law instead of responses to the personal equities of the case.¹⁴⁹ Use of Llewellyn's "type-situation" would also create the slightly broader principles—but not the generalities—of the common law, which Llewellyn had argued were necessary in order for opinions to operate effectively as precedents.¹⁵⁰ Llewellyn perceived that the application of law to facts was a crucial and a creative function of the judiciary, but he also argued that this application function had to recognize commercial context.¹⁵¹

Although Llewellyn failed to define "situation-sense," in describing his sense of "immanent" law¹⁵² he explained that the "sense of the situation as seen by the court" was a vital factor in judicial decisionmaking.¹⁵³

Situation-sense will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.¹⁵⁴

Although the meaning of the phrase is not entirely clear,¹⁵⁵ it appears that Llewellyn used the term "situation-sense" in two different ways. First, he used it to indicate a broad policy, standard, or

149. K. LLEWELLYN, *supra* note 26, at 402.

150. *Id.*

151. *Id.*

152. *See supra* notes 120-23 and accompanying text.

153. Llewellyn, *supra* note 148, at 397.

154. K. LLEWELLYN, *supra* note 26, at 60. Llewellyn amplified this brief explanation a bit: *Only as a judge or court knows the facts of life, only as they truly understand those facts of life, only as they have it in them to rightly evaluate those facts and to fashion rightly a sound rule and an apt remedy, can they lift the burden. . . to uncover and to implement the immanent law.*"

Id. at 127 (emphasis in original). This last explanation or use of "situation sense" clearly is meant to refer to a judge's familiarity with the context, social or business, of a controversy.

155. *See* Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 699 (1984). Professor Twining also analyzed these terms and he found at least four plausible definitions. W. TWINING, *supra* note 72, at 218.

principle under which, or because of which, a court must make a judgment.¹⁵⁶ Second, he used it to refer to something remarkably similar to the Law Merchant—also similar to his use of the phrase “type situation”—to describe the desiderata of judicial familiarity with commercial practices and mores, coupled with substantial reliance on factual context to resolve disputes.¹⁵⁷

Defined in this fashion, “situation-sense” is a method for evaluating the facts that requires knowledge of commercial practice and the willingness to view the facts of a particular dispute in the light of that custom and practice.¹⁵⁸ This use of “situation-sense” would enable the courts to fashion approaches to commercial disputes which accurately reflected the intent and expectations of the parties in terms of their commercial community.¹⁵⁹ This view was premised on the assumption that the commercial community shared a consensus of values, and that this consensus needed only to be found and applied.¹⁶⁰ Llewellyn displayed his meaning of “situation-sense” in his analysis of the opinion in a New York case, *Jenkins v. Moyse*.¹⁶¹ In that case, the court held that a loan which on its face appeared to violate New York’s usury statute in fact did not because the legislature had created a special device or excep-

156. W. TWINING, *supra* note 72, at 221. Clark and Trubek argue that choices made in this fashion are subjective. Clark & Trubek, *supra* note 146, at 261.

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

158. Rohan, *supra* note 146, at 57.

159. Feinman, *supra* note 155, at 700.

160.

There are few branches of law which concern directly such a close-knit community with such a wide range of agreement as to what is “right”, “fair” or “reasonable”. It is possible to infer that, in Llewellyn’s view, a “sound” decision uncovering the “immanent law” would be one in which the judge has sufficient experience and understanding of the usages and ethics of the particular trade and the way this kind of transaction would be conducted and how it fitted into the general pattern of commercial usage to be able to know what kind of solution would be likely to be deemed reasonable and acceptable by the mercantile community. A judge in a commercial case who can see the facts in the way businessmen would see them, as well as from the lawyer’s point of view and from the point of view of the “mores” of the community as a whole, has grasped the “situation sense”. . . .

W. TWINING, *supra* note 72, at 225.

161. 254 N.Y. 319, 172 N.E. 521 (1930). Llewellyn’s analysis of the opinion appears in K. LLEWELLYN, *supra* note 26, at 228.

tion to the usury statute for corporations "for the very purpose of letting a businessman meet the business cost of a business loan for a prospective profit."¹⁶² Llewellyn observed that the opinion was written by a judge who "understood both real estate and business finance."¹⁶³ Llewellyn argued that in a close-knit community like the commercial/mercantile community, the application of "situation-sense" by the court was useful in reaching correct, just results.¹⁶⁴

C. Llewellyn's Theory of Statutory Drafting and Interpretation

1. A Unique Drafting Technique

For a variety of reasons, Llewellyn developed his own unique statutory drafting technique and used it in drafting the Code.¹⁶⁵ One reason was Llewellyn's attempt to fashion a solution to many of the problems of the then-current commercial law he had criticized. For example, he believed that by permitting courts to give effect to the policy, purpose, or rationale of the statutory language, technical and complicated language could be reduced substantially.¹⁶⁶ Language of principle, rather than rules drawn in a very specific fashion, would eliminate this problem. The use of common policy and purpose throughout the statute would eliminate conflicts and inconsistencies between various sections of the statute and would also be of great assistance in filling any statutory gaps. The serious problem of keeping the statute current with existing business practice and customs could be undertaken by the courts as they applied it. He explained his drafting method as follows:

162. K. LLEWELLYN, *supra* note 26, at 228.

163. *Id.* at 228 n.225. This example and the difficulties it poses for the definition of "situation sense" are analyzed at length in Rohan, *supra* note 146, at 58.

164. Some analysts have severely criticized Llewellyn's use of the concept. See Clark & Trubek, *supra* note 146; see also Feinman, *supra* note 155, at 700 n.100. "My criticism of situation-sense focuses both on the method prescribed by Llewellyn and on the use of the method in the cases. It appears from the opinions that, unlike Llewellyn, courts have not always perceived the limits of the method." *Id.*

165. "Despite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling." Mentschikoff, *supra* note 70, at 168 n.3.

166. W. TWining, *supra* note 72, at 526.

Drafting Techniques and Policies

1. The principle of the *patent reason*: Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle.

The rationale of this is that construction and application are intellectually impossible except with reference to some reason and theory of purpose and organization. Borderline, doubtful or un contemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the reason*; it provides a stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of case-law.¹⁶⁷

Most lawyers and judges recognize that one canon of statutory construction involves seeking out the purpose of a statute in order to resolve an ambiguity or determine how to apply or interpret provisions of a statute in particular situations.¹⁶⁸ The use Llewellyn made of purpose and policy in the Code, however, was far different from their use in the old canons. Llewellyn consciously included reason, purpose, and policy in each section as part of the major drafting technique in the Code.¹⁶⁹ Such use of purpose and policy in an active and comprehensive fashion gave those matters a crucial role in defining the meaning and the mode of application of Code terms.

Llewellyn's use of this device was not mere coincidence. Instead, it was a manifestation of a more general realist theory of statutory interpretation.¹⁷⁰ Although Llewellyn recognized that the realists

167. Karl N. Llewellyn Papers § (J)(VI)(i)(e), at 5 (1944), reprinted in W. TWINING, *supra* note 72, at 321-22 (emphasis in original).

168. Breitel, *The Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 1, 22-34 (M. Paulson ed. 1959).

169. One of the principal manifestations of that effort was to put the reason or purpose of each code section on the face of that section. Mentschikoff, *supra* note 70, at 170.

170. Frank, *Words and Music*, 47 COLUM L. REV. 1259 (1947); Llewellyn, *supra* note 148; see also Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L.

had fully developed a critique of legal process in connection with common law cases and had suggested alternatives and improvements, he argued that the realists also had to develop and implement an analogous theory of statutory interpretation.¹⁷¹ He explained his idea about a theory of statutory interpretation at some length, emphasizing the need for courts to use policy and purpose in interpreting and applying a statute and arguing that this use of purpose and policy would help prevent courts from "eviscerating" statutes by a "wooden and literal reading."¹⁷² Llewellyn observed that in interpreting statutes according to this policy or purpose orientation, courts had to use the term policy according to two different meanings. One meaning included ideas "consciously before the draftsman, the committee, the legislature," so that a court's focus on legislative intent or policy would be "reasonably realistic."¹⁷³ The other meaning, Llewellyn observed, gained ascendancy as a statute aged. When that occurred, the courts in interpreting the statute would be confronted with situations that were "utterly un contemplated" by the language of the statute or by the drafters at the time of enactment.¹⁷⁴ Consequently, the courts would have to use policy and purpose to make "sense . . . of [the statute] in the light of the new situation."¹⁷⁵ Llewellyn saw the need for a drafting technique that would implement his theory of statutory interpretation. The patent reason device was an attempt to achieve that objective.

REV. 630 (1958) (asserting that it is impossible to interpret words in a statute without knowing the aim of the statute); McDonnell, *supra* note 66 (advocating an approach to statutory construction that identifies the statute's articulated purpose, and then interprets all the statutory language with an eye towards that purpose).

171.

What we need to see now is that all of this is paralleled, in regard to statutes, because of (1) the power of the legislature both to choose policy and to select measures; and (2) the necessity that the legislature shall, in so doing, use language—language fixed in particular words; and (3) the continuing duty of the courts to make sense, under and within the law.

Llewellyn, *supra* note 148, at 399.

172. "Today the courts have regained, in the main, a cheerful acceptance of legislative choice of policy, but they are still hampered to some extent in carrying such policies forward by . . . insistence on precise language." *Id.* at 400.

173. *Id.*

174. *Id.*

175. *Id.*

Llewellyn's technique of purposeful interpretation also addressed the realist concern about the role of courts in the area of statutory interpretation.¹⁷⁶ The realist approach recognized the major judicial role in applying statutes to particular cases.¹⁷⁷ For Llewellyn, this approach was the antithesis of the conveyancer's mindset or drafting technique, which consisted of drafting detailed rules and exceptions that attempted to describe every situation that might occur, and in which courts would merely announce which rule or exception the particular fact situation fit into. Llewellyn argued that drafting with a conveyancer's mindset in the commercial area arose out of distrust or misunderstanding of the courts' role, and attempted to prevent courts from exercising any discretion at all in decisionmaking.¹⁷⁸ In place of this approach, Llewellyn proposed to recognize the judicial discretion that in fact exists in interpretation and application of statutes. He recognized that the patent reason technique would produce a more "open-ended," less detailed statute.¹⁷⁹ To Llewellyn, this approach more "realistically" recognized the judicial function in interpreting and applying statutes.

176. *Id.* at 399.

177. *Id.*

178. "Language drawn in distrust or anxiety about courts' understanding may accomplish its immediate purpose, but it paves the way with stumbling blocks within a decade." W. TWining, *supra* note 72, at 526.

179. Mentschikoff, *supra* note 70, at 171. The term "open-ended," as used by Dean Mentschikoff, means that the statute is drafted in terms of general principles, rather than specific, detailed rules, or that the content of statutory terms is left to the courts. An example of the former occurs in § 2-609(1):

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

U.C.C. § 2-609(1).

An example of the latter occurs in § 2-302(1): "If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed." *Id.* § 2-302(1). The term "unconscionable" is not defined in the statute.

2. *The Comments*

The Code commentary was a major part of the patent reason device. Llewellyn argued that the use of written statutory commentary was a necessary condition for the sound development of commercial law by the courts, and that the purpose of a commentary was to guide and connect the development of legal material as a whole.¹⁸⁰ In the earlier Uniform Acts, excessive detail in drafting was used in an attempt to accomplish that goal. That attempt failed, Llewellyn argued, because trial courts of varied jurisdiction could not develop sufficient command of commercial law as a result of the press of other types of cases.¹⁸¹ He maintained that a commentary would remedy this problem by giving guidance to the courts about the relationship of one part of the Code to another.¹⁸² More important, the comments would also show the purpose, policy, or reason for a Code section, group of sections, article, or articles.¹⁸³ The commentary was thus an indispensable part of Llewellyn's patent reason technique, for in those situations in which the purpose or reason of the section could not conveniently appear on its face, the commentary would provide an explanation of its reason, policy, or purpose to guide application and interpretation.¹⁸⁴ Although the use and authoritativeness of the comments have been the subject of disagreement,¹⁸⁵ the comments were intended by the drafter of the Code to assist the courts in applying and interpreting commercial law, and the use of comments was an integral part of Llewellyn's patent reason technique.

180. Llewellyn Memorandum, *supra* note 90, at 526.

181. *Id.* at 527.

182. W. TWINING, *supra* note 72, at 327.

183. *Id.*

184.

Under Subsection (2) [of the proposed Revised Sales Act] the courts are expressly authorized to consult the Comments in interpreting and applying the principles of the Act. . . . Sustained effort has been made to make the reasons and purposes of the Act apparent on the face of the text wherever possible. The comments are further designed to state with clarity and precision the intent of each section and to integrate the Act as a whole by pointing out the relationship between one section and another.

Id.

185. Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 809 (1958); Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 598.

IV. TEXTUAL MANIFESTATIONS OF LLEWELLYN'S METHODOLOGY

The textual evidence that Llewellyn's ideas about methodology were completely incorporated into article 2, and that they produced a new and unique type of code, is overwhelming.¹⁸⁶ Two principal manifestations of interest here are manifestations of codification and manifestations of use of the patent reason device. This section examines those textual manifestations and their significance.

A. *Manifestations of Codification*

The U.C.C. possesses all the general characteristics of a code: it is orderly, authoritative, selective, comprehensive, and unified. It consists of ten interlocking articles, each of which deals with one major area of the law. The first article supplies general material and definitions that are applicable to all other articles and sections of the statute.¹⁸⁷ This general material consists of definitions, policies, rules of construction and application, identification of the scope of the subject matter, and general obligations, principles, and approaches.¹⁸⁸ Each individual article contains a similar set of introductory definitions, general policies, principles, and scope.¹⁸⁹ Each article in turn is divided into parts or sections that deal with more specific subjects.¹⁹⁰ Moreover, within each part of each article, the sections are often organized into groups, each of which re-

186. D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* 8 (1968).

187. "Article I applies to any contract or transaction to which any other Article of this Act applies." U.C.C. § 1-105(1).

188. *E.g.*, *id.* § 1-102 ("Purposes; Rules of Construction"); *id.* § 1-105 ("Applicability of the Act"); *id.* § 1-201 ("General Definitions"); *id.* § 1-203 ("Obligation of Good Faith"). Section 1-201 begins "Part 2 of Article I," and that part is captioned "General Definitions and Principles of Interpretation." *Id.* § 1-201.

189. *E.g.*, article 2 (sales), part 1, which is captioned "Short Title, General Construction and Subject Matter." *Id.* § 2-101.

190. Article 2 consists of the following parts: part 1, "Short Title, General Construction and Subject Matter"; part 2, "Form, Formation and Readjustment of Contract"; part 3, "General Obligation and Construction of Contract"; part 4, "Title, Creditors and Good Faith Purchasers"; part 5, "Performance"; part 6, "Breach, Repudiation and Excuse"; part 7, "Remedies."

fers to related and more specific topics in a unified, complementary fashion.¹⁹¹

A high degree of correlation between rules and underlying policies is apparent throughout the various sections in each group.¹⁹² Within each part are numerous interrelationships and cross relationships between sections¹⁹³ as well as numerous relationships between sections that make up the various parts of each article.¹⁹⁴ These features create a textured, "relational" statute.

Other relational attributes of the Code are superordination and subordination.¹⁹⁵ These features are established in the Code in several ways. For example, many sections state a general rule and then, in the text of the same section, state an exception to the rule.¹⁹⁶ Exceptions to some Code sections are stated by textual cross-reference to other sections.¹⁹⁷ Subordination is also maintained by defining, when two or more Code sections appear to be applicable, whether they can be cumulative.¹⁹⁸ When conflicts are likely to occur between the provisions of various sections, some or all of which are apparently applicable, the Code also contains some provisions for resolving those conflicts.¹⁹⁹ The comments suggest

191. See, e.g., *id.* §§ 2-313 to -315 (various warranties given by seller); *id.* §§ 2-316 to -318 (exclusion, modification, and inconsistency among warranties). See also *id.* § 2-703 (general plan of seller's remedies); *id.* §§ 2-704 to -710 (specific seller's remedies).

192. Compare *id.* § 2-204(1) (any manner of making a contract) with *id.* § 2-206(1)(a) (any reasonable acceptance), *id.* § 2-206(1)(b), (3) (beginning performance as reasonable acceptance), and *id.* § 2-207(3) (terms when contract by conduct only). For a similar sequence, see *id.* § 2-711 (remedies in general), §§ 2-712 to -717 (specific remedies).

193. Compare, e.g., *id.* § 2-201(1) (statute of frauds) with *id.* § 2-209(2), (3) (statute of frauds requirements in case of modification and waiver).

194. Compare, e.g., *id.* § 2-204(3) (contract with open terms) with *id.* § 2-305 (open price term).

195. See *supra* notes 84-86 and accompanying text.

196. Compare, e.g., U.C.C. § 2-201(1) (statute of frauds, general rule) with *id.* § 2-201(2), (3) (exceptions to general rule); *id.* § 2-316(1), (2) (rules for excluding and modifying warranties) with *id.* § 2-316(3) (modifying remedies).

197. E.g., *id.* § 2-314(3) (implied warranties in addition to those set forth in § 2-314 may arise, but not if excluded under § 2-316); *id.* § 2-610(b) (duty of injured party in case of anticipatory breach subject to § 2-611 on retraction of repudiation); *id.* § 2-611 (subject to § 2-609 on demand for assurance).

198. Compare, e.g., *id.* § 2-703 (seller's remedies in general) with *id.* §§ 2-704 to -710 (various seller's remedies).

199. Compare, e.g., *id.* §§ 2-313 to -315 (creation of express and implied warranties) with *id.* §§ 2-316 to -317 (exclusion, modification, cumulation, and conflict of warranties); *id.* § 1-102(d) (provisions of Code may be varied by agreement) with *id.* § 1-102(c) (Code-imposed

further superordination and subordination, although they are not binding.²⁰⁰

B. Patent Reason Theory Manifestations

Llewellyn's patent reason theory, which was an expression of realist theories of statutory interpretation, was carefully used as the principal Code drafting device.²⁰¹ The Code is filled with statements about the use of purpose and policy in interpretation and application. For example, section 1-102 furnishes explicit textual evidence of the use of the patent reason theory through admonitions that the principal rule of construction of the Code is to construe in conformity with fundamental purposes and policies.²⁰² The language of the section is mandatory ("shall"), and it is remarkably similar to Llewellyn's own explanation of the patent reason theory.²⁰³ The section also states the underlying purposes and policies themselves.

general obligations of good faith, due diligence, commercial reasonableness, and reasonable care may not be disclaimed).

200. The comments to virtually every section contain cross-references and definitional cross references. *E.g.*, *id.* § 2-316 comment 1:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It protects a buyer from unexpected and unbargained language of disclaimer by prohibiting the disclaimer of express warranties and permitting the exclusion of implied warranties only by specific language or other circumstances which protect the buyer from surprise.

Id.

201. *See supra* notes 165-79 and accompanying text.

202. The text of § 1-102 provides:

(1) This Act *shall* be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) To simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;

(b) To preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;

(c) To make uniform the law among various jurisdictions.

(3) *In construing and applying this Act to effect its purposes*, the following rules shall apply. . . .

U.C.C. § 1-102 (emphasis added).

203. *See supra* note 167 and accompanying text.

The comments to section 1-102 further indicate that the drafter intended the patent reason theory to be an indispensable part of the Code. That comment is clearly intended to be mandatory, and its statement of the place of policy or purpose in interpreting the Code is compelling:

The Act *should* be construed in accordance with its underlying principles and reason. The text of each section *should* be read in the light of the purpose and policy of each rule or principle, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the principles and policies involved.²⁰⁴

The use of mandatory language throughout the comment underscores the drafter's view of the importance of the use of purpose and policy in interpreting the Code.

Section 1-102 also provides that a "liberal" construction of the Code must be employed in order to accomplish underlying policies and purposes.²⁰⁵ The same theme is repeated in section 1-106 in reference to remedies.²⁰⁶ This principle of liberal construction was, and perhaps still is, unique among American statutes.²⁰⁷

The most authoritative source of policy in the Code is the text of the Code itself. The clearest examples of textually stated policy occur in article 1, which applies to all other Code articles.²⁰⁸ Section 1-102(2) explicitly states the substance of the underlying general policies and purposes of the entire Code.²⁰⁹ They are to modernize and simplify the law, to preserve flexibility and continue the growth of commercial law through recognition of commercial custom, usage, practice, and agreement, and to make the law uniform.

204. U.C.C. § 1-102 comment 1 (emphasis added).

205. "This Act shall be liberally construed. . . ." *Id.* § 1-102(1).

206.

(1) *The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential nor penal damages may be had except as specifically provided in this Act or by other rule of law.*

Id. § 1-106(1) (emphasis added).

207. W. TWINING, *supra* note 72, at 323.

208. "(1) Article 1 applies to any contract or transaction to which any other Article of this Act applies." U.C.C. § 1-105(1).

209. *See supra* note 202.

"between merchants."²²² A group of succeeding sections imposes special duties on merchants.²²³ The unmistakable implication is that merchants are held to a different, higher duty than nonmerchants in transactions governed by the Code.²²⁴

Another source of policy and purpose statements is the Code comments.²²⁵ The best evidence of the policy orientation of the comments comes from reading them, for the text of the comments themselves is focused almost entirely on the purpose and policy of the statutory material they explain.²²⁶ The comments also contain

Id. § 2-104(1).

222. "'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." *Id.* § 2-104(3).

223. Section 2-201(2) imposes the following duties:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Id. § 2-201(2).

An offer by a merchant to buy or sell goods in a signed writing which gives assurance that it will be held open needs no consideration to be irrevocable for a reasonable time or during a stated time but in no event for a time exceeding three months; but such term on a form supplied by the offeree must be separately signed by the offeror.

Id. § 2-205.

224. Twining quotes Llewellyn:

An alternative technique to explicit statements of purpose "consists in making the purpose of a provision appear on its face by the choice of language and by the organization of the thought in the light of the situation."

This can be illustrated by reference to the special provisions concerning merchants in Article 2. . . . The reason for this is that those who hold themselves out as having knowledge or skills peculiar to practices involved in a transaction, on the one hand need less protection from formalities and on the other hand should not be allowed to take advantage of the ignorance or lack of skill of others. . . .

W. TWINING, *supra* note 72, at 324-25 (quoting Karl N. Llewellyn Papers, *supra* note 167, § (J)(VI)(i)(e), at 6).

225. See *supra* notes 181-185 and accompanying text.

226. The statutory text and comments contain many cross references concerning policy, and many comments are concerned specifically with the purpose of the section. See U.C.C. §§ 2-205 comment 2 ("The primary purpose of this section is. . . ."), 2-317 comment 1 ("The present section rests on the basic policy of this Article. . . ."), 2-403 comment 1 ("The basic policy of our law allowing transfer of such title as the transferor has. . . ."), 2-509 comment 1 ("The underlying theory of these sections on risk of loss is. . . ."), 2-605 comment 1 ("The present section rests upon a policy of. . . ."), 2-712 comment 3 ("Subsection (3) expresses the policy that. . . ."). In other comments that do not deal specifically

numerous references to the Code's changes in purposes and policies from the old Uniform Acts.²²⁷ In spite of the speculation over the authoritativeness of the comments, clearly they were an integral part of the patent reason device incorporated into the Code.

The textual manifestations of the patent reason theory in the Code establish that this was in fact the principal device Llewellyn used in drafting. His general statements in article 1 are virtual restatements of this theory.²²⁸ He expressly used policy and purpose consistently throughout the Code in the text and comments; these statements were general and specific, in order to provide guidance; and when the policy or purpose was not express, it was clearly implied.

V. CONCLUSION

Judicial decisions have largely ignored the realist methodology that Karl N. Llewellyn incorporated into the Code.²²⁹ The failure of the courts to follow a uniform method of interpretation and application of the Code has been a major cause of nonuniformity or inconsistency in Code decisions. Llewellyn understood the difficulties of statutory interpretation and realized that courts would be unwilling to give up ingrained methods of interpreting statutes. He attempted to resolve these problems by using two devices in tandem in drafting the Code—the code form and the patent reason drafting technique. These devices grew out of his efforts to analyze past statutory interpretational methodology and its inadequacies, and to produce a realist theory of statutory interpretation. Llewellyn attempted to accomplish a critique of existing statutory interpretational methodology and to generate a constructive new theory

with policy, the discussion almost invariably is framed as an explanation of statutory purpose or policy. *E.g.*, *id.* §§ 2-104 comment 1 (“[This Article] thus adopts a policy. . .”), 2-206 comment 1 (“This section is intended to remain flexible and its applicability to be enlarged. . .”), 2-305 comment 6 (“Throughout the entire section, the purpose is. . .”), 2-507 comment 1 (“Subsection (1) continues the policies of the prior uniform statutory provisions. . . [b]ut the provisions of this subsection must be read within the framework of the other sections of this Article which bear upon the question. . .”).

227. For example, the following Code sections all bear comments titled “Purposes of Changes” or “Purposes of Changes and New Matter”: *id.* §§ 2-102, -103, -201, -304, -402, -505, -607, -702.

228. See *supra* notes 202-207 and accompanying text.

229. See *supra* notes 28-68 and accompanying text.

to replace or improve it. His effort was deliberately analogous to the analysis and suggestions made by the legal realists in connection with the judicial process in nonstatutory cases, in which the courts construed pure case precedent. He employed these two devices within his own realist framework. The assumptions of legal realism thus were major influences in the drafting of the Code.

Many implications for Code interpretational methodology flow from the use of the patent reason device and the code form. First, the use of the code form has significance for interpretation. A debate has raged over the differences between continental methods of interpreting a code and the common law methods of interpreting a statute.²³⁰ Without regard for any of the systemic or theoretic considerations urged in that debate, however, the mere use of the code form leads to several unavoidable methodological requirements. These requirements are inherent in the code form itself.

The Code was drafted as an integrated, unified whole. This drafting philosophy led to extensive cross-references and relationships among the text and comments of the various sections, parts, groups of sections, and articles. Code methodology must recognize this textual unity. In interpreting and applying the Code, the usual focus should not be on single sections viewed in isolation. Because of the integrated code approach, many terms, concepts, definitions, principles, and rules explain and supplement each other. As a result, examination of a concept, rule, or policy must involve the use and relationship of that concept in the several contexts in which it appears: in the context of the usually related group of sections in which it appears;²³¹ in the wider context of the Code part in which it appears;²³² in the context of general obligations, rights, and policies imposed by the Code;²³³ and in the context of the other sections that, although in different parts of the Code, nevertheless re-

230. See *supra* notes 74-76 and accompanying text.

231. For example, the related sections will often use similar approaches to a similar but not identical problem, or else use the same term to resolve a similar problem, which of course sheds light on the meaning of the section being construed or applied.

232. For example, the introduction to each part usually indicates the problems it seeks to resolve and provides definitions, an approach, and the general policy sought to be implemented or promoted.

233. The drafter used several general terms to modify the entire Code or a whole part. An example of the former principle is the obligation of good faith imposed on all performance under the Code; an example of the latter is the injunction that all remedies are to be liber-

fer to the section being construed or to a closely related concept.²³⁴ Although these observations seem obvious, many courts and commentators still refuse to acknowledge them.

Second, the use of the patent reason technique in drafting the Code has profound implications for Code interpretational methodology. The real importance of the patent reason technique is apparent when the interpreter compares the Code approach to the use of policy with the use that legislatures and courts ordinarily make of statutory policy. Legislatures commonly incorporate a general statement of purpose, policy, or reason into the preamble or definitional part of a statute. Courts may then use these general statements in interpreting the statute. In the Code's patent reason technique, however, Llewellyn used purpose and policy in a totally different fashion. In drafting the Code, Llewellyn continuously and consistently employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means. This active use of policy should be contrasted with the use made of policy as part of a canon of construction when courts construe a typical, noncode statute.

The patent reason principle also assigns a definite role to the courts in interpreting and applying the open-ended principles of the Code. Llewellyn used the patent reason technique because of his realist understanding of the judicial process of statutory interpretation. He recognized that the courts have some leeway in interpreting a statute. He also recognized that this leeway is similar to the latitude courts employ in using case precedents in decisions that do not involve a statute. His objective was to give guidance to courts in exercising this leeway.²³⁵ The patent reason concept in the Code thus embodies realist theory about the way courts function.

ally construed to place the aggrieved party in the position in which he would have been if the sales contract had been performed.

234. For example, compare the general statute of frauds (U.C.C. § 2-201(1)) with the special statutes of frauds for orders between merchants (§ 2-201(2)) or for modifications of contracts (§ 2-209).

235. In describing the patent reason technique, Llewellyn took the position that only "[r]easonably uniform interpretation" was possible. Karl Llewellyn Papers, *supra* note 167.

In terms of the present discussion, courts using the Code need not share Llewellyn's realist beliefs about their role and function in order to use the patent reason methodology. The important point is that Llewellyn's understanding of the judicial process led him to draft in the language of principle and to use policy, purpose, and reason to convey meaning. Faced with that statutory architecture, courts should not and probably cannot avoid using policy and purpose in interpreting the Code.²³⁶

Courts would be unwise, furthermore, to avoid the methodological implications that flow from Llewellyn's creation of this judicial role. First, as suggested throughout this Article, the leeway created by Llewellyn's open-ended drafting must be guided by judicial use of the web of interlocking textual concepts built into the code structure and form. An important corollary of this principle is the idea that courts should not automatically revert to the concepts and methods of the common law when the statutory text is not self-applying or does not yield a precise rule. Nor should courts automatically resort to the plain meaning of a statute or the dictionary meaning of a word. Llewellyn's drafting device recognizes the leeway that courts in fact exercised in choosing earlier statutory interpretational devices, realistically preserves it for the courts, but attempts to channel it to produce uniformity and consistency.

Although commentators have complained about lack of uniformity in Code decisions since its enactment, they have also demonstrated little understanding of the procedural and methodological devices used to construct the Code.²³⁷ The combination of realist jurisprudence and Llewellyn's drafting techniques resulted in a totally unique product that is, perhaps, the first "realist" statute. Use of policy, purpose, and reason in interpreting the Code according to the drafter's design, along with use of a relational approach to interpretation, which the code form inherently requires, will go far to produce the uniform results Llewellyn sought.

236. "The rationale for this is that construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization." *Id.* (emphasis in original).

237. *See supra* notes 2-4 and accompanying text.