Promise Fulfilled and Principle Betrayed

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PROMISE FULFILLED AND PRINCIPLE BETRAYED

JAMES J. WHITE*

My responsibility in this paper is to address three questions. (1) How has the legal realist body of thought affected contract law and its application? (2) How will contract law and its application be affected in the future by realist thinking? (3) If the realist viewpoint were fully accepted, what kind of system would result and how would contract law be affected? Because my focus is upon a principal legislative monument to realism, Article Two of the Uniform Commercial Code (the "U.C.C."), and upon its drafter, Karl Llewellyn, I will not answer any of the three questions explicitly. By focusing on specific sections of Article Two, I hope to demonstrate some of the realists' successes and failures and some of the limits to their approach.

I

THE REALIST DEFINED

First, one must meet the "legal realists" and ask what they stand for. Because there was never any formal invocation into the realist school and because most of its publicly identified members were lawyers and law teachers who did many things besides writing articles that might identify them as realists, determining who is a realist is problematical and perhaps even controversial.¹ Because I focus on lawyers whose writings and other public activities have identified them as realists, I ignore the largest and arguably most significant group of legal realists in the United States, namely, the thousands of practicing lawyers who are the quintessential legal realists.² I would argue that all good practicing law-

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¹ Robert A. Sullivan Professor of Law, The University of Michigan Law School. I wish to thank Brian Knox, University of Michigan Law School 1988, who did much of the work on the article for which I claim the credit. I give thanks also to my colleague Fred Schauer, who read and commented on the paper, and to Elizabeth Warren and Richard Danzig, who commented on the paper at the N.Y.U. conference.

² One might argue that one of the most outspoken realists, Jerome Frank, was a realist in his academic garb and a conventional lawyer in his judicial robes. R. Glennon, *The Iconoclast as Reformer* 104, 107, 110, 117 (1985).

In my childhood, my uncle, Edward White, a lawyer in Carroll, Iowa, and my father, Leland White, a lawyer in Harlan, Iowa, used to tell one another stories on Sunday afternoons about the recent events in their law practices. One of them is particularly relevant here. Representing the defendant's insurance com-

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yers, not just in the twentieth century in the United States, but in every culture and for all times, are at heart legal realists. Unlike the academic, the practicing lawyer's livelihood depends upon an accurate interpretation of the law defined in the realists' most fundamental terms, namely, what will this judge and jury do when faced with these facts. My concern here, however, is with the academic lawyers.

The core of the academic realists was a group of law professors who taught at Columbia Law School in the 1920s. They consisted of W.W. Cook, Herman Oliphant, Hessel Yntema, and Underhill Moore. Ironically those not at the core of this group, including some who were never part of the Columbia clique, were the most important proponents of the realist school. The leader among the latter group, and the man whose ideas I will trace here, was Karl Llewellyn. Llewellyn was a member of the Columbia faculty in the 1920's, but because he was only a youngster at the realist school's inception, he was not at the core of the realist movement at its beginning. As we will see, he was never as radical as some of the realists despite the fact that his public debate with Dean Pound about the realist creed later labeled him as the company, my uncle had recently lost a case in which the plaintiff was the Baptist minister from a small Iowa town by the name of Red Oak. The minister apparently had run a stop sign and conceivably was guilty of other negligent behavior. Notwithstanding that, the defendant had been held liable. After reciting the facts and the jury verdict in some detail, my uncle, who did nothing but try lawsuits, correctly identified the legal principle. "If you have an auto accident with the Baptist minister in Red Oak, you will pay." Like Llewellyn, my father and uncle knew that only a small part of the law was to be found in the cases and in the statutes. Better than any academic, practicing lawyers are taught this day by day and week by week by judges, juries, and their clients.

3. I am assuming, of course, there has never been a culture in which mechanical law as written was faithfully and mechanically applied. In such a society, as my colleague Fred Schauer has pointed out, the formalist and realist would be the same thing.


5. For the 1931 debate on realism with Dean Pound, Llewellyn listed twenty law professors and lawyers, including the "leading figures of the new ferment" and others who had taken extreme views on a variety of realist positions. Apart from Moore, Cook, Oliphant, Yntema, and himself, he named W. Bingham, E.G. Lorenzen, C.E. Clark, A.L. Corbin, T.R. Powell, J. Frank, L. Green, M. Radin, J.C. Hutcheson, S. Klaus, W.A. Sturges, W.O. Douglas, J. Francis, E.W. Patterson, and L.A. Tulin. Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1226 n.18 (1931).

6. See Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931); Pound, The Call for a Realist Jurisprudence, 44 Harv. L. Rev. 697 (1931).
LEGAL REALISM

leader of the realists. Others, not part of the realist group at Columbia, but who should probably be identified as realists and who were more prominent and influential than any of those at Columbia, save Llewellyn, are Frank, Corbin and perhaps even Holmes.7 Holmes' famous statement that "[t]he life of the law has not been logic: it has been experience"8 can be viewed as the very kernel of realist thought.

Here is not the place to deal with the small distinctions among the various members of the American realist school, yet one should know that the realists' views covered a spectrum of some width.9 At the radical end were the scientists: Cook, Oliphant, Yntema, and Moore.10 Their skepticism about traditional legal analysis was pervasive. Their doubt that courts ever gave the true reasons for their decisions as opposed to rationalizations, was so deep that the scientists gave hardly any credence to the traditional view of "law" as a body of rules published in statute books and reports.11 They tended to regard judges and other legal actors merely as parts of the legal body that, like muscles of

7. Indeed, Llewellyn and other important realists saw Holmes as a visionary whose ideas were a foundation for legal realism. See Llewellyn, Holmes, 35 Colum. L. Rev. 485, 487 (1935), reprinted in K. Llewellyn, Jurisprudence 513, 516 (1962)("Holmes[,] almost alone, has cracked open the law of these United States. The time-deep calcine crust is burst forever."); Llewellyn, On Philosophy in American Law, 82 U. Pa. L. Rev. 205, 210 (1934)("As one follows the growth of Holmes' thinking . . ., one finds increasing precision in the development of a cynical realism."); Yntema, Mr. Justice Holmes' View of Legal Science, 40 Yale L.J. 696, 703 (1931)("Thus Holmes' great conception of rational legal science as the basis of law still holds the burden of our hopes. It commands the future, a valid but imperfectly realized ideal."). See also Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 Stan. L. Rev. 621, 624 n.12 (1975)(Holmes' influence on Llewellyn is indicated by the similarity of their masterworks' titles: Holmes' The Common Law and Llewellyn's The Common Law Tradition).


10. L. Kalman, Legal Realism at Yale, 1927-1960 at 20 n.85 (1986); W. Twining, supra note 4, at 43. Examples of the scientists' writings are cited in notes 11 and 12 infra. See also W. Cook, The Logical and Legal Bases of the Conflict of Laws (1942); Moore & Callahan, Law and Learning Theory: A Study in Legal Control, 53 Yale L.J. 1 (1943); Moore, Sussman & Brand, Legal and Institutional Methods Applied to Orders to Stop Payment of Checks (pts. 1 & 2), 42 Yale L.J. 817, 1198 (1933).

11. See Cook, Scientific Method and the Law, 13 A.B.A. J. 303, 308 (1927); Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71, 159 (1928); Yntema, The
the human body, responded predictably to certain stimuli. These legal stimuli were to be found in the facts surrounding the controversy and perhaps in the judges’ own experience, but not at all in the “paper rules,” in prior decisions, or in acts of the legislature. These are radical views.

Listening to only the radical members of the realist group, and taking their strongest assertions at face value, one might conclude that the only quality that truly characterized the members of the realist movement was their iconoclasm. Surely Cook, Oliphant, and Yntema were iconoclasts first. Their attack on legal conceptualism was virulent and unceasing. If iconoclasm is the beginning and the end of “realist thought,” its significance fades. If the realists’ only mission was to break the old idols, they were no more than a phenomenon that arises periodically in every legal culture to destroy the accepted norms. However successfully


12. Moore & Sussman, Legal and Institutional Methods Applied to the Debiting of Direct Discounts, 40 Yale L.J. 1219, 1249-50 (1930-31); Oliphant, supra note 11, at 159-61. For descriptions of Oliphant’s behavioristic model and Moore’s institutional model of predicting judicial decision, see W. Rumble, supra note 9, at 159-67.

13. In a review of Professor H. Goodrich’s conflict of laws hornbook, Hessel Yntema rebuked the professor’s conceptualistic, rule-centered analysis.

The crux of the matter is really that law is a practical thing; it has to do with human activities, the doings of judges and lawyers, of legislators and, above all, of socially organized individuals. Which is to say that law is not a theoretic but an applied science. Of course, we must have a legal language. Human activities must be analyzed and described for legal purposes in terms and rules, all of them symbolic of the activities to which they advert. But to say that the rule is the law, that the symbol is reality, leaves us still in the squirrel cage of conceptualism; it is only less objectionable than defining law in terms of general principles to the extent that the rules embrace a narrower scope. It should be obvious that when we have observed a recurrent phenomenon in the decision of cases by the courts, we may appropriately express the classification thus adopted in a rule. But the rule will be only a mnemonic device, a useful but hollow diagram of what has been. It will be intelligible only if we relive again the experience of the classifier and will be safely employed only with knowledge of its limited purpose and of the scientific deficiencies of the decisions from which it is abstracted. To say that the rule of law is law, that by reference to abstract rules we may control decision and determine whether cases have been “correctly” decided, is in effect to assert the social practicability of the decision, if found “correct,” without attempting to ascertain whether it is useful. And this is the ultimate fallacy in the realm of applied science.

Yntema, supra note 11, at 480-81.

14. Examples of such “anti-constructive” behavior can be found in a wide
one might argue that Cook and his friends were mere iconoclasts, the same could not be said of the more moderate members of the legal realism movement.

Llewellyn's view of the law was never as radical as that of Cook, Moore, and the other scientists. Although he believed and

variety of legal systems and cultures. Consider three examples, two English and one German.

The Levellers, a populist movement of mid-seventeenth-century England, were involved deeply in the impassioned political and legal debates of their era. Unlike other reformers, they did not espouse a specific evolution of current institutions. Along with others, they did accuse the legal system of being corrupt, self-serving, and deliberately obstructionist. They did not, however, limit their focus to the process of law. Rather, they attacked the very legitimacy of the system itself. To the Levellers, the current legal system and the social order it reflected were Norman corruptions of Anglo-Saxon customs, a tyranny of the wealthy and privileged established to support their dominion; it had displaced the true common law which sprang from a less hierarchical society with greater respect for fundamental rights and liberties.

Calling for a return to such principles, the Levellers rejected the beliefs and assumptions on which the current system was based. Reform was an unacceptable compromise. D. Veall, The Popular Movement for Law Reform 1640-1660 at 74-110 (1970). See also T. Green, Verdict According to Conscience 153-99 (1985).

Legal reform was again a lively issue in England in the late eighteenth century. Jeremy Bentham, a lawyer himself, was among its leading proponents. An early disgust with expensive and obscure legal technicalities led him to increasingly critical of the fundamental aspects of the system. As initial moderation gave way to increasing political radicalism, he became steadily more hostile toward the English common-law system. He regarded it as the tool of a tyrannical social order which deliberately attempted to obscure its primary function of benefiting the privileged few. Bentham, a prominent utilitarian philosopher, espoused a system of enacted laws designed to serve the fundamental utilitarian principle, "the greatest good for the greatest number." His attacks on the current order and Blackstone, its principal theorist, gradually became marked by an extraordinary virulence. To Bentham, Blackstone was merely a "base apologist for all things established." XIII W. Holdsworth, A History of English Law 79 (1952).

In the early nineteenth century, F.C. von Savigny, a German legal theorist, reacted sharply against the natural law philosophy. He rejected calls for codification of the law, believing it would stunt the natural evolution of an innate German legal order. To Savigny, the law was not a rigid and unalterable body comprised of a single set of rationally discoverable truths. Rather, it was a product of history, the result of common experiences and shared conditions, which evolved slowly over time. He emphasized the traditional "usage of the courts" and believed that the legal profession should attempt to "discover and perfect the law residing in the collective mind—the national Volksgeist." To help the profession perfect this German legal science, he pursued and encouraged the study of Roman law as the traditional alternative to natural law philosophy. J. Dawson, The Oracles of the Law 441, 452-55 (1968). See also A. Watson, The Making of the Civil Law 99-131 (1981).
often said that "paper rules" infrequently determine legal outcomes, he would never have rejected the paper rules. In *Realistic Jurisprudence—The Next Step*, Llewellyn put it as follows:

I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get to the bearings of legal matters one is examining. I say again, therefore, that I shall not attempt a definition. I shall not describe a periphery, a stopping place, a barrier. . . . I shall try to discuss a point of reference; a point of reference to which I believe all matters legal can most usefully be referred, if they are to be seen with intelligence and with appreciation of their bearings. A focus, a core, a center—with the bearings and boundaries outwardly unlimited. *Pardon my saying it so often; but I find it very hard to make people understand that I am not talking about putting or pushing anything out of the field or concept of law.*

On the other hand, Llewellyn was hardly accepting of traditional legal conceptualism. Consider the following criticism of paper rules:

Substantive rights and rules are spoken of as prevailing between people, laymen: one has, *e.g.*, a right to the performance of a contract. It is a heresy when Coke or Holmes speaks of a man having liberty under the law to perform his contract, or pay damages, at his option. It would likewise be a heresy to argue that the vital real evidence of this supposed "right" lies in an action for damages, and that the right could rather more accurately be phrased somewhat as follows: if the other party does not perform as agreed, you can sue, and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay. To argue thus would be to confuse the remedy (which you can see) with the substantive right (which you cannot see, but which you know is there—somewhere; people tell so). The substantive right in this

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body of thought has a shape and scope independent of the accidents of remedies. And herein lies the scientific advance involved in the concept. You are freed of any necessity of observing what courts do, and of limiting your discussion to that. You get back into the ultimate realities behind their doing. Obviously you can think more clearly among those ultimate realities. They are not so much obscured by inconsistency and divergence of detail. They are not answerable to fact.\textsuperscript{16}

If Llewellyn did not agree with the radicals who would have thrown out all of the paper rules to concentrate exclusively on the behavior of the relevant parties in society, he was in greater disagreement with the legal conceptualists. It is the central tenet of the realist movement, embraced by Llewellyn, that judges' decisions arise not merely from the rules that they state in their opinions, but at least as much from unstated reasons, from the facts before them, from the expectation of the parties in the trade, or from their own judgment about fairness.\textsuperscript{17} In the traditional view of the judge's role, these factors are beyond appropriate consideration, and the judge must defend his decision exclusively by an appeal to prior cases or statutes. In the view of the realist, the judge engages in the disingenuous practice of torturing the stat-

\textsuperscript{16} Llewellyn, Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. at 437-38.

\textsuperscript{17} Llewellyn explained to beginning law students that an advocate can either portray a judicial precedent narrowly, and thereby confine the unfavorable case to its facts, or extend the favorable reasoning of a particular case. He continued:

[Not] until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict \textit{out of the rules alone}; how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them. . . .

You have not the tools for arguing from that case as counsel on \textit{either} side of a new case. You turn them to the problem of prediction. Which view will this same court, on a later case on slightly different facts, take: will it choose the narrow or the loose? Which use will be made of this case by one of the other courts whose opinions are before you? Here you will call to your aid the matter of attitude that I have been discussing. Here you will use all that you know of individual judges, or the trends in specific courts, or, indeed, of the trend in the line of business, or in the situation, or in the times at large—in anything which you may expect to become apparent and important to the court in later cases.

ute or the prior cases and then rationalizes his decision on that basis.

To put the most conservative face on the realists' position, one could argue that it was merely a call for honesty that would enhance certainty and predictability by allowing judges to state their true reasons, reasons that arise not only from precedent, statute, and the like, but also from the judge's conscience, from the facts and from other "extra-legal" sources. In his description of this aspect of the realist argument, Professor Fuller describes the realists' goal as follows:

If you put an animal in too small an enclosure you may rely on it that he will make a violent effort to escape. There is no way of predicting whether he will succeed in this effort, or where he will go if he breaks out. If you put him in a larger enclosure you may be reasonably sure that he will be content to stay inside the enclosure. And if you study your animal's habits closely you will be able to follow his movements within the enclosure and discover regularities in them. What we need, as I see it, is a larger grazing area for judges. The realists are bringing this about, and they ought to realize that in doing so they are making the judge a more tractable and predictable animal.18

Fuller also charged, however, that the realists went well beyond methodology.19 He accused them of denying the view that law is "prescriptive," that is, that it establishes norms of conduct. Fuller characterizes the realists as believing that the process works almost exclusively the other way, namely, that society produces its own rules and that the law is important only to the extent that it ultimately learns from and adopts the rules of society, not vice versa.

Here Fuller is too hard on Llewellyn, at least on Llewellyn as he appeared by 1950. To say that written law is of no consequence, is never prescriptive, and rarely establishes a rule that will affect a judge or any other actor's behavior seems a strange position for one who spent a substantial part of his life in the drafting of the U.C.C. Yet, we will see that Llewellyn believed strongly that legal rules are to be found in and derived from the behavior of actors.

In summary, a card-carrying realist would have to agree with at least the three following propositions. First, the realist would

19. Id. at 449-50.
have to doubt that the reasons commonly recited by judges are the only or necessarily the true reasons for judicial decisions. Second, a realist, particularly a more radical realist, would have to believe that the rules set out by legislative bodies and the courts often are not followed by the relevant actors and are only a modest influence upon the courts. Third, the realist would believe that understanding the underlying facts and the interrelation between the relevant actors would enable one to predict not only the judicial response to a dispute between those actors, but also the rules that the parties to the transaction would expect to apply.

In their debate with Pound, Llewellyn and Frank make somewhat the same point as follows: a realist would have an "[insistence] on beginning with an objectively scientific gathering of facts," an interest in the psychology of rationalization and in "[l]ooking at precepts and doctrines and institutions with reference to how they work or fail to work, and why," and an open recognition of the "non-rational element in judicial action."20

The debate that occurred in the law reviews in the 1930's may exaggerate the differences between the legal realists and others; certainly it exaggerates the differences between the moderate realists like Llewellyn and others. Llewellyn never dismissed "paper rules" as unimportant or uninfluential, and he never embraced the idea that a careful study of the facts would give all the answers. Even among the principal traditional scholars such as Pound, one finds ideas that were consistent with those of the realists.21

II
THE REALIST AS LEGISLATOR

Because there never was any realist manifesto, scholars often identify different qualities as the core of realist thought. Some might say that empiricism, the need to examine law in action at

20. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1224 (1931) (quoting Pound, The Call for a Realistic Jurisprudence, 44 Harv. L. Rev. 697, 700, 706 (1931)). Frank did not take credit as the joint author of this article, but Llewellyn acknowledged that "the paper could not have been written without [Frank's] help." Id. at 1222.

21. See W. Rumble, supra note 9, at 9-20. Rumble explains how Pound's writings on "sociological jurisprudence" in fact introduced many ideas that the realists later reasserted more vigorously. Llewellyn himself said of Pound's work that it was "the basis of our forward-looking thought in the '20's and '30's and has provided half of the commonplace equipment on and with which our work has built." K. Llewellyn, Jurisprudence 496 (1962).
the street level, is the core idea of legal realism. Others might find the core to be a complete rejection of written rules and judicial reasons without any necessary suggestion that the truth is to be found in empirical examination. Yet others might identify the core as a milder version of the latter, namely an open recognition that things formerly regarded as extra-legal are "legally relevant." To some extent these differences among current-day observers track the differences that actually existed among the realists themselves. For the purpose of this paper I do not propose to identify the "core," and I understand that the most radical realists and their most fervent followers might regard the idea of "a realist as a legislator" as an oxymoron. Nevertheless, I now turn to Llewellyn's work on the U.C.C.

Surely Llewellyn was the most prominent and self-conscious legal realist. He accepted the label, however ambiguous, for himself. Because Llewellyn is the principal drafter of Article Two, we would expect to find some of his realist ideas there. From Article Two and some of the cases under it, I make some tentative judgments in this paper about the influence and success of the realists' ideas.

As a starting point, one might ask what a realist could hope

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22. An account of Llewellyn's involvement with the U.C.C. begins in 1937, when the Conference on Uniform States Laws (the "Conference") took note of Llewellyn's criticisms of the Uniform Sales Act and approved of his intention to revise it. Llewellyn immersed himself in the project during the summer of 1940, and in September of that year presented the Conference with a First Draft and Report on a revised Uniform Sales Act. Llewellyn was the principal drafter; while he drew on the second Federal Sales Bill and other materials, he made significant revisions and additions to earlier works.

After considering the draft, the Conference appointed a committee to produce a second draft based on the first, which would become the sales article in the projected U.C.C. In the summer of 1941, Llewellyn worked intensively on the draft for two months and by the end of August had produced a report... containing a very detailed critique of the Uniform Sales Act and the case-law surrounding it, an analysis of the problems of producing a semi-permanent code and a complete new draft, backed by extensive annotations and comments. W. Twining, supra note 4, at 280. Where this account of Llewellyn's work on Article Two does not quote Twining, it relies on his information. See id. at 270-301 for a complete account of Llewellyn's involvement with the entire U.C.C.

In 1942 the American Law Institute agreed to cooperate with the Conference to produce a uniform act on sales. Llewellyn was made the chief reporter of the joint committee, which used the second draft of the Revised Uniform Sales Act (the "RUSA") to produce the first Proposed Final Draft in 1944.

The various drafts of the RUSA and the U.C.C. have been compiled in a twenty-three volume set, E. Kelly, Uniform Commercial Code: Drafts (1984).
to accomplish in a code. Conflicting answers suggest themselves. First, the realist's interest in and insistence upon finding facts and understanding how institutions work would lead the realist to squeeze rules out of stereotypical transactions and to codify those rules. To do so is to conform to Fuller's description, namely to allow society to form law, not vice versa.

Second, one might expect the realist to be acutely aware of the weakness of paper rules. If nothing else, the realist knew that judges were motivated by many things other than such rules. One mindful of such matters might hope only to encourage judges to state their true reasons so that their decisions could be understood and applied even by unsophisticated lawyers and judges. This is Fuller's suggestion, that realists really wished to give judges more grazing room, to the end that their behavior would be more predictable.

But the two goals are inconsistent. Certainly one can squeeze a rule out of a stereotypical transaction and set that rule down in print. Yet that rule may form an enclosure even more tightly around a judge than the case law or a conventional statute might. The second goal is to do the opposite, to enlarge the enclosure. Here we see the dilemma faced by all drafters of codes.

23. A thought that might occur to one drafting a code, particularly one who is sensitive to the disingenuousness of judges' reasons, is to state clearly and honestly one's purpose. This, too, we might expect Llewellyn to do if he drafted a code. Indeed, he did, through the Official Comments to the U.C.C. The comment to § 1-A of the Second Draft of the RUSA explains the comments' function. They give "the reasons for choosing one expression rather than another, ... the matters intended to be included, and ... those intended to be left out." 1 E. Kelly, supra note 22, at 330. See also W. Twining, supra note 4, at 326-30 (discussing Llewellyn's views of the role of Official Comments to the U.C.C.).

24. One who completely rejected the idea that paper rules prescribe behavior or are followed by any relevant actors would find the idea of codification to have little or no significance, for, by hypothesis, neither judges nor those compelled to follow the rules would do so because of the rules. They would follow the rules only because external factors made them do so. Thus even to speak of a legislator as a realist implies some watering down of the ideas of realism and some recognition that paper rules in certain circumstances have prescriptive value.

25. For a nineteenth-century expression of the arguments for and against codification, see the Carter-Field debate on the topic of codification of New York State common law. J. Carter, The Proposed Codification of Our Common Law (1884); 1 D. Field, Speeches 328-38 (A. Sprague ed. 1884). Both are excerpted in S. Kimball, Historical Introduction to the Legal System 374-82 (1966). Field argued that written codes offer greater relative certainty than common-law decisions, that they make the law more accessible than when it is to be found in reported decisions, and that they ensure that the legislature—the only governmental organ
but a peculiarly acute one for the realists whose writings had attacked paper rules and had been particularly scornful of attempts to control judicial behavior by narrowly written rules.\textsuperscript{26}

Which of these goals did Llewellyn follow? In fact, he followed both; he rode across sales in both directions. On the one hand he included such narrow, explicit, and substantive rules as sections 2-319, 2-320, 2-509, 2-706 and 2-712, and on the other, he provided such open-ended rules as sections 2-204 on agreement and 2-302 on unconscionability. The former seemed to come from the pen of a scientist who, having studied the underlying transaction, determines its contours and draws a rule from the parties’ expectations. The latter draw no specific rule from the underlying transaction, but appear merely to be an acknowledgment that the courts must decide these matters on a case-by-case basis.

Consider first U.C.C. sections 2-319, 2-320, and 2-509.\textsuperscript{27} The symbols F.O.B., C.I.F, and F.A.S had long been used in commerce.\textsuperscript{28} By the middle of the twentieth century they had acquired relatively fixed and widely understood meanings. The use of the term “F.O.B. seller’s place” determined who had the risk of loss during shipment and who was to bear the cost of shipment. With sections 2-319 and 2-320, Llewellyn transformed this set of practices and expectations into a rule of law.\textsuperscript{29} These rules re-

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\textsuperscript{26} The drafters of the Second Draft of the RUSA, Article Two’s precursor, addressed the hazards of codification from the realists’ point of view in their 1941 report to the Conference.

Any semi-permanent Act or “Code Chapter” must reckon with the danger on the one hand, of remaining remote from life and intelligibility by reason of over-abstractness, or, on the other, of becoming rapidly “dated” by reason of reliance on “practical” “modern” patterns of thought and action which may then prove to be passing ones.

I E. Kelly, supra note 22, at 308.

\textsuperscript{27} The text of §§ 2-319, 2-320, and 2-509 can be found in the appendix.

\textsuperscript{28} The C.I.F. term had been invented by merchants in overseas trade, and the merchants’ usage eventually became the term’s legal meaning in the U.C.C. See 2 E. Kelly, supra note 22, at 167 (comment to § 45 of the RUSA, Proposed Final Draft No. 1, April 27, 1944). As to F.O.B. and F.A.S terms, it is clear that they had also been used in commerce for a considerable time before the 1940’s and that they too had taken on fairly settled meanings. These terms had tended to produce relatively more confusion than C.I.F., however, because of the variety of situations to which F.O.B. and F.A.S. were applied. 1 E. Kelly, supra note 22, at 488 (comment to § 51 of the RUSA, Second Draft, 1941).

\textsuperscript{29} In a memorandum to the New York Law Revision Commission in sup-
placed a particularly murky and troublesome set of rules under the Uniform Sales Acts according to which the risk of loss and other matters turned on the place of "title." Where title rested was highly unpredictable and was subject to much judicial discretion. By the enactment of sections 2-319 and 2-320, Llewellyn was limiting the court's power to allocate the risk by manipulation of the title concept.

A second place where Llewellyn seems to elevate commercial behavior into the law is in U.C.C. sections 2-706 and 2-712.  

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31. The appendix contains the texts of §§ 2-706 and 2-712. See 1 1955 N.Y. Law Revision Comm'n Report 559 (§ 2-706 "adds to and strengthens" a seller's remedies for breach of contract under the Uniform Sales Act); see also id. at 569-70 (§ 2-712 was an "innovation," as the Uniform Sales Act had not recognized cover).

Llewellyn criticized the contract-market damage provisions of the Uniform Sales Act of 1906, as they had been applied by American courts, for being removed from the actual needs of aggrieved buyers and sellers.

The damage remedies provided under the Sales Act of 1906 were taken in the main almost without verbal change from the English Sale of Goods Act, 1893. The English damage remedies had worked, and still work, very well. The equally satisfactory working of the Sales Act damage remedies was dependent on their being implemented and supplemented by the same type of mercantile and flexible rules and court-practice in regard to measurement of damages which the English courts have been using to work justice under the Sale of Goods Act.

This presupposition of the Uniform Sales Act of 1906 has failed to work out. That Act has in consequence suffered severely in adequacy; in uniformity; in providing merchants with a clean-cut basis for movement or for litigation. The rules of damage-law which have been actually used to supplement the Act have not been uniform, they have been often unfortunately
Prior to the U.C.C. some courts had used the seller's actual resale or the buyer's actual cover as the basis for measuring the plaintiff's damages in a contract action, but in most states a plaintiff who covered or resold could not be confident that he would recover the difference between that and the contract price. Rather, he would face the prospect of being forced to take a different and smaller contract market differential. Intuitively, Llewellyn knew that a disappointed buyer who wanted the goods would cover and a disappointed seller would resell. He also understood that most would recognize resale or cover as the fairest rigid, and even their rigidity has been unreckonable and uncertain in its incidence. 

Litigation of an hypothetical market price in an hypothetical market is indeed always expensive and always uncertain; and as interpreted, the rule of 'time and place where the goods ought to have been delivered' too commonly forces the issue to turn on an hypothetical market; and, too often, an unexpected ruling chooses a market on which counsel is not prepared; or even results in a reversal, in addition to giving inadequate damages.  

1 E. Kelly, supra note 22, at 522-23 (emphasis in original).  

In the introductory commentary to the new cover provisions in the Second Draft of the RUSA (1941) Llewellyn explained the need to put damage provisions in line with commercial practice. (Note that in the quoted passage, the term "cover" is used to mean both buyer's purchases of substitute goods and seller's resale of refused goods).  

[Cover makes] it possible, in transactions between professionals in the market, for the justified claimant, be he buyer or seller, to fix his rights with speed, after a breach, and then to move, with safety, in such manner as to get in fact the agreed benefit under the contract, or so much of it as is still available. . . . It not only steps up the certainties which the law can provide to help contractors, fitting into mercantile need and mercantile practice; but it also lays a foundation for cheaper and more adequate administration, at law, of the other remedies. . . .  

These sections incorporate the long standing practice of the English courts to give the aggrieved party reasonable time, on discovering breach, to cover himself in any reasonable way. Any litigation after cover has been actually sought and had is thus made to turn first on a fact easy to prove: to wit, what loss was actually suffered.  

Id. at 522-23.

32. See 1 1955 N.Y. Law Revision Comm'n Report 559 n.398 (decisions had occasionally given weight to seller's resale as evidence of market price, citing cases); C. McCormick, Handbook on the Law of Damages 660 n.10 (1935) (citing cases where resale price was evidence of the market price); id. at 660 n.11 (citing cases where because of circumstances such as unavailability of market price, the difference between resale and contract price is the appropriate damage measure); id. at 668 n.35 (citing case where buyer gives notice of intention to purchase substitute goods and purchase price may be evidence of the market value); id. at 669 n.37 (citing cases where repurchase price gives the best measure, if no available market); L. Vold, Cases and Materials on the Law of Sales 215 n.69 (1958).
and most appropriate measure of damages, at least if it were done in a reasonable manner.

Not only do these rules in sections 2-319, 2-320, 2-706, and 2-712 limit the “legally relevant” reasons that the judge can bring to bear, they also set out an explicit substantive rule. They not only determine the procedure by which the court is to arrive at the result; they prescribe the result. If the contract is F.O.B. seller’s place of business, the risk is on the buyer as soon as the goods are put in the hands of the carrier. If, after breach, the buyer covers in a more or less sensible way, the measure of damages is the difference between the cover price and the contract price.

Consider Llewellyn riding now in the other direction across sales. Here we come to U.C.C. sections like 2-302 and 2-204. These are as undetailed and imprecise as sections 2-319 and 2-320 are specific and certain. They grant the judge the authority under section 2-204 to find a contract if the facts are “sufficient to show agreement.” Section 2-302 authorizes the court to invalidate a contract or clause in a contract found to be “unconscionable.” What is unconscionable is left to the imagination of the parties and the judge. There is a remarkable contrast between these sections and those discussed above. In these there is neither channeling for the judge nor any substantive rule. Pre-

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33. See appendix for texts of §§ 2-302 and 2-204.
34. The U.C.C. nowhere defines “unconscionability.” While § 2-302 makes it clear that the determination of unconscionability is for the court, it does not tell a court how to distinguish an “unconscionable” contract from an acceptable one. Subsection (2) of § 2-302 ensures the parties the opportunity to present evidence of commercial setting, purpose, and effect of suspect contract provisions, but the court is not limited to this evidence. Neither does the Official Comment to § 2-302 confine the court’s inquiry. Indeed, the Comment consistently returns to the word “unconscionability” as if to avoid constraining the court’s discretion.

This section is intended to allow the court to pass directly on the unconscionability of the contract . . . and to make a conclusion of law as to its unconscionability. . . . The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. U.C.C. § 2-302 comment 1 (1977).

umably the judge can listen to the testimony of the parties and of experts, economists, sociologists, or others. Nothing is excluded; everything socially, morally, economically, and politically relevant is, ipso facto, "legally relevant." Once everything that is legally relevant has been admitted, the court is free to establish the substantive rules of unconscionability and contract formation on an ad hoc, common law basis.

In section 2-302, Llewellyn seems concerned exclusively with method. Llewellyn was particularly suspicious of "covert tools." As a teacher of sales and contracts, Llewellyn doubtless shared the discomfort that most of us experience in teaching concepts such as consideration, mutuality, and the like. Ultimately we defend these concepts as obscure, bizarre ways of explaining why certain contracts should be enforced and other should not. Llewellyn would have placed many consideration or mutuality cases under section 2-302. He would have encouraged a frank admission that certain contracts are unenforceable because the

35. Llewellyn identified three hazards of "covert tools" in particular. A court can "construe" language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of "mutuality," though allowing enforcement by the weaker side because "consideration" in some other sense is present. Indeed, the law of agreeing can be subjected to diverse modes of employment, to make the whole bargain or a particular clause stick or not stick according to the status of the party claiming under it: as when, in the interest of the lesser party, the whole contract is conditioned on some presupposition which is held to have failed. The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the minimum decencies are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.

judge thinks them unconscionable. He would argue that both student and lawyer are less likely to be misled by a bold finding of unconscionability than by the same decision hidden under the skirts of mutuality or contract interpretation. It is not obvious then that Llewellyn intended section 2-302 to change the substantive law at all, at least the law as it existed in the heads of clever lawyers and clever judges.\textsuperscript{36}

Section 2-204 carries more substance. Here, Llewellyn doubtless intended to eliminate some of the common law rules on offer and acceptance that would have kept a common law court from recognizing a contract long after the parties thought they had a binding agreement.\textsuperscript{37} Of course the courts are left free to decide what is "sufficient to show agreement," but it is clear that Llewellyn would have the courts find contracts in circumstances where no contract would be found under a proper interpretation of the pre-U.C.C. common law.

Returning to the first question posed above, I would argue that the realist, albeit the schizophrenic realist, in Llewellyn has contributed to all of the sections described above. The fixation on the facts, on the actors' behavior, and on their expectations, as well as the belief that rules can be extracted from those facts and that behavior, produce sections 2-319, 2-320, 2-509, 2-706 and 2-712. On the other hand, sections 2-204 and 2-302 nicely fit Fuller's description of the admirable realist goal—to give grazing room.

To say that legal realism has spawned these sections does not fully answer the question of how realism has affected contract law. Many statutes have crossed the legislative threshold never to be cited by a court or read by a relevant actor. Recognizing that thorough knowledge of the impact of Article Two demands that

\begin{itemize}
  \item \textsuperscript{36} After studying Llewellyn's explanation of the proposed § 2-302, the New York Law Revision Commission understood the purpose of § 2-302 as "not to enlarge the area in which agreements of the parties will be defeated by judicial action on the ground of unfairness or undue harshness, but to require that the question of unconscionability be dealt with directly . . ." 1 1955 N.Y. Law Revision Comm'n Report 730.
  \item \textsuperscript{37} In the comments to § 2-204's precursor, the Second Draft of the RUSA, the drafters explained the proposed section's relationship to prior law.
  [The section] seeks to make explicit the view of the better case-law that no rules of Offer and Acceptance are ends in themselves, or are too rigid to yield to plain contrary intent, but that they have a purpose; and that the purpose is not to be drowned in the form.

1 E. Kelly, supra note 22, 348-49 (Comment to alt. § 3-A, RUSA (2d Draft, 1941)).
\end{itemize}
one poke his nose not merely into appellate volumes but also into
trials, arbitrations, negotiations, and even the lawyers' and lay-
men's offices, I offer far less than that. I speculate on the effect of
these sections from the examination of the reported decisions in
the six most recent volumes of the U.C.C. Reporting Service.38

Cases under sections 2-319, 2-320, and 2-509 are both few
and unremarkable. In the six-volume survey there were only ten
cases in which the dispute focused on any of these three sections.
A representative example is Ladex Corp. v. Transporters Aer-
eos Nacionales.40 There thieves stole a cargo of shrimp along with
the carrier's delivery truck. The buyer sued the carrier for the
value of the shrimp, and the carrier defended on the ground that
the buyer had not yet paid the purchase price and, having in-

38. 40-42 U.C.C. Rep. Serv. (Callaghan); 1-3 U.C.C. Rep. Serv. 2d
(Callaghan).

U.C.C. Rep. Serv. 2d (Callaghan) 1778 (6th Cir. 1987) (Under § 2-509(2)(c),
merchant buyer assumed risk of loss for propane gas kept in independent
storage tanks upon receipt of a "confirmation of distribution" from seller, but
the court reached that conclusion in part by analyzing buyer's resale of the gas as
"acceptance" under § 2-606); Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.,
774 F.2d 214, 41 U.C.C. Rep. Serv. (Callaghan) 1287 (7th Cir. 1985); Phillips
Serv. (Callaghan) 1678 (2d Cir. 1985); U.S. ex rel. Trans-Colorado Concrete,
ghan) 1353 (D. Colo. 1987)(parties modified "F.O.B. jobsite" term to put addi-
tional cost of transport to a new, more distant jobsite on buyer); Ladex Corp. v.
Transporter Aereos Nacionales, S.A., 476 So. 2d 763, 42 U.C.C. Rep. Serv. (Cal-
laghan) 133 (Fla. Dist. Ct. App. 1985); Kumar Corp. v. Nopal Lines, 462 So. 2d
summary judgment for carrier based on "title" analysis, and holding that seller
bore risk of loss under C.I.F. term either because the parties expressly so agreed
or because seller had failed to obtain shipping insurance as required by "C.I.F."
term, under § 2-320); Schock v. Ronderos, 394 N.W.2d 697, 2 U.C.C. Rep. Serv.
2d (Callaghan) 1302 (N.D. 1986); Paramount Supply Co. v. Sherlin Corp., 16
Ohio App. 3d 176, 475 N.E.2d 197, 40 U.C.C. Rep. Serv. (Callaghan) 447
(1984)(remand for trial on whether "C.F. Kuwait" term had been modified to
authorize shipment to New Jersey port); Emery v. Weed, 343 Pa. Super. 224,
494 A.2d 438, 41 U.C.C. Rep. Serv. (Callaghan) 115 (1985); Buenger v. Pruden,
713 P.2d 771, 42 U.C.C. Rep. Serv. (Callaghan) 859 (Wyo. 1986)(holding that
under § 2-319 "F.O.B. destination" means Seller must pay freight).

My six-volume-survey figures do not take into account every case which cites
the U.C.C. sections under examination. Cases which give only a passing men-
tion to a section, or which easily find a section to be inapplicable, are not in-
cluded. Cases are included wherever the opinion indicates that the court
considers the arguments even slightly meritorious.

40. 476 So. 2d 763, 42 U.C.C. Rep. Serv. (Callaghan) 133 (Fla. Dist. Ct.
curred no loss, was not entitled to recover. The trial court agreed with the carrier and granted summary judgment. The appeals court reversed and instructed the lower court to assign the risk of loss between the seller and buyer by determining whether the sale contract had a typical C.I.F. term modified by the course of dealing between the parties. Determining the particular term and thus allocating the risk at a second trial should not be a particularly difficult task for the court.

If the Uniform Sales Act applied to the transaction in Ladex and the risk had to be allocated according to the rules set out there, the legal question would be substantially more complex.

41. Id. at 766, 42 U.C.C. Rep. Serv. (Callaghan) at 137.
42. The applicable rules under the Uniform Sales Act were as follows:

Sec. 18. Property in specific goods passes when parties so intend.—(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred . . .

Sec. 19. Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer “on sale or return,” or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passed to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
Whether property passed was a complex legal conclusion under the Uniform Sales Act, based not only on the F.O.B. terms, but also on other questions such as time of payment, transfer of possession, and a variety of other terms in the contract concerning control and the like.

Cases under sections 2-706 and 2-712 in the six volumes total a mere nine. As with the risk of loss cases, none suggests

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in § 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words “collect on delivery” or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Sec. 22. Risk of loss.—Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but the goods are at the buyer’s risk whether delivery has been made or not, except that—

(a) Where delivery of the goods has been made to the buyer or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer’s risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.


43. Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 41 U.C.C. Rep. Serv. 2d (Callaghan) 1178 (9th Cir. 1985)(in calculating resale damages, seller cannot add the amount of credit extended to original buyer and subtract the credit extended to resale buyer of aircraft); Afram Export Corp. v. Metallurgiki Halyps, S.A., 592 F. Supp. 446, 40 U.C.C. Rep. Serv. (Callaghan) 911 (E.D. Wis. 1984)(resale of scrap iron during period of falling prices after notice to buyer was commercially reasonable), aff’d in relevant part, rev’d in part on other grounds, 772 F.2d 1358, 41 U.C.C. Rep. Serv. (Callaghan) 1709 (7th Cir. 1985); Mason Distribrs., Inc. v. Encapsulations, Inc., 484 So. 2d 1275, 42 U.C.C. Rep. Serv. (Callaghan) 1307 (Fla. Dist. Ct. App. 1986)(see text accompanying note 44 infra); Consolidated Aluminum Corp. v. Krieger, 710 S.W.2d 869, 1 U.C.C. Rep. Serv. 2d (Callaghan) 46 (Ky. Ct. App. 1986)(buyer’s refusal to “mitigate damages” by passing price increases on to its customers did not affect its action for cover damages); Watson v. Tom Growney Equipment, Inc., 104 N.M. 371, 721 P.2d 1302, 1 U.C.C. Rep. Serv. 2d (Callaghan) 1523 (1986)(affirming summary judgment that buyer’s subsequent purchase of smaller backhoe did not consti-
particular difficulty. Representative of the utterly conventional nature of these cases is *Mason Distributors, Inc. v. Encapsulations, Inc.* There the appellate court affirmed the trial court's holding that the buyer's claimed cover ("as needed" purchases of commodity vitamins in a volatile market) was not unreasonably delayed where the buyer made a purchase forty-two days after the seller had breached.

Of course there are many possible explanations for the absence of significant appellate litigation. A plausible explanation, and one I choose to believe, is that these sections are working as they were intended to work. By adopting the reasonable expectations of the parties as the law, the U.C.C. has narrowly restricted potential areas of conflict. By using quite straightforward rules, the U.C.C. has reduced the areas of conflict about their meaning. Even when reported opinions deal with these sections, one finds neither raging controversies over the policy that underlies the rules nor radical differences about their interpretation. I would argue, therefore, that this is a success of the realists. Here they have found the behavior of the parties and sensibly codified it.

Turning to sections 2-204 and 2-302, one has greater difficulty measuring consequences. These sections have not produced a great deal of appellate litigation either, but here one
might argue that appellate litigation, at least under section 2-302,


In 10 cases the courts reject the unconscionability argument with scarcely more than a mention. See Goldstein v. S & A Restaurant Corp., 622 F. Supp. 139, 42 U.C.C. Rep. Serv. (Callaghan) 81 (D.D.C. 1985)(exercise of ten-day ter-
represents an advance. If, for example, a party would have es-


capeced from a contract because of lack of consideration in the past, the world might be made better and not worse by a subsequent appellate opinion that relied on section 2-302 rather than lack of consideration. To conclude that Llewellyn achieved his purpose by replacing covert tools such as consideration with overt tools such as 2-302 and the doctrine of unconscionability, one would have to examine hundreds of disputes. Assuming one could determine how these cases had been decided in lawyer's offices and in the trial and appellate courts, one would then have to imagine how the same cases might have been decided in the lawyer's offices and in the courts under the former regime with the use of covert tools. Only by comparing these outcomes can one be sure that Llewellyn had succeeded or failed. I have done none of that and cannot make such claims.

There are at least a few cases, however, which suggest that sections 2-204 and 2-302 are producing overt and therefore better decisions. Consider, for example, Gianni Sport Ltd. v. Gantos, Inc. In this case a New York manufacturer of women's clothing, Gianni Sport Ltd., agreed to sell a large holiday shipment to be delivered in October to Gantos, Inc., a buyer located in Grand Rapids, Michigan. The contract contained a clause that gave the buyer the right to "terminate by notice to Seller all or any part of this Purchase Order with respect to goods that have not actually been shipped by seller." In September the buyer cancelled the order. Later the seller agreed to ship the goods to the buyer at one-half the original price. The goods under this order comprised more than twenty percent of the seller's business for the year, and they were made specially for the buyer. Ultimately the Michigan Court of Appeals affirmed the trial court's holding that the cancellation clause was unconscionable and that the subse-

48. Id. at 600, 391 N.W.2d at 761, 1 U.C.C. Rep. Serv. 2d (Callaghan) at 1434.
49. Id. at 601-02, 391 N.W.2d at 762, 1 U.C.C. Rep. Serv. 2d (Callaghan) at 1435.
sequent agreement was invalid as not necessary. It allowed the seller to recover the remainder of the original purchase price.\footnote{Id. at 604, 391 N.W.2d at 763, 1 U.C.C. Rep. Serv. 2d (Callaghan) at 1436.}

The case is full of innuendo about how the buyer chiseled the seller and about how much more powerful the buyer was in the trade than the seller. The facts must have been truly appalling, for a New York seller is surely not a favorite of a Michigan trial court in a suit against a local buyer.

It is possible that Gianni would have come out differently had section 2-302 not been on the books. Conceivably, in those circumstances the court would have said that the buyer had the right to cancel the order and, having done so, had the right to negotiate to purchase the goods at any price. It seems more likely that a pre-U.C.C. court would have been stimulated by the same underlying factors that stimulated the trial judge and that the case would have come out the same.

A common-law judge might have found that the seller had relied detrimentally upon the buyer's promise by manufacturing the dresses and thus that the buyer became bound under section 90 of the \textit{Restatement (Second) of Contracts}\footnote{Section 90 of the \textit{Restatement (Second) of Contracts} provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." \textit{Restatement (Second) of Contracts} § 90 (1979).} to pay the purchase price. Once a common-law court found the buyer to be bound, it could easily conclude that there was not consideration for the proposed modification and that it was not binding. The second possibility would be to find that the cancellation clause was intended by the parties only to be used if some catastrophe or other specific event rendered the buyer's purchase onerous. A common-law court might in effect torture the language to find some condition to the cancellation right.

If without the aid of the U.C.C. a court would have arrived at the same outcome by manipulating the language or using the consideration doctrine, here section 2-302 has done us a favor. Whatever one thinks of the analysis by the court in Gianni and whatever one's view of unconscionability, the court's decision is clear and its message is not likely to mislead another lower court or the parties themselves in a similar circumstance.\footnote{If one disagrees with me and believes instead that a Michigan court would have come to the opposite conclusion but for § 2-302, that presents the}
honest than one based on fictional contract interpretation and
more comprehensible than one explained in the words of the
mysterious consideration doctrine.

In view of the small number of cases, it is hard to say that
section 2-302 has accomplished its purpose. Conceivably, trial
judges routinely are willing to set aside contracts or clauses where
they should be set aside based on unconscionability, not on some
theory such as consideration. So, too, it is possible that trial
courts recognize contracts where they formerly would not have.
Given the limited number of appellate decisions, the data that I
can present does not demand that conclusion. Of course, it is
also possible that section 2-302 has allowed for development of
the law in a way that Llewellyn would have thought appropriate
simply because the judges are now freed to deal honestly with the
cases before them. None of this can I prove.

It seems plausible that courts are now recognizing contracts
where the parties believe contracts existed but where the English
common law would not have recognized them. Likewise it seems
plausible that contracts that should not be enforced but might
have been formerly, and yet could have been avoided only by tor-
ture, are now not enforced because of the open admission that
they are unconscionable under section 2-302. If those two things
are true, then Llewellyn has succeeded by granting the courts
more grazing room; he has made the law both more fair, if we can
rely upon the judges to determine fairness, and more predictable,
by encouraging honest judicial explanations of reasons.

Thus far we have examined only the polar extremes in Article
Two of the U.C.C., sections 2-319 (where the legal realist
factfinder would dig out the rule and the practice and make it law)
and 2-302 (an exhortation to the courts to be honest about their
reasoning and a legitimation of the exercise of judicial authority
in doing so). There are realist failures too. The most obvious
candidate is section 2-207. That section appears to have been
drafted for two types of transactions. First, it was meant to re-

53. See Murray, The Chaos of the "Battle of the Forms": Solutions, 39
Vand. L. Rev. 1307, 1319 (1986). See also 1954 N.Y. Law Revision Comm'n
verse the outcome in cases like *Poel v. Brunswick-Balke-Collender Co.* There the parties exchanged nearly identical documents (orders and acknowledgments) yet the court found no contract because of insignificant deviations in the acceptance. Second, it was intended to protect an oral agreement from surprise alterations when one or both parties send “confirming” forms containing terms additional to or different from those already agreed upon. As originally drafted, section 2-207 might be regarded as a subset of section 2-204, concerning contract formation.

Here the realists went astray. First, they grossly overestimated their knowledge of the underlying transactions. The

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54. 216 N.Y. 310, 110 N.E. 619 (1915).
55. Id. at 324, 110 N.E. at 623.
56. It would be unfair and inaccurate, however, to attribute the present § 2-207 wholly to Llewellyn or even to the realists. Many drafters had a hand in writing § 2-207 and its comment, and they contributed to it at various times and probably with various purposes. See Letter from Professor Grant Gilmore to Professor Robert Summers (Sept. 10, 1980), reprinted in R. Speidel, R. Summers & J. White, *Commercial Law Teaching Materials* 467-68 (4th ed. 1987).

It is possible, however, to look at Llewellyn's early work on § 2-207's precursors and see that he originally meant the section to deal with two basic transactions, the exchange of a purchase order and an acknowledgment and the documentary confirmation of oral agreements. Consider the approach taken in the Second Draft of the RUSA to revising the rules on contract formation. Llewellyn chaired the committee which proposed the revision, and he was heavily involved in the drafting. See note 22 supra. The Second Draft proposed two alternative sets of rules on offers and acceptances, the first a brief section on the “effect of certain offers” (§ 3); and the second a much-expanded range of rules, many of which dealt with specific kinds of contract formation problems which had not been separately treated in the 1940 Draft (Alternative §§ 3A-3J). Among the alternative rules are two antecedents to the present § 2-207, alternative §§ 3-H and 3-I, which are set forth below. These two sections survived the U.C.C.'s various drafts and drafters to become, in somewhat altered form, parts of § 2-207. Their presence in § 2-207 connects Llewellyn, and his judgment about what kinds of transactions should be addressed with rules on business-form contract formation, with the present § 2-207.

**Alternative Section 3-H.** Interpretation of New Terms in Alleged Acceptance. (New to Sales Act.) An expression of definitive acceptance in substance, accompanied by additional terms, shall be construed, in case of doubt, as constituting an acceptance accompanied by an offer of a modification which the other party is free to accept or reject.

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**Comment on Alternative Section 3-H.** Where terms are changed in a purported acceptance, the absence of agreement is patent. But where further terms are suggested, and especially where such terms go to arrangements for facilitating performance, the better case-law has tended strongly to read them according to the section.

* * *
model transactions contemplated in section 2-207 occur when only two documents, an order and acknowledgment, are exchanged, or when the parties follow their oral agreements with printed acknowledgments. In fact the transactions are much more varied and complex. In the six-volume survey alone, I found cases where there were three documents, a solicitation, a purchase order, and an acknowledgment;\textsuperscript{57} where one party signed the other's documents;\textsuperscript{58} and where a party's behavior appeared to indicate assent to materially different terms in the other's responsive form.\textsuperscript{59}

\textit{Alternative Section 3-1. Confirmations Containing New Terms. (New to Sales Act.)}

(1) This section applies between merchants where a contract has been concluded orally or by wire, and a letter of confirmation contains additional language proposed for inclusion in the agreement, or treated in the letter as being included.

(2) In the absence of express objection by the other party within a reasonable time after his receipt of the letter, the additional language shall be construed as included in the agreement if it satisfies the following conditions—

(a) If it is of a character reasonably connected with the agreement; and
(b) If it does not unreasonably depart from the provisions of law which would otherwise govern; and
(c) If it does not negate or unduly modify the particularized terms of the agreement as made; and
(d) If it is so placed and printed as reasonably to force attention from the addressee.

(3) If there is express objection by the addressee within a reasonable time, or if the language does not meet the requirements laid down in subsection 2, the original contract stands as made, and the additional language operates only as an offer to modify it.

* * *

Comment on Alternative Section 3-1. There is no adequate case-law on the subject of this section, although the problem is of daily occurrence when oral or wired deals are confirmed on "our form". Some cases have tacitly read the clauses in; some have forgotten the oral deal, looking only at the letter of confirmation; none have presented a clear and workable general attack on the situation.

The base-line taken here is that the deal is closed, and that both parties know it. Such a phrase as "letter follows" is not to be read a meaning "a letter containing different terms."

1 E. Kelly, supra note 22, at 360-61.


Unlike "F.O.B." or "F.A.S.," where the transaction is ossified, here is a young, mutating transaction. The transaction the realists examined and the rule they attempted to draw from it turned out not one transaction, but hundreds of transactions, calling not for one rule but for many rules.  

Section 2-207 cases in the last six volumes contrast with the cases under the other sections. There are twenty-seven cases in those volumes dealing with section 2-207,  


These are hard cases; these are cases where 2-207 is not merely an incidental matter, but in which the parties are fighting hammer and tongs over its meaning.

Consider *Daitom, Inc. v. Pennwalt Corp.*, a case decided in 1984 by the Court of Appeals for the Tenth Circuit. As with almost all of the section 2-207 cases, *Daitom* arose when goods that were accepted and used by the buyer never worked to buyer's satisfaction. Daitom sold industrial dryers to Pennwalt to dry material to be made into pills. Because the dryers could not be made to work properly, the buyer sued the seller for breach of warranty. The seller responded that the one-year statute of limitations contained in its response to the request for proposals was a part of the contract and cut off the buyer's claim.

The opinion consists of the usual application of section 2-207's various parts to the parties' behavior. In this case the buyer solicited bids, the seller submitted a response, and the buyer issued a purchase order. The dryers were then shipped and paid for, but they sat idle for a year while the buyer built its factory. Part of the appeal of the buyer's argument was the unfairness of applying a one-year statute of limitation clause when the goods had not even been put in use until the time for suit had run out. The seller persuaded the trial court that its response to the original request for a proposal was the offer and that the buyer's purchase order was an acceptance which resulted in a contract that included the one-year statute of limitations from the seller's form. The buyer prevailed on appeal, however, with a clever and incorrect interpretation of section 2-207. The buyer maintained that its purchase order should be treated as though it contained an explicit four-year statute of limitations of the kind that

63. Id. at 1571-72, 39 U.C.C. Rep. Serv. (Callaghan) at 1206-07.
64. Id.
65. Id. at 1572, 39 U.C.C. Rep. Serv. (Callaghan) at 1207.
would have governed under U.C.C. section 2-725.\textsuperscript{66}

If the buyer's purchase order (acceptance) had contained a specific provision of that kind, most would say that the two conflicting statutes of limitations would knock one another out and the statute of limitations would be as provided in the U.C.C. By treating the acceptance as though it contained an explicit term that would otherwise be implied in the U.C.C., the \textit{Daitom} decision distorts the prior decisions and greatly strengthens the offeree's hand.

The \textit{Daitom} case is representative of the kind of complexity that section 2-207 has brought to the interpretation of such contracts. Worse, it exhibits exactly the kind of statute-torturing that Llewellyn and the other realists most despised. To think that the realist's own statute has reduced a smart judge to such dishonest behavior would embarrass Llewellyn's ghost.

Unfortunately \textit{Daitom} is not the exception; it is the rule.\textsuperscript{67} The sample of cases even in the limited six volumes shows how miserably the drafters failed to segregate and identify particular transactions, much less comprehend the real expectations of the parties. Were one to revise Article Two, section 2-207 would be at the top of the list. Surely it is a failure.

But how did legal realism fail the drafters here? It failed them because the realists were incapable of understanding the underlying transaction. Although many of the realists had non-legal training, they were fundamentally lawyers whose research constituted looking at appellate cases. It is ironic that Llewellyn in his later years ridiculed the minuscule output of Underhill Moore,\textsuperscript{68} the one realist who doggedly stuck to looking at the

\textsuperscript{66.} Id. at 1580, 39 U.C.C. Rep. Serv. (Callaghan) at 1215-20.

\textsuperscript{67.} For an expert's discussion on § 2-207's failure, see Murray, The Chaos of the "Battle of the Forms": Solutions, 39 Vand. L. Rev. 1307 (1986).

\textsuperscript{68.} In a 1955 article entitled "On What Makes Legal Research Worth While," Llewellyn reviewed Moore's behavioristic, empirical approach to law study.

[H]e faded into pure behaviorism in regard to the effects of men's behavior on appellate decision. His base-approach, on this, sounds almost insane and was certainly perverse. Moore was so set against taking the impact of words of authority as being in themselves solely determinative that he insisted on studying behaviors without reference to the words and configuration of pre-existing rules of law at all, and even without reference to whether any knowledge of the supposedly relevant behavior was brought home to the judges whose deciding was under inquiry; and he insisted on further assuming that these unknown patterns or semi-patterns or non-patterns of often obscurely technical lay-behavior could have significantly measurable and provable determinative impact on the appellate decisions. Be it
facts to determine how law worked. The lesson that Llewellyn should have learned from Moore's experience is not that Moore was a fool, but rather that finding out how law works is far more complicated and difficult than Llewellyn or any of the other realists ever realized. The work of the other realists, Oliphant, Yntema, and Cook, was meager fare.69 Even today those who exhort others to find out how the law works far exceed those who attempt to make their names by doing so.

We have examined three separate areas of realist effort in Article Two: section 2-319 and the others which extract rules from commercial practice; sections 2-204 and 2-302, which encourage overt explanations of judicial decisions; and section 2-207, with all its difficulties. Should one conclude that Article Two is the apotheosis of legal realism or its damnation? I conclude that it is more nearly the former than the latter. On the one hand are the sections I regard as unqualified successes, sections 2-319, 2-320, 2-706, and 2-712. These are additions for which Llewellyn deserves credit. They are additions one would expect the realists to bring to a code. To the extent we can tell, they are working as well as any private law can.

Whether the grazing sections, 2-302 and 2-204, are wholly successful is less clear. I am certainly not ready to condemn them. The idea of Article Two as a "common-law statute" may yet prove quite workable. I suspect that we are better for having sections 2-302, 2-204 and the like than we would be without them. I believe that the realists were right in encouraging judges to abandon covert tools and in expanding the scope of the "legally relevant." Although the cases and discussion above hardly prove it, I also believe that the presence of these sections will make the law more knowable, certain, and predictable, not less so.

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remembered that the planner of such an amazing project was himself a trained lawyer and one whose high legal art in setting up and coloring a communicated background and then playing communicated words against that background was the sole important cause of the successive decisions of various groups of people to let him have, over years and years, money and more money with which to get magnificently into nowhere.


The real difficulty in determining whether the U.C.C. will ultimately damn realist thought or exalt it lies in the problems presented in section 2-207 and the like. If the world with which the legislatures must deal is necessarily so complex, disorganized, and changing that it is impossible to make a sensible and reliable taxonomy of the underlying transactions and of the parties' expectations—if the world is as section 2-207 seems to make it—then the scientists' wing of realism holds out a false hope. If, on the other hand, better tools will enable scholars to turn disorganized and complex transactions into those that can be made to behave like the ones governed by sections 2-319, 2-320, and 2-706, the realists hold out real hope.

I am uncertain about the answer to these questions. It is possible that the realists were lucky in stumbling upon sections 2-319 and 2-706 and that they are aberrations rather than the usual. Surely it is true that the realists in general and Llewellyn in particular were far more sanguine than they should have been about the ease with which one can identify specific transactions and determine what the parties to those transactions expect the rules should be. From those engaged in the law and society movement we know how laborious, expensive, and time-consuming is the study of law in action. Because of the variety among our courts and the differentiation of the economy from state to state, and because much law in action is private, drawing the law out of society is much more difficult than the realists believed. Certainly we will continue to have substantial study that will enable the legislatures to tune a statute, possibly even to enact one, and occasionally entirely to change the statutory course, but none of those things will be done routinely.

I conclude that Article Two of the U.C.C. was a noble and probably successful realist experiment. Its success arises not just from the fact that sections 2-319 and 2-320 show us that law can be drawn from society, but also from section 2-207, which shows us how difficult it will be to do so in some circumstances, and from sections 2-204 and 2-302, which show a way of opening up grazing room for the judges and of making honest persons out of them.

III
THE REALIST AS DICTATOR

Finally, I turn to the last question. What would happen if the
realist view were fully accepted? As I have indicated above, I suspect that the realists would soon have abandoned the proposition that one can enact any large body of law by studying the behavior of the underlying players and drawing from it the rules which should be enacted. Life is too complex, too secret, and too incomprehensible for that. On the other hand, I would have expected for us to see more common-law statutes such as sections 2-302 and 2-204.

The strongest resistance to realist thought is found in the law schools, where the appellate cases in particular and legal doctrine in general occupy the largest share of time. Doubtless the realists would drive more of us to empirical research and insist that the appellate cases be replaced more frequently with trial transcripts or other aids to instruction. It is ironic that academic lawyers, who normally aspire to be the most progressive and forward-looking in the profession, might be condemned by the realists as the last holdouts of the old order or, even worse, as recidivists.

Despite this academic resistance, it is my guess that if the

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70. If one takes the view that the realist's central quality was their iconoclasm, then, of course, the third question has no meaning. Once the iconoclast has broken the idol, he is seldom the best person to explain what should be done next. If, as one might argue, Cook, Yntema, and Oliphant were principally interested in breaking icons, then it would not have been they who could have produced the "system" that would have resulted from the full acceptance of the realist creed. It would have been the system of some other group.

If one identifies iconoclasm as the central quality of legal realism, then Llewellyn, despite his protestations to the contrary, was not a realist, for Llewellyn clearly enjoyed building as well as destroying. The efforts on the U.C.C. in the latter half of his life were iconoclastic only in the most favorable sense of that term. He broke down and washed away stultifying common law decisions, but he replaced them with U.C.C. sections such as 2-204, 2-712, and others.

71. This is doubly ironic if one considers the significant impact the realists have had on law teaching. Much of that impact is traceable to the curriculum study undertaken by the Columbia Law School faculty in the 1920's. Two lasting influences of that study are the realists' decision to reorganize traditional doctrinal categories of study along functional lines and their determination to draw upon non-legal disciplines, especially the social sciences, to assist in the study of law. Currie, The Materials of Law Study (pt. 3), 8 J. Legal Educ. 1, 1 (1955). Although the realist proposals were not wholly adopted by the Columbia Law School, they were widely noticed and had an enduring effect on the teaching of law. R. Stevens, Law School: Legal Education in America from the 1850's to the 1980's at 138-39 (1983) [hereinafter R. Stevens, Law School].

Llewellyn reflected the realists' ideas about teaching in the organization and content of his unconventional casebook on sales. K. Llewellyn, Cases and Materials on the Law of Sales (1930) [hereinafter Cases and Materials]. In his introduction to the book, Llewellyn felt compelled to give fifteen pages of reasons for his "unconventional" book. Id. at i-xv. One innovation in the book is described in
realists were dictators, life would not look much different than it does now. To a considerable degree their ideas are accepted. All

its title, *Cases and Materials on the Law of Sales*, although the clue is likely to be overlooked in the 1980's. Llewellyn explained in the introduction:

> [A]n effort has been made to draw on suggestions from the other social sciences: From modern psychology, especially in reference to the processes of decision, and to the use of rationalization to make the decision appear acceptable to bar and other benches. From experimental logic, in the attempt to present each new case as in fact a new case, and to show "rules" as formulae the actual content of which varies with each new decision which is made. From social psychology, in the effort to show how patterns of thought, and especially legal concepts, influence the course of decision; as also to show how changes of fact background alter old legal concepts, or bring forth new. From anthropology and sociology, in relation to the "diffusion" or "contagion" of a "culture complex"; this includes the process that we know in law as reasoning from analogy, but includes a deal beyond; it is a line of thought which brings peculiar light into the field of documents of title.

Id. at xi-xii.

The non-legal content of the book is slight by today's standards, but its very presence was an innovation in Llewellyn's time. Currie, supra, at 49-50 n.224. Llewellyn also put the book together in a new way, using business transactions rather than traditional legal categories as the organizing principle. Id. at 49-50. A third realist principle seen in Llewellyn's teaching is closely related to the second: he appreciated the need to teach law students about the settings in which they would work as well as about the doctrines they would find in libraries. For Llewellyn, doctrine alone would not adequately serve a practitioner:

We know that raw facts repeatedly, and in defiance of our legal "safeguards," break through undistorted to the court's consciousness in some cases and influence decision.—Again, we must recognize on the one hand that the opinion is often a mere justification after the event, a mere making plausible to the legal audience, of a decision reached before the opinion was begun, a decision the real reasons of which we may never learn. And on the other hand, we must remember that the opinion may, in any given case, reveal the true course of decision; and that in any event it will be a factor of power in further decisions of the same or other courts. In a sense, this is but a further development of our two-headed system of doctrine; every lawyer knows that a prior case may, at the will of the court, "stand" either for the narrowest point to which its holding may be reduced, or for the widest formulation that its ratio decidendi will allow. The lawyer's art as a counselor lies in prognosis, as in the argument. It is a tool the best practitioners use consciously, and which law teachers cannot afford to disregard. Hence we must become prepared at the same moment, and in regard to the same pending case, to anticipate either a triumph of the felt needs of the case, with a consequent ignoring or reshaping of doctrine to fit the result; or the triumph of mechanical, deductive reasoning from formulae which crush to death some needed, budding, economic institution. This forked expectation goes to the essence of an understanding of the law. Above all, we must learn to see, to expect, to predict, that which we may not at all approve; must learn not to permit our desires to entice us into inaccurate prediction;
of us are skeptical of judges' rationalizations. Few of us believe we can or should pen judges in. Every good practicing lawyer is a practicing realist.

nor to permit our esthetic pleasure in an abstract rule or system to interfere with our observation of the concrete heterogeneity of life.

K. Llewellyn, Cases and Materials, at x-xi.

Jerome Frank later extended the realists' belief in teaching law students to be lawyers by exposing them to what lawyers actually do.

The Law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning law by work in the lawyer's office and attendance at the proceedings of courts of justice. . . . They must repudiate the absurd notion that the heart of a law school is its library.

Speech by J. Frank, "What Constitutes a Good Legal Education?" to the Section of Legal Education (1933)(quoted in R. Stevens, Law School, supra, at 156-57). Frank's ideas about practical training re-emerged thirty years later to support clinical law programs. R. Stevens, Law School, supra, at 157.
§ 2-204. Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it
was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.


(1) Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat
the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.


(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.& F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and
(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer’s rights.

(3) Unless otherwise agreed the term C.& F. or its equivalent has the same effect and imposes upon the seller the same obliga-
tions and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2-509. Risk of Loss in the Absence of Breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier
   (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
   (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
   (a) on his receipt of a negotiable document of title covering the goods; or
   (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
   (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in the subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).


(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover
the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale
(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.