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***231 THE UNIFORM COMMERCIAL CODE AND THE CIVIL CODES**

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The title of my lecture was suggested by Professor Litvinoff, and, like him, it's awesome--"The Uniform Commercial Code and the Civil Codes." If literally read, the ambit of such a lecture would be enormous, embracing subjects that are far beyond my limited capabilities. I, therefore, propose to change its title and narrow its scope. In doing so I would like to resurrect the title of a paper I wrote in 1950--forty-five years ago.

In 1950, I was a young law professor in my second year of teaching, holding the position of assistant professor of law at Temple University. I wrote an article for the magazine the law school published occasionally, and I gave it the grand title, "On Certainty, Uniformity and the Dream Again." [FN1]

Although this title was pretentious, it did describe the nature of the article. In it I tried to show that the commercial law community had for centuries longed for law that would produce predictable results, not only for local transactions but for interstate and even international transactions as well. In short, it DREAMED of uniformity and certainty.

I ended the piece by suggesting that the enactment of the Uniform Commercial Code would be a giant step toward making this dream come true. I didn't explain how the UCC would accomplish this goal, and indeed, truth to tell, I had no idea how it could do it. But I was optimistic. Doubtless my optimism sprung, at least partially, from the fact that I had recently been Professor Karl Llewellyn's research assistant at Columbia Law School. Llewellyn, of course, was the principal draftsman of the UCC, and his enthusiasm for his own product was boundless and highly contagious. I left Columbia absolutely convinced that the UCC was the answer to the legal problems of the business world.

Although my article was modest by any standard, I received some very generous commendations about it from William Schnader, an outstanding lawyer in Philadelphia (about whom I will speak later), and from Judge Herbert Goodrich, Chief Judge of the Federal Third Circuit Court of Appeals and former dean of the University of Pennsylvania Law School, who was famous for his textbook on Conflict of Laws. Years later, I realized that my article had not merited such praise, and I figured out why it was given. In 1950, when I wrote the article, no state had yet enacted the UCC, but Schnader and Goodrich were leading the effort to get it passed in Pennsylvania. And they welcomed any support, however weak. They were grasping at straws--no matter how thin.

*232 In any case, I was encouraged by their response, and I continued to think about the thesis I had developed. Twelve years later, in 1962, I was a professor of law at the University of Illinois. I wrote another article--this time concentrating on what I had left out of the first piece--namely, my answer to the question: How can the UCC give us certainty and uniformity and thus make manifest the ancient dream? I called the article "Uniform Commercial Code Methodology." It was published as the lead article in the fall issue of the 1962 law review of the University of Illinois. [FN2] It is this article that I would like to revisit with you tonight.

My story, as recited in the article, starts in 1922 when a committee of the American Bar Association produced a draft Federal Sales Act, which was closely modeled on the Uniform Sales Act that had been adopted in about

thirty states. The goal of the ABA committee was uniformity, and the plan was to accomplish it by having the federal government preempt the entire field of law dealing with the sale of movable property. At this time, Karl Llewellyn was a young law professor who had recently given up a position on the Yale Law School faculty to become a professor at Columbia. Llewellyn specialized in commercial law, principally the law of sales and negotiable instruments. In his work on sales, he had become very disenchanted with the Uniform Sales Act. He saw the proposed Federal Sales Act as a vehicle for promoting reform of the law of sales. He certainly was not unmindful of the fact that uniformity would be achieved by the enactment of this law, but at the time, he seemed to place a greater emphasis on reform than on uniformity. In any event, he became heavily involved in the effort to enact a Federal Sales Act which he tried with limited success to amend to fit his own views. Although the final version of the Federal Sales Act bore a striking resemblance to the Uniform Sales Act and, therefore, disappointed Llewellyn in this respect, he strongly supported the bill when it was finally introduced in Congress in 1937. The bill, touted as one that would produce uniformity, had the support of the ABA, many members of Congress, and probably President Franklin Roosevelt, but it was vigorously opposed by the National Conference of Uniform Law Commissioners who were then, as now, eager to keep all the private law under the control of the states. The bill was withdrawn when the Uniform Law Commissioners promised to revise the Uniform Sales Act along lines that would make it truly uniform. They invited Llewellyn to be their reporter.

Llewellyn eagerly accepted the assignment, but he now faced the formidable job of creating on the state level commercial law that would operate uniformly throughout a country in which many regions held divergent views on what the law of private commercial transactions should be. How was this goal to be accomplished? Llewellyn's answer, though never directly articulated by him in so many words, was codification.

Here let me digress, for a moment, to tell you why I think Llewellyn chose not to use the word "codification" in describing the method employed in drafting *233 the Uniform Commercial Code. His reason was political. Let me quote from a statement made by Professor Samuel Williston in 1914, a statement that Llewellyn knew and to which he occasionally made reference. Williston said:

Codification has an ugly sound to most American lawyers. We have been trained to believe that no code can be expressed with sufficient exactness, or can be sufficiently elastic to fulfill adequately the functions of our common law. The iridescent legal utopia proposed by Bentham . . . has proved a dream. . . The instinctively hostile attitude of American lawyers has been made more pronounced by the inadequacy of the attempts in the United States to draft elaborate codes. [FN3]

If Llewellyn had publicized his intention to codify the commercial law, his Uniform Commercial Code probably would have died aborning. But he almost certainly had elected to use the code structure in building his new UCC because he knew that the common law methodology had broken down in the commercial arena. He knew the truth of a statement that the distinguished commercial law Professor Grant Gilmore was to make at a later time. Gilmore said:

When the number of printed cases becomes like the number of grains of sand on the beach, a precedent-based case-law system does not work and cannot be made to work. A hundred years ago a lawyer, in the course of his professional career could--and many did--become familiar with the entire body of case law, both in this country and in England. In any given field, a competent lawyer could easily master all the available precedents. In this country it has been a long time since even the best lawyer could make that claim, even in the narrowest field. . . .

When it becomes possible to cite to a court not merely two or three prior cases which bear a reasonable relationship to this case, but dozens of cases, many of them so nearly identical on the facts as to be indistinguishable, decided every which way--then what is the court to do? [FN4]

The Uniform Law Commissioners thought they had the answer to Gilmore's question: push through the state legislatures a series of uniform statutes dealing with commercial law and thereby solve in one stroke both the

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uniformity and certainty problems. The approach was tried, and it failed.

There were many reasons for this failure, the most important of which must be assigned to the fact that the uniform acts were not sufficiently preemptive and comprehensive. Most of these new commercial statutes were never intended to *234 be much more than a "mere declaration of the common law," and thus from the start it was clear that they were ill equipped to replace commercial law that had grown like topsy. Au contraire, they added to the confusion in some instances by giving the courts one more authoritative set of rules to manipulate. But even if these laws had been preemptive, they could not achieve their goal of uniformity, for their enactment by the several states was sporadic and uneven. For example, fifty years after its promulgation only thirty-six states had enacted the Uniform Sales Act, arguably the most important statute of the package. Other statutes in the package, like the Uniform Trust Receipts Act, fared even worse. Obviously, this statute-by-statute, state-by-state approach was a slow and uncertain method of obtaining uniformity, and its failure to do so fostered the suspicion that success could have been achieved if only the various statutes had been offered for adoption in a single package. William Schnader, about whom I have previously spoken (he was the person who wrote me a nice letter about my piece in the Temple magazine), was an important uniform law commissioner, and he echoed this sentiment: "Could not a great uniform commercial code be prepared which would bring the commercial law up to date and which could become the uniform law of our fifty-three jurisdictions, by the passage of fifty- three acts, instead of many times that number?" [FN5] Because of this statement, Schnader became known as the "father of the Uniform Commercial Code."

But Schnader had missed the mark. He thought, incorrectly, that if all the states would pass a package of uniform commercial laws, then the uniformity problem would be solved. He overlooked, for example, what had happened with regard to the N.I.L. which was enacted word-for-word in every state but ended up producing splits of authority in over eighty of its one hundred ninety-eight sections.

But Llewellyn did not miss the point, and he gladly accepted the additional responsibility of drafting not only a new sales act but an entire commercial code. He knew that Schnader was right in one respect--that uniformity of parts is an impossibility. He knew that sales law, for example, could not be made uniform even if he were to try to codify it because it lives its life with negotiable instruments, secured transactions, warehouse receipts and bills of lading, letters of credit, and so forth. Of course, he would admit there is such a thing as a "pure" sale: a man or woman buys a bag of groceries for cash and carries it home in his or her station wagon. But this transaction has little to do with the commercial law. Law and lawyers usually become involved at a more complicated stage: a man or woman buys a station wagon and gives the dealer a check for the down payment and a note and a security agreement for the balance. The dealer deposits the check in his bank, negotiates the note, and assigns the security as collateral for a loan. Immediately we are thrown into a real, "live" commercial situation involving the law of sales, negotiable *235 instruments, bank collections, and security. If the station wagon came from abroad, the transaction also will involve a letter of credit and an ocean bill of lading and more. Necessarily, the solution to problems which will arise upon one or more defaults in this common but complicated marketing and financing arrangement depends on the interplay of many rules, and if the solution is to be left to statutory law, integration is imperative.

If the uniform commercial statutes had been integrated, they would have been partially successful. But no more. Lack of comprehensiveness was always their Achilles's heel; lack of system was always their soft spot.

And so the uniform commercial statutes failed to achieve their great expectations. This matter did not go unnoticed by Karl Llewellyn. Writing in 1946, he observed this failure by emphasizing the immense leeway the commercial law allowed the courts in the resolution of cases. He wrote:

Our whole body of authoritatively accepted ways of dealing with authorities, ways in actual use in the daily work of the courts, is a body which allows the court to select among anywhere from two to ten correct alternatives in something like eight or nine appealed cases out of ten. [FN6]

Clearly, Llewellyn knew that this leeway would have to be suppressed, or at least greatly reduced, if he were to carry out his assignment of producing a truly uniform commercial code.

What caused this leeway to exist? Clearly, its existence can be traced to the fact that the uniform commercial statutes lacked preemption, system, and comprehension--the key elements of a true code.

Codification of the commercial laws, therefore, became the answer. And it was Llewellyn's answer, though, as I have indicated, he was very reluctant for political reasons ever to admit this fact.

I have also indicated that while most American lawyers seem hostile to the concept of codification, they could not, if put to the test, distinguish a code from a statute.

As all of us in Louisiana know, there is a wide difference between a statute and a true code. A "code," in my view, is a preemptive, systematic, and comprehensive enactment of a whole field of law. It is preemptive in that it displaces all other law in its subject. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own policies.

A mere statute, on the other hand, is neither preemptive, systematic, nor comprehensive, and therefore, its methodology is different from that of a code. The late (and great) Professor Grant Gilmore summed up the matter this way:

***236** A "statute," let us say, is a legislative enactment which goes as far as it goes and no further: that is to say, when a case arises which is not within the precise statutory language, which reveals a gap in the statutory scheme or a situation not foreseen by the draftsmen (even though the situation is within the general area covered by the statute), then the court should put the statute out of mind and reason its way to decision according to the principles of the common law. A "code," let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source. We may take another, subsidiary distinction between "statute" and "code." When a "statute," having been in force for a time, has been interpreted in a series of judicial opinions, those opinions themselves become part of the statutory complex: the meaning of the statute must now be sought not merely in the statutory text but in the statute plus the cases that have been decided under it. A "code," on the other hand, remains at all times its own best evidence of what it means: cases decided under it may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefined code text. [FN7]

At this point in my law review article, I undertook to show that the UCC meets the test of a true code. This showing was technical in nature and required argumentation that went over many pages. It would be out of place this evening to go through this technical argument, so now I will merely summarize some of the points that were made. Indeed, with your permission I will quote a summary of my argument as reported by Professor Richard Buxbaum.

By way of background, this past year a number of German scholars met to honor Karl Llewellyn. Among other matters, they were interested to know whether he had tried to codify the Uniform Commercial Code. They asked Professor Richard Buxbaum to review the literature and give them a report on this matter. His article and the report of this conference is just out, and I am happy to state that he agrees with my position that the UCC is a code. [FN8] He was very generous to state ***237** that of all the commentators who had dealt with this question I had provided the most extensive proof which, using my language, he truncated for his German readers as follows:

Since a true code pre-empts a large body of law and comprehensively deals with all of its parts, it obviously

must be constructed systematically. This requires: (1) that its provisions be logically presented and coordinated and stated in language employing a chosen and consistent terminology; (2) that means be made available to handle competing and conflicting rules; (3) that means be provided to fill the gaps; and (4) that supereminent ("safety-valve") provisions be present to mitigate harshness which might otherwise flow from rigid rules.

The Uniform Commercial Code meets these requirements. Its provisions, following the organizational plan of most European codes, are logically divided into interlocking "articles," each handling one major subdivision of the entire subject.

A chosen and consistent terminology runs through the Code, a matter made possible by the forty-six generally-applicable definitions presented in article 1.

The Code coordinates and subordinates. Subordination makes available means to handle competing and conflicting rules.

In a sense, the requirement of comprehensiveness is relatively meaningless in most civil law jurisdictions, because where the entire body of law is codified, there is no longer any concern for "completeness," and attention is concentrated on developing a systematic methodology which, through coordination, subordination, gap-filling, and the like, will lead to intended answers. The situation is quite different in the United States, where the major portion of the law is uncodified. Here the requirement of comprehensiveness has real meaning: a true code must pre-empt, and not merely supplement an operational body of law.

The Uniform Commercial Code meets this test. It takes as its set the rules which are needed to build the basic legal framework to control the flow of goods from producer to ultimate consumer. [FN9]

Professor Buxbaum did a good job of summarizing in two pages what it took me twenty to write, but I would like to amplify just one point.

Although the UCC is sufficiently comprehensive to be called a code, gaps in its coverage are bound to occur, just as they do in any code. As has been indicated, a "true" code must provide some systematic way to fill these gaps. The UCC accomplishes this goal by a provision in its very first section, 1-102. Let me read you this short section in its entirety:

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

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions. [FN10]

While this section may appear almost banal to most American lawyers, those familiar with the civil law and the construction of codes attach high importance to it. Mitchell Franklin, the brilliant law professor who taught at Tulane Law School, had this to say about it:

(I)n important respects, the *lex Llewellyn* (the UCC) displaces the legal method of the Anglo-American common law and substitutes the legal method of the civil law. Formally, such "displacement," which is cautiously stated, represents a remarkable advance in the history of American law.

The basic text in which this development is accomplished is Section 1-102.1 . . .

The effect of this language is that the code not only has the force of law, but is itself a source of law. The formulation of fragment (subsection) I of section 1-102 signifies that if the text of the code falls short of deciding the controversy or problem, the code may itself be developed or "applied to promote its underlying reasons, purposes and policies." The fragment (subsection) consecrates the general process of development or unfolding the code, so that it decides by analogy what it does not control by genuine interpretation ("construction"). Other legal theorists may regard this process as extensive interpretation. [FN11]

Official comment 1 to UCC section 1-102 surely confirms Professor Franklin's opinion. It states:

This Act (meaning the entire UCC) is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the *239 Act requires that its interpretation and application be limited to its reason. [FN12]

At this point of the law review article, I felt I had shown that the Uniform Commercial Code is a code in the continental sense. Of course, I conceded that the UCC is not drafted as elegantly as the French Civil Code. Nor does it employ its highly abstract principles. Yet, I hoped I had demonstrated that it meets the formal requisites of a true code and ought to be treated as such, at least for purposes of legal method.

In this connection, I suggested that the UCC portended or should portend three changes in Anglo-American common law method. I suggested that courts construing the UCC should (1) use analogy and extrapolation, rather than "outside" law, to fill code gaps; (2) rely somewhat more heavily on the decisions of other code states in making their own decisions; and (3) give their own decisions somewhat less permanent precedential value.

Standard code methodology utilizes analogy to fill gaps--an approach designed to give the enactment comprehensiveness and to implement legislative design by extending the underlying reasons, purposes, and policies of the various provisions to their analogues. It also steers the court from error by keeping it from resorting to rules and principles that have become obsolete or defeated by competing policies.

Earlier in this lecture, I quoted from Professor Grant Gilmore's statement on the breakdown of common law methodology in commercial cases. Remember, he said, "When the number of printed cases becomes like the number of grains of sand on the beach, a precedent-based case-law system does not work and cannot be made to work."

If uniformity and certainty are desired, a court should avoid, to the extent possible, any reference to this vast body of outside law. In short, a court should not readily turn to Section 1-103 which permits it to go outside the UCC for answers in cases not covered by the commercial code. Rather, it should stay within the UCC and find its answer by way of analogy or extrapolation.

In my view, this is the result that Llewellyn fervently desired, but his curious way of expressing himself prevented him from ever making this point very clearly. Speaking to a very large group of lawyers in Philadelphia, when Pennsylvania was first considering enacting the UCC, one person in the audience asked, "Professor Llewellyn, what is wrong with the Uniform Sales Act?" Llewellyn responded immediately, "It's annotations."

I doubt that three people in an audience of over one thousand understood him. What he meant was, "Each section of the Uniform Sales Act has been interpreted by so many courts in so many different ways that one can find some case to demonstrate almost any kind of meaning for any section."

***240** Remember another quotation I gave you earlier in which Llewellyn said, "Our whole body of authoritatively accepted ways of dealing with authorities, ways in actual use in the daily work of the courts, is a body which allows the court to select among anywhere from two to ten correct alternatives in something like eight or nine appealed cases out of ten." How can this be? Those damned annotations.

If someone in the Philadelphia audience had said, "Professor Llewellyn, how do we avoid the problem posed by the annotations," he might have responded in his typical, cryptic way, "Avoid them like the plague."

If the member of the audience had replied, "How do I do that," Llewellyn probably would have said something like, "If at first you don't succeed, try, try again."

If our hypothetical questioner had persisted and asked, "What is it that I am to try to do over and over again until I succeed, and, what is success here," then he would be "cutting close to the bone," to use one of Llewellyn's favorite expressions, a bone that Llewellyn did not want touched. He probably would have responded, "Try to work out an answer by way of analogy or extrapolation rather than by resort to outside law."

But if our hypothetical inquisitor continued to "hang in there" with one more question, he would have finally "smoked Llewellyn out," to use again one of Llewellyn's favorite expressions. The final question would be, "How can you ask me to use analogy and extrapolation when the firmly-established methodology of American law is precedent-based and built on the doctrine of stare decisis?" Llewellyn was evasive at times, but he was intellectually honest, and I think he would have answered him, and I think he would have said that the Uniform Commercial Code is a "code," and as such, it rejects standard American methodology for filling gaps by resorting to common law cases and replaces it with codal methodology that fills gaps by the analogical development of its own text.

Of course, this hypothetical conversation never took place, and we don't know what Llewellyn's answers would have been had it taken place. If it had taken place, I am sure he would have been careful. In this connection, remember Llewellyn knew well Williston's statement that "codification has an ugly sound to most American lawyers," and he didn't want to push that concept when he was out on the stump trying to get the UCC enacted. He also knew that the doctrine of stare decisis is so deeply established in America that any attack on it certainly would harm the chances of getting his project accepted.

Scholars, who later on contended that the Uniform Commercial Code was not intended by Llewellyn to be a code in the civilian sense because he never described it as such in so many words, overlook these very practical considerations.

In any event we do know from his own mouth and pen that Llewellyn thought the annotations, his word for the jurisprudence of the commercial law statutes, presented a very big problem for those statutes--a problem that had to be avoided by the UCC for it to achieve its goals of uniformity and certainty.

***241** He knew something else as well. He knew that even if the American courts accepted the idea that analogy and extrapolation should be used to fill gaps, they would go outside the UCC for answers in "hard" cases. Here, let me digress for a moment to talk about "hard cases."

The phrase "hard cases" comes from Oliver Wendell Holmes, Jr. In his famous dissent in the Northern Securities case, he asserted that "(g)reat cases like hard cases make bad law." [FN13] He told us what he meant by great cases [FN14] but he did not define "hard cases." What did he mean by these words? More importantly, what did Llewellyn think he meant?

Well, every judge has two duties: to stay within the law and to get a right result. Usually, these duties do not conflict because if the judge stays within the law, he will get the result that is considered just in most cases. Our law represents rules that either come to us from the legislature and, therefore, in theory at least, represent a

democratic consensus or from customs or judicial decisions that have been proved on the anvil of time and experience. But every judge knows of the hard case where a strict application of the law renders a bad result. In this "hard case" setting, the judge must choose which duty to honor and which to violate. Either he or she must stick with the law and get a bad result or abandon the law and get a good result. In Holmes' view most judges opt for the good result and make bad law in the process. Why? Because in reaching their decision, they pretend to be staying within the law, but actually, they have had to change it, to distort it, if you will, to get what they consider to be the right result. They change it by various manipulations--by making exceptions not heretofore recognized, by stretching a point, by reading the language of the statute so as to pervert its obvious meaning, and so forth. In commercial cases, at least, desired results often are obtained in the hard case by adversely construing the language of the contract to make it say what it patently does not say. While this process may result in justice for the immediate parties, it makes bad law in a jural system that relies on stare decisis because it leaves in its wake a "twisted law," to use again a Llewellyn expression--a "twisted law" to haunt the counselor and confuse the judge in subsequent situations not having the same fireside equities.

Let me tell you another Llewellyn story, and then I'll try to explain it. I carried his briefcase to a meeting he had with a group of important lawyers in Albany, New York. He lectured all day on the UCC emphasizing, as he was *242 went to do, its Article 2 on Sales. At the end of the day, a lawyer of great prominence, whom I will not name, rose to ask a question. It was not a very profound one to say the least. He asked, "Professor Llewellyn, how would you compare the Uniform Sales Act with Article 2 of the UCC?" The question was a banal one because Llewellyn had spent the entire day addressing that very point. But without any sign of exasperation, Llewellyn responded immediately, "Compared to Article 2 of the UCC," he said, "the Uniform Sales Act is a twisted midget." The gentleman who had asked the question thanked him and sat down. That night in the bar car of the train going back to New York, I told Llewellyn something that I would not have dared to tell him except in a bar car--that I realized that the lawyer's question was a stupid one but that he, Llewellyn, couldn't afford to "put down" prominent and influential people if he hoped to get support for the UCC. My comment amazed him. He said he didn't think the question was stupid. He thought it was profound, and he didn't put him down; he gave him an equally profound answer. He never told me why the lawyer's question, and his answer to it, were exercises in profundity. But I thought I knew. His answer to the lawyer was that a major problem with the Uniform Sales Act was that its meaning and purpose had been twisted out of shape and its true meaning distorted by the cases constituting the annotations, some of which were pernicious because they arose out of "hard cases."

Thus, the Uniform Sales Act became twisted through its vast repository of annotations, some of which represented "bad" law in the sense that Holmes used that word. It became a "twisted midget" in Llewellyn's eyes because the Uniform Sales Act seemed "small" to him when compared with his "giant" work on sales as set forth in the UCC.

It has taken me quite a while to state this anecdote; it took Llewellyn only two words: twisted midget. Thus, you can see the economy that flows from being a genius.

How is the "hard case" to be handled so that courts will not indulge in distorting incursions? Llewellyn's answer: By using supereminent provisions. This answer is straight from the civil law. Thus, for example, Professor Rudolph Schlesinger has dogmatically asserted that supereminent provisions form a part of every true civil code. "(C)omprehensive codifications," he has written, "cannot get along without such broad, general clauses which permit adaption to new conditions and judicial interpretation expressing the moral value of the community." [FN15]

I have previously alluded to the fact that the UCC contains a number of supereminent provisions, thus fortifying my belief that it is a true code in the continental sense.

Here, I will mention one such provision and how Llewellyn intended it to be used. The section is 2-302. It is part of the sales chapter, the only chapter *243 we have not adopted in Louisiana, but I have elected to use it

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because it illustrates clearly how Llewellyn attacked the problem of the hard case through a supereminent provision. Section 2-302 provides:

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. [FN16]

That's a mouthful, particularly in view of the fact that the word "unconscionable" is not defined. What does this section mean? Its official comment explains its meaning:

This section is intended to make it possible for courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. [FN17]

Thus, the mandate of this comment to the courts is this: Don't manipulate the provisions of the UCC or adversely construe the language of contracts to get goods results in the "hard case," for such an approach makes for "bad Law" by "twisting" the act and making planning under it hazardous. When a hard case arises, construe this code and the contract fairly and get your just result through the safety valve of unconscionability.

Critics of the UCC doctrine of unconscionability have centered their attack on the fact that the word "unconscionable" is not defined. When defenders of the section respond by alluding to the official comment that I have just read, the critics sometimes reply that Llewellyn himself was almost scornful of the idea of having UCC comments, and therefore, it is incongruous to defend him by resorting to one of them.

This rejoinder overlooks a couple of matters. Llewellyn opposed comments that could be used to give the courts an alternative rule to be used, where desired, instead of the rule found in the section to which the comment related.

It is getting late, but here let me tell you yet another Llewellyn story.

***244** One day in the privacy of his office, Llewellyn told me he wanted me to take an oath. He had me stand and repeat after him these words or "words of similar import" (to use one of his favorite phrases):

I promise if it ever falls my lot to write a comment to a section of the Uniform Commercial Code that I will not paraphrase the section to which it relates.

I took that oath. I didn't laugh because he was dead serious, but I took the oath freely and without second thoughts because I could not in my wildest imagination ever conceive of a time when someone might call upon me to write a UCC comment. But strange to say, that day did come when I was appointed by the Uniform Law Commissioners as one of their five representatives on the Permanent Editorial Board (PEB) of the UCC. The PEB monitors the UCC for the American Law Institute and the Uniform Law Commissioners, drafts new chapters, writes comments, and so on.

One day the PEB was writing a comment, and it became clear to me that the group was paraphrasing the section to which the comment related. I suddenly remembered my oath, and I told the group about it as an explanation of why I could not sign off on the new comment. They all thought it was very funny until another member of the PEB, Ronald DeKoven, an outstanding lawyer in New York with the Shearman and Sterling firm, startled the group by saying, "I took the same oath when I was Llewellyn's research assistant at the University of Chicago."

"When I took the oath," he said, "I had no idea that I would ever be called upon to write a comment. But here I am, and since I took the oath, I cannot sign off on the comment that we have just prepared." The result of these defections, I am happy to report, was that DeKoven and I were assigned the job of rewriting the comment in a way that would not violate our oaths.

So Llewellyn did not hate the idea of having any UCC commentary, though doubtless his first choice would have been a code with no comments; he just didn't want comments that would give the courts yet another way to construe a section of the code.

Although, as I have tried to tell you, he hated annotations, he knew that some jurisprudence would develop under the UCC, and in one respect at least, he felt he could put it to use in his effort to achieve uniformity. The very first substantive section of the UCC, Section 1-102 (the section that Mitchell Franklin relied on when he said the lex Llewellyn was a code), provides:

This Act shall be liberally construed and applied to promote its underlying purposes and policies. Underlying purposes and policies of this Act are . . . (c) to make uniform the law among the various jurisdictions.

This mandate can be accomplished only if courts abandon their view of foreign law as persuasive in favor of exclusive reliance on decisions of other *245 code cases, particularly where the matter before the court is one of first impression. Suppose, for example, most of the states have construed a particular section of the UCC in a certain way, and the problem comes up in a state, say Louisiana, as a matter of first impression. Does not Section 1-102 direct the judge to follow the law of the other states? I believe the answer is yes. Our legislature has told our courts to construe the UCC to promote its underlying purposes, one of which is uniformity. How can a court get the kind of uniform result thus mandated if it insists on going its own way in cases of first impression and ignores what the other states have done. If we are forced by the doctrine of stare decisis to give some credit to jurisprudence, then, at least, let us use this process, where possible, to carry out one stated goal of our law--uniformity of result with the other states.

At this point my law review article ended.

CONCLUSION

Well, how has it all worked out? In a nutshell, not so well, but let me make four short, comments.

First. The courts in America, by and large, construe the UCC as if it were a statute, and the jurisprudence handed down under each section becomes increasingly a part of the statutory complex. The fighting ground has been Section 1-103, which I regard as the preemptive section of the UCC. It provides, "Unless displaced by the particular provisions of this Act (i.e., meaning the entire UCC) (the common law) shall supplement its provisions." [FN18] Statutes and codes, of course, seldom meet precise questions with precise answers. The "cow" case is almost as rare in the statutory and codal repository of answers as it is under common law methodology. Most commercial cases, of course, fit more or less easily under one or more sections of the UCC, and the courts have resolved them, by and large, by references to these sections, seeing no need to go outside the UCC for answers. The process seems to be employed instinctively in most situations and not as the result of any philosophical pondering. There are many cases, however, in which the transaction clearly falls within the scope of the UCC but does not fit easily under any code section. Here, a question of considerable importance is whether such a case is to be resolved by the UCC or the common law. The courts are divided on this matter. The division is not along any jurisdictional lines but tends to occur within each jurisdiction, depending on the kind of case that is before the court and how it is argued.

Second. The supereminent provisions have been somewhat successful in handling the "hard case" problem. But many American lawyers and courts have not understood their purpose. They regard these provisions as if they

were rules rather than norms. Civilians, particularly those in Europe, draw a sharp distinction between rules and norms, but lawyers in the common law tradition *246 give this distinction less currency. A rule is a concretely worded proposition of law, such as "an offer must be accepted to form a contract." A norm, on the other hand, is a broad statement of principle, such as "no man shall be unjustly enriched at another's expense." A norm has little force of its own. It gathers its content and bite only by virtue of its relationship to the specific rules that make up most of the body of law. The concept of unconscionability was intended to be a norm. It was not intended to be a rule in the sense of being a precise and concretely worded proposition of law to be used affirmatively or negatively, for example, as a weapon to protect consumer interests or to cut big business down to size. It is, as I have tried to explain, a "safety-valve" to be used to solve the hard case problem.

Yet some courts have used it as a rule, allowing them to stick their necks into contracts that may be one-sided because of superior bargaining power, but that are not unconscionable or lacking in good faith. To destroy such contracts on grounds of unconscionability completely perverts its true meaning.

Third. The mandate of the UCC, that courts should rely somewhat more heavily on the decisions of other states in making their own decisions, has been ignored in many cases largely, I think, because it has not been forcefully argued. It is true that this mandate involves a seeming contradiction. As a code, the UCC dictates, on the one hand, that courts are to give their own decisions somewhat less permanent precedential value than in the past. On the other hand, it provides, paradoxically, that they are to rely somewhat more heavily on the decisions of other code states.

Yet, if vigorously argued by counsel, courts can be made to see the compelling force of UCC section 1-102, and this has happened to some extent around the country. A good local example is *Cromwell v. Commerce & Energy Bank*. [FN19] Our Supreme Court held in a case of first impression in Louisiana, involving an interpretation of "fraud in the transaction" under UCC 5-114(2), an examination of relevant cases decided in other states was prompted by the intent of the UCC section 1-102(2)(c) in the interest of harmonizing the commercial law of the country.

It was gratifying for me to see that one of my former students, drilled by me in the use of Section 1-102, carried the day in that case. It was discouraging to realize, however, that this provision of the UCC had been in force in Louisiana for over ten years but was used for the first time in *Cromwell*. During this ten-year period, many cases of first impression must have reached our courts under it. At the same time, the other states had had the UCC for a substantial period of time and had handed down many cases under it. Many opportunities were missed by not citing to these cases, not by way of persuasive authority, but as mandated sources of controlling law.

Fourth and last. My law review article has had little impact on the courts. I missed my target, which was the courts and the lawyers. Instead, I hit a *247 different target--law professors and other scholars. Several articles have been written agreeing or disagreeing with my thesis. In Louisiana, where I like to think we know something about codification, law review articles by Shael Herman [FN20] and Mitchell Franklin [FN21] have reached the same conclusion at which I arrived, namely the UCC is a code. And, as I indicated earlier, Professor Richard Buxbaum has also concluded that the UCC is a code. [FN22] On the other side, Homer Kripke, [FN23] an excellent commercial lawyer, and Professor John Geddis [FN24] have come to a different conclusion.

This academic excitement, which I played a small part in generating, is scant consolation for the fact that the courts have not, in the main, adopted code methodology in construing the UCC. But the UCC is what it is, and if it is a code, it has within its own structure the ability to cast aside what already has been decided under it. It has the capability of making a fresh start. In this respect, common law lawyers who hate codes should not underestimate the power that resides within them.

And now I close by returning to the start of this lecture--a reference to my little piece in the *Temple* magazine, *On Certainty, Uniformity and the Dream Again*. The commercial community has made a modest demand on the law to give it good rules that will operate evenly and with a fair degree of predictability. It was promised that this

dream could be accomplished through state law. A brilliant law professor, Karl Llewellyn, showed them how this could be done, but so far his approach has been rebuffed to a considerable extent. But it is not too late. If judges can be made to realize that the UCC is a code, imposing on them a different methodology, they can save this important field of law for the states. If they fail in this task, it is safe to predict that the federal government again will be called upon for salvation.

FNNote: Copyright 1995, by Louisiana Law Review.

FNa. Chancellor Emeritus, LSU Law Center; Boyd Professor, LSU. This paper was presented as the twenty-third John H. Tucker, jr. Lecture in Civil Law at the LSU Law Center on March 15, 1995.

FN1. William Hawkland, The Uniform Commercial Code--On Certainty, Uniformity and the Dream Again, 1 Temp. L. Rep. 1 (1950).

FN2. William Hawkland, Uniform Commercial "Code" Methodology, 1962 U. Ill. L.F. 291 (1962).

FN3. Samuel Williston, The Uniform Partnership Act with Some Remarks on Other Uniform Laws, Address Before the Law Association of Philadelphia (1915).

FN4. Grant Gilmore, Legal Realism: Its Cause and Cure, 70 Yale L.J. 1037, 1041 (1961).

FN5. Address by William Schnader, in Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 58 (1940).

FN6. Karl Llewellyn, Commercial Transactions 17 (1946).

FN7. Gilmore, supra note 4, at 1043.

FN8. Richard Buxbaum, Is the Uniform Commercial Code a Code?, Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht, 197, 220 (Duncker & Humblot, Berlin 1994). Professor Buxbaum, however, has qualified his view by stating that the UCC is a code "within the American frame of reference." In this regard, he has stated: "If that vision (Llewellyn's) was right for its time, the UCC is indeed a code, of course within the American frame of reference." Id.

Although Professor Buxbaum agreed with my conclusion that the UCC is a code and was generous in stating that I had provided the most extensive proof of this fact, he thought my views were somewhat idealistic in some respects and should be tempered to some extent by the views of Professor Homer Kripke, who had taken an opposite position to me in a companion piece published in the same issue of the Illinois Law Forum in which I had advanced my thesis. Id at 215.

FN9. Id. at 214-15.

FN10. U.C.C. S 1-102 (1994).

FN11. Mitchell Franklin, On the Legal Method of the Uniform Commercial Code, 16 Law & Contemp. Prob. 330, 333 (1951).

FN12. U.C.C. S 1-102 cmt. 1 (1994).

FN13. Northern Securities Co. v. United States, 193 U.S. 197, 400, 24 S. Ct. 436, 468 (1904) (Holmes, J., dissenting).

FN14. Great cases like hard cases make bad law. For great cases are called great, not by reason of their real

importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Id.

FN15. Rudolph Schlesinger, *Moral and Ideological Elements in the Principal Codes, Cases on Comparative Law* 307-50 (1950).

FN16. U.C.C. S 2-302 (1994).

FN17. U.C.C. S 2-302 cmt. 1 (1994).

FN18. U.C.C. S 1-103 (1994).

FN19. 464 So. 2d 721 (La. 1985).

FN20. Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the UCC*, 56 Tul. L. Rev. 1125 (1982).

FN21. Franklin, *supra* note 11.

FN22. Buxbaum, *supra* note 8.

FN23. Homer Kripke, *Principles Underlying the Drafting of the U.C.C.*, 1962 U. Ill. L. Forum 321.

FN24. John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 Wm. & Mary L. Rev. 341 (1988).