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# Taking Democracy Seriously

by  
NEIL B. COHEN\*

Like Henry Gabriel, I think I ought to lead with a statement of possible conflicts of interest. I have been privileged to participate in several of the commercial law drafting projects in the past decade. I was the Reporter for the Restatement of Suretyship and Guaranty and I was a member of the Article 9 Drafting Committee. As you have heard, I am now the Reporter for UCC Article 1, and I am on the reconstituted Drafting Committee for Articles 2 and 2A. I was not, though, on the original Article 2 and 2A Drafting Committees. Also, I am a member of the American Law Institute, but I am not a Uniform Law Commissioner. I think it is fair to say that I am probably completely free from the absence of bias about this process. Also, I have many friends whom I'm likely to offend by these remarks: so I'll just jump right in right now and offend everyone.

First of all, though, I should add a few more facts as background. One is that my experiences as a Reporter, both for a Restatement and for a UCC Article, have given me a deep appreciation of the very significant differences between those two processes and the differences in the preparation of those two products. I should also add that in my experiences as a Reporter I've been very lucky, in most respects, to be working on projects that have, for the most part, come in below the radar of those who do the heavy-handed lobbying of the sort that Dick [Speidel] and Linda [Rusch] experienced. This isn't to say there has not been spirited debate in my projects, but the debate has largely been a lawyer's debate about the right answers rather than a lobbyist's debate. So I am laden with bias, and I invite

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you to take everything I say with a grain of salt—or perhaps a boulder of it.

It is the recent experience with Article 2 that essentially gave rise to this program, so I will start there. I will start, though, by disclosing one more bias. That bias is that I like the policies that were embodied in Dick and Linda's draft of Article 2 (the July 1999 draft). I voted for it at the ALI, I generally supported its policies in the endless harmonization meetings that Dick referred to, and, if I ran the world, probably the bulk of the policies in that draft would be law. Indeed, I would not even have to run the whole world; I would just have to be empowered to make commercial law for it.

But I don't make the rules. Judges and legislators do. The last time I looked, I do not have a black robe and I have not been elected to any legislature. So, while my view of appropriate public policy is quite important to me, and might lead me through amicus briefs or communications to legislators to urge its adoption by those entrusted to make law, again, I am not one of the entrusted. Indeed, not only do I not have any legitimate political power of my own, I haven't even been delegated any such power by those who do have legitimate power to make public policy choices. It is something I try to remember in this process.

It is probably a good thing that I don't have that power, at least in the context of Article 2. Like most law professors, I have been a buyer much more often than I have been a seller. I benefit from warranty obligations, but I don't have to model anticipated experiences with them to estimate the expected costs from living up to them and assess the market benefits from choosing to bear those obligations along with those costs. I am on a payroll, but I have never had to meet one. And, while I am not personally litigious, I can assert my rights at little or no cost for legal services, and I occasionally even get paid by others to assist them in asserting their rights; I have never had to view the corporate legal department's budget or the costs of outside counsel while wearing a green eyeshade.

Moreover, when I conjure up a hypothetical situation to help myself determine what the rule ought to be in a particular case, I have a tendency to make myself a player in the hypothetical. And the role I assign to myself tends to reflect the experiences I have just described. I am willing to admit that my conception of the "better rule" that sometimes emerges from this exercise might well be tainted, just a little bit, by rooting for me (I tend to like my character). The result of this is some skepticism—skepticism about just how important my own policy views are. They are quite important to me, of course, but I do not view their failure to become law, when they do fail, as a betrayal of the "right answer" that must

be adopted or necessarily as a sign that the process is somehow tainted.

I suppose I was trained for this by presidential elections. I have voted in eight presidential elections in my life, and I have not voted for the winner in the majority of them. Except for the last one, though, I would say that there was not much doubt that the process was working even though my view did not prevail at the end. But, other than telling you that I do not think the extent to which legal initiatives replicate my views is necessarily a good measure of their value, I haven't really told you much about what I think about the current situation.

I think I really ought to introduce my views with a word that we have not heard very much today—somewhat surprisingly I think. That word is “democracy.” I might add that I think democracy is a good thing. One shouldn't have to say that, but at least some of what has been said today suggests that democracy is something to be run from and avoided and not be tainted by, rather than something that is a positive good. It does not always work; it has its flaws; but I have not yet seen a Plan B that works any better.

Democracy is the biggest difference between a Restatement and a proposed Article of the UCC. As you all know, a Restatement is neither mandatory nor self-executing. It becomes law solely by its persuasive power, and, in a sense, by the visibility it enjoys by standing on the shoulders of the giants who did the first Restatements. While a Restatement is not considered successful if it is not widely followed, it can gather that following over time; a split in the States as to whether to follow a Restatement rule is not considered a mark of failure.

Legislation, on the other hand, is the product of democracy, with all its virtues and all its flaws. Majorities have to be assembled, and, more importantly, proposed legislation needs supporters who care enough about it to actually get it to the floor where it can be determined if there is a majority supporting it; things do not just automatically come to the floor of legislatures. For uniform law, as opposed to regular old law, we need, essentially, consensus. Closely divided decisions are likely to be decided differently by different legislatures. If uniformity is valued—and that is a pretty big “if” that we all ought to think about rather than assume—the existence of different answers in different legislatures is not a good thing.

The result is that to achieve uniform legislation some common denominators have to be sought. Now, I am not saying “lowest common denominator,” although sometimes it might be there. Keep in mind, though, that sometimes the lowest common denominator is still a pretty big number. Also remember, that a statute can fail for a number of reasons. It can fail for saying too many things that people

dislike. It can also fail for not saying enough good things. And it needs the right balance in order to get enough support and enough of a consensus.

In light of these realities, if the decision has been made (again, that is a big “if,”) to seek legal reform through uniform state legislation, politics and democracy in all their glory are a necessary part of the process. We should not profess surprise or shock when that happens. Every time that happens I think of the line in *Casablanca*, where the police commander professes to be shocked upon discovering gambling at Rick’s; that is about as shocked as we should be at the presence of politics and democracy in our process. We should not be shocked when uniform legislation that would inspire lobbying efforts by interest groups in the legislatures inspires similar efforts in the so-called private legislatures in which we all participate, putting these products together.

In fact, there is some real advantage to having lobbying occur in private legislatures such as Drafting Committees rather than in the real legislatures. First, and I hesitate to say this, the interest groups might actually be right sometimes. Even a stopped clock is right twice a day, and sometimes the interest groups bring in things that we have not heard before, things that we have missed. Without that input the information would not come to our attention and the result is a better product for that input. Also, whether or not the interest groups are right, if they are successful at the drafting committee stage, they get the benefit of the high-quality technical drafting that is the hallmark of our projects. Whatever policies are adopted by the projects, it is certainly a positive value to have them done well rather than poorly. Finally, and this is the most difficult point and I will come back to it later, by having this fighting occur at the drafting committee stage and the private legislature stage, the proponents not only get a draft statute but they also get a “seal of approval” from the sponsoring organizations.

As Dick Speidel pointed out, though, not all action by interest groups is positive in the sense that it seeks enactment of certain rules. Much of it is negative, as in, “we will not let this draft be enacted; see our ad in today’s *USA Today*.” Indeed it was this sort of lobbying that ultimately killed Dick and Linda’s draft of Article 2. And it is this negative lobbying that has upset the proponents of that 1999 draft the most, as it ought to. That draft was killed off in a way that was quite harmful to the reputation. I should add that I am not referring to the reputations of Dick and Linda (their reputations soared when that happened); it was the reputation of the National Conference that suffered. The draft was killed off through a cover story that was, shall we say, not very credible. Those of you who were present remember that it was simply announced that there was not enough floor time to

openly discuss the issues and that, therefore, Article 2 was not going to be discussed anymore. At the same meeting in which the Conference promulgated UCITA<sup>1</sup> over significant opposition, it killed Article 2, because of its significant opposition. Those two decisions, juxtaposed in the same week, did not exactly put the Conference in its best light. And, unfortunately, that is not a good thing. Anything diminishing the reputation of one of the UCC sponsors is not good for the UCC. Even if one agrees with the decision made by the Conference, I think one ought to regret the result.

Yet, as much as the decision may have been handled in a way that was not good from a public relations standpoint, the Conference may in fact have made the correct decision not to go forward. I say "may" because I honestly don't know the answer. But if, in fact, the opposition would have prevented enactment in many states, the uniformity goal of the UCC would obviously have suffered. If the opposition would have prevented enactment in most states, the project not only would have been a waste of the sponsoring organizations' time and money, as well as the time devoted by the Reporters and drafting committee members, but it would have been a serious blow to the UCC as a whole. The failure of any part of the UCC damages all future UCC projects by robbing them of the aura of inevitability that often surrounds them when they get to the legislatures.

This would be harmful to both sponsoring organizations—particularly harmful to the National Conference because the UCC is, in many ways, the crowning glory of the National Conference. Many products of the National Conference have been widely enacted. Many have not. None has been as successful as the UCC. The failure would be a harm to the ALI as well, although perhaps somewhat less so. The ALI's reputation is likely to be based, for the foreseeable future, on the Restatements.

So, if the Conference leadership assessed the situation correctly, their decision to not go forward might well have been the correct one.

That's a big "if." They may have gotten it wrong. The opponents could have been bluffing, making empty threats with the hope of extorting a better deal, or they may not have had the ability to prevent enactment in the states. I don't know. Certainly the Conference leadership has much more experience in assessing these matters than I do, and I don't care to second-guess them. I do know, though, that this action has emboldened other groups to use the threat of opposition to seek more favorable rules, and we're paying the price of that in the Article 2 process right now.

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1. UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (1999).

If, indeed, though, the Conference made an accurate political assessment with respect to Article 2 and, thus, made the right decision—again, putting aside how it was handled from internal decision-making or public relations standpoints—what should happen next? The two obvious choices are to do nothing or to produce something more enactable.

My colleague Ted Janger, in a wonderful article in the *Iowa Law Review*<sup>2</sup>—I can tell him it's wonderful because I also tell him I disagree with about three quarters of it every time I talk with him about it—analyzes this latter phenomenon of producing something more enactable under the label of "preemptive capture." It is not so much that the Drafting Committees and the sponsoring organization have been captured themselves, as that they anticipate capture by the legislatures and try to match that capture. Now, he meant that pejoratively, but I am not so sure it's necessarily a bad thing. After all, producing in pretty good technical form what the democratic process can ultimately enact is only bad if we presume that we know that the answer that is acceptable to the democratic process is bad and should not become law despite its democratic support. I do not think we should reach such a conclusion casually.

But there are times that we can, should, reach that conclusion. Why? Because the ALI and the Conference are not just state legislative drafting services that merely put the ideas of others in proper statutory form. Products of the ALI and the Conference carry a sort of Good Housekeeping Seal of Approval. This seal of approval is not only for technical formulation, but also for acceptable policy.

As a result, when we put together these projects, I think we should be quite consciously serving two masters. We should simultaneously be seeking excellent law and enactable law. The former without the latter is merely a big self-indulgent law review article (not that I have anything against self-indulgent law review articles). But the latter without the former comes uncomfortably close to intellectual prostitution, and that, obviously, is not a good thing.

Kathleen Patchel opened her very impressive article<sup>3</sup> on the UCC drafting process several years ago with a quotation from Karl Llewellyn in which he suggested that the work of drafting the UCC

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2. See generally Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998).

3. See generally Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993).

would be largely technical rather than policy-laden.<sup>4</sup> Maybe he was just being disingenuous. The other possibility is he was just plain wrong. Because, of course, the technical aspects and the policy aspects are inseparable. We have to remember that; and the two sponsoring organizations should not put their seal of approval on any products they would not want associated with their names—that goes for both technical competence and policy.

So, what conclusion does this lead us to in terms of Article 2? In light of the history of the last two years, I think we must carefully examine the product that is going to come out of the Drafting Committee for which Henry is the Reporter and on which I serve. It should really be a multi-faceted examination. The product should be tested against some absolute norms—it should be good law and it should be enactable law—but also there should be a comparative analysis.

I do not think, though, the proper basis of comparison is Dick and Linda's draft. For better or for worse, that draft is gone and is not likely to come back any time soon.

I think that what is in the new draft ought to be compared with two benchmarks. One benchmark is current law—is the draft better than current law? The second, as Dick and others have mentioned, is opportunity cost. What is the opportunity cost of foregoing what we might produce if we do nothing now, and instead wait a few more years to perhaps find a more propitious moment?

This is where it is important to note that Article 2 is different from the rest of the UCC. Article 2 has always been the oddball in the UCC. Most of the rest of the UCC deals substantially with third-party rights with respect to a transaction, or is concerned with maintaining efficient systems, like wire transfer systems, for standardized terms. Article 2 is neither. It deals almost exclusively with completing incomplete contracts and as everyone has noted, tends to provide somewhat fuzzy norms. The result is an Article that is different than all the others. The other Articles tend to answer our questions, Article 2 tells us what question we should have asked. That is a very different function.

It is a function that the common law performs also, and tends to perform pretty well. While the common law rules and the Article 2 rules are often quite different, we cannot really say that the common law is a failure. So, if through obsolescence Article 2 withers to irrelevance without being replaced or updated, the social cost will be

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4. "There is a very considerable body of commercial law which is very largely non-political in character, and which can be put into shape to be flexibly permanent." Karl Llewellyn, *quoted in Patchel, supra* note 4, at 83.

significantly less than if the same thing happened to Article 8 or Article 9.

I am not saying the common law does a better job: Dean Scott will be talking about that. I am making the more modest claim that Article 2 may be a bit less essential in 2001 than we like to think. It certainly was a great advance in the 1950s and 1960s, but it is not necessarily true that we need that advance today.

So “do nothing” may not be as bad a choice for Article 2 as it might be in the case of another UCC Article. Accordingly, the sponsoring organizations, both of them, can afford high standards in assessing the new Article 2 draft. I am not counseling against its approval—far from it. I am on the Drafting Committee and I am convinced that it represents an improvement over current law, even if its policies aren’t as much to my liking as the 1999 draft that Dick and Linda prepared. But, since the cost of doing nothing is low, the opportunity cost of not waiting until a better time should play a large role in the decisions.

What does this say about other UCC projects? I am guardedly optimistic but I would make a couple of suggestions for improvements in the process when other Articles are being considered. First, Drafting Committees should listen to the demands of interest groups, but they should also remember the difference between demands and needs, and realize that most interest groups are not particularly sensitive formulators of proposals that fulfill their needs—even when their needs are legitimate. The interest groups tend to be indifferent at best to the harm that their proposals wreak on others, and they typically describe their proposals as demands and fail to articulate clearly the concerns that give rise to those proposals. But if a Drafting Committee can force itself to see behind those demands, to reach and see the often legitimate needs that are lurking behind them, it can draft rules that meet those needs but do not cause the same level of harm that satisfying the demands might cause. Moreover, if this is done well, very often the unreasonable demands ease or disappear. I think this is something we don’t do often enough, and we should do more. This is something also that is more likely to be successful early, rather than late, in the process.

I think, secondly, that the ALI and the Conference should openly acknowledge their different perspectives on the law creation process in which we are all involved, and celebrate those differences rather than becoming frustrated by them, as is often the case these days. As many have said, the ALI’s institutional perspective is to try to devise the right rule, not necessarily the best rule. There can be lots of “rights,” but there can only be one “best.” But the ALI certainly tries to at least get a rule that is right. There is recognition within the ALI of the difference between right and best, and that it might have to

settle for second best for reasons of enactability, but the prime focus is on getting it right.

The Conference, on the other hand, not only has to deal with enactability, but some might say enactability is its primary focus and that the Conference seeks the best possible rule within that constraint. I leave it to all of you to decide whether that characterization is correct. But these two different roles and these two different perspectives of the two organizations are complementary, and not antagonistic. Both of those focuses should be served if we are to produce law that we are proud of. More open discussion of these different perspectives and the different directions that they might lead us in will, I think, serve us all well.

I think the process points raised by Gail Hillebrand are good and should be followed for the most part. I think that they would, in fact, benefit the process. I think that Lance Liebman's five questions must be addressed, and addressed openly. Some of us may claim that we implicitly think about them all the time, but implicit thinking doesn't really do the job here. Unless you debate something openly you do not really get a full range of views.

Henry Gabriel's view that good law bothers everyone, or ought to bother everyone, may well be true. After all, a balance of dissatisfaction may in fact produce equilibrium. Those of you who remember high school physics, though, may remember that a pendulum has two equilibrium points. There is the one at the bottom, and there is the one at the top. The one at the top is what is called an unstable equilibrium, because if you push the pendulum a little bit it goes careening pretty far away, while the one at the bottom is a stable equilibrium—if you push the pendulum away it will come right back. I think that there may be a lesson in that for us here as well. It is a lot easier to maintain that equilibrium at the bottom than it is at the top, but we want to be striving for that equilibrium at the top of the pendulum rather than the bottom.

Where does that leave us? I think, at the present time, that what we ought to do is to keep putting one foot in front of the other—go through the journey, do the best we can, be more sensitive, perhaps, than we have been in the past to a lot of issues we have tended to gloss over, and not lose sight of the goal of the enterprise, which, of course, is bringing about good law.

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