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The Language of the Uniform Commercial Code

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Uniformity, like inbreeding, can produce works of genius or monsters, sometimes both. A case in point is the Uniform Commercial Code.

Twenty-five years after the start of the brainstorming and salesmanship that has swept the UCC across the nation and onto the statute books of all but one state, it is now nearly forgotten that uniformity is only one of several avowed purposes of the UCC. Another purpose is to "clarify . . . the law governing commercial transactions. . . ."¹ Yet when we learn from the Code that *debtor* can mean someone who is not indebted,² that gasoline may be a *farm product*,³ that *identification* of goods "occurs" when goods have been identified,⁴ and that you may revoke an *irrevocable credit*,⁵ it is pardonable to suspect that clarification has been junked for the illusion of uniformity. A more detailed look at the Code will harden suspicion into conviction: for all its substantive contributions, the UCC is a slipshod job of draftsmanship.

The Code itself is devoid of the uniformity it prescribes for the substance of the law. The language is now clear, now mud; now grammatical, now illiterate; now consistent, now inconsistent, slapdash and slovenly. It wallows in definition that does not define and definition that misleads—definition for the sake of forgotten definition. It includes many ways of saying the same thing, and many ways of saying nothing. The word *reasonable*, effective in small doses, has been administered by

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1. UNIFORM COMMERCIAL CODE § 1-102(2)(a) [hereinafter cited by section only].

2. See § 9-105(1)(d).

3. See § 9-109(3).

4. § 2-501(1)(a).

5. § 5-106(2).

the bucket, leaving the corpus of the Code reeling in dizzy confusion. And overshadowing all else, even in a gallery of elaborate ugliness, are the ambiguity and vacuity inherent in the determined and needless use of the long, long sentence.

Some specifics are now in order. Be warned, however, that even an abridged catalog of the UCC's language vices makes a long, long list. Once convinced or revolted by one category of vice, the impatient reader may leaf ahead to the next and ultimately to the denouement, which begins on page 720. All of the UCC citations in this article refer to the 1962 Official Text replete with Comments of the draftsmen, as reproduced by West Publishing Company in a watery blue paperback 731 pages long. The pages are somewhat small than those in a Sears, Roebuck catalog. Although it might have helped, none of the italics in this article appear in the UCC or elsewhere.

I. The Definitions

The striving for precision which is a noteworthy characteristic of the language of the law⁶ often leads us to define, whether defining is needed or not. Definition gives an appearance of precision that warms the cockles of the draftsman's heart. At one stroke you can say what you mean, give an easy reference tag for later parts of a writing, and provide the basis for clarity, brevity, and consistency. The rewards are so alluring that it is easy to overlook the prime difficulty—the process of defining—and the attendant burden of remembering to follow your own definitions. The UCC has opted for the rewards and blinked at the difficulties. So much in the UCC is labeled "definition" that it is almost irreverent to ask the preliminary question "Are there really any definitions at all in the UCC?"

A. *"Unless the context otherwise requires"*

The first of a long series of sections containing "definitions" warns of more to come, and adds the ominous preface to definition: "unless the context otherwise requires"⁷ The phrase is repeated in various definitional sections of other articles.⁸ What does it do to the definitions that follow?

The most charitable answer is: "Nothing! The phrase is a redun-

6. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* §§ 17, 116, 129 (1963).

7. § 1-201.

8. §§ 2-103(1), 2-106(1), 3-102(1), 4-104(1), 4-105(1), 5-103(1), 7-102(1), 8-102(1), 9-105(1).

dancy, expressing the truism that context can choke the life out of any word, and make black mean white.” Of course, if the phrase means nothing, why not delete it? That is just what Ohio did.⁹ This Buckeye deviationism was denounced by the Permanent Editorial Board for the Uniform Commercial Code. It said the words were a “customary device of statutory draftsmanship,” “standard in definitional sections throughout the Code,” which there was no “good” or “apparent reason” to abandon.¹⁰ Connecticut heretics got a similar treatment: “The preamble omitted in this variation is standard in all definitional sections throughout the Code. There is no apparent reason why it should be omitted.”¹¹

But there was. For customary or not, the device is not standard in the UCC, and is not used in even nearly “all the definitional sections” of the UCC.¹² Perhaps the draftsman nodded. But no. When Oregon put the “customary” words in where the UCC had omitted them from a definitional section, that too was rejected by the Board. It lumped Oregon’s addition of “unless the context otherwise requires” together with a change of numbering and dismissed both as “purely a matter of style.”¹³ From this one might easily conclude that the words are in or out of the UCC because they happen to be in or out, and that apart from the need for uniformity it makes no difference what is in or what is out. There is, however, another possibility.

If some UCC definitions are to apply “unless the context otherwise requires,” and some are to apply without that qualification, a decent respect for the draftsman gives rise to an inference that the difference is intended.¹⁴ If the phrase does not appear often enough to establish a consistent pattern, it nonetheless appears too often to be dismissed as a happen-so or printer’s error. Possibly the draftsman, when he has thought of it, has tried to duck the responsibility for his own definitions. He could be saying, “I think this is what I mean—usually. But for the love of Coke, don’t hold me to it!” Perhaps he is trying to shuck the burden of writing so that the context will not otherwise require. But who creates the context?

9. See §§ 2-106(1), 4-104(1), 5-103(1); 13 OHIO REV. CODE §§ 1302.01(11), 1304.01(A), 1305.01(A) (1962).

10. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2, at 30, 73, 101 (1965).

11. *Id.* at 100, referring to CONN. GEN. STAT. ANN. § 42a-5-103(1) (1958).

12. See, e.g., §§ 2-104, 2-105, 3-410, 5-108, 6-102, 8-201, 8-302, 8-303, 9-106, 9-107, 9-109, 9-301(3).

13. REPORT NO. 2, *supra* note 10, at 181, referring to ORE. REV. STAT. § 79.1060 (1963).

14. *Cf.* § 1-102(4).

The draftsman faces a problem different from that of the lexicographer, who defines and waits. That "humble drudge" whose fate is "to be exposed to censure, without hope of praise . . .,"¹⁵ is at the mercy of every genius or illiterate who seizes his hard-defined words and plops them down in a thousand novel contexts; but once resigned to his lot, he may disclaim responsibility for changes in either the world or its use of words. The draftsman cannot, even when he wants to.¹⁶ Yet once he has decided to turn word-maker, he has the distinct advantage of being able to decide not only upon the definition, but on each of the thousands of words that will provide the setting for his defined word. Thousands of decisions. But that is what the defining draftsman has undertaken. If he doesn't want to play word-maker, he should never begin. If he essays the role, he can at least try to create a context that will be hospitable.

For example, take two definitions under the heading "unless the context otherwise requires."

"*Banking day*" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions.¹⁷

Five paragraphs on, that newborn *banking day* means something else—not *part* of a day, but a *date*:

"*Midnight deadline*" with respect to a bank is midnight on its next *banking day* following the *banking day* on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.¹⁸

Here there was no compulsion to create for *banking day* a context that requires a sense contrary to the definition. The reader who has just absorbed *banking day* finds "midnight on its next banking day" a mind-twisting anachronism, since he knows that the "part of any day on which a bank is open to the public" rarely has a midnight. Jerked into wakefulness, he will wonder why the definition of *banking day* didn't say that it could be a date as well as a part of a day, or in the alternative why *midnight deadline* didn't speak of a midnight on the date of "its next banking day."

15. S. JOHNSON, *Preface* to 1 A DICTIONARY OF THE ENGLISH LANGUAGE, at b (4th ed. 1775).

16. See pp. 195-96 *infra*.

17. § 4-104(1)(c).

18. § 4-104(1)(h).

Agreement and *contract* create a more widespread confusion. As defined:

“*Agreement*” means the *bargain* of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act. . . .¹⁹

Agreement is distinguished from *contract*, which “means the total *legal obligation* which results from the parties’ agreement as affected by this Act and any other applicable rules of law.”²⁰ Though *bargain* is nowhere defined, verbally at least this looks like a straightforward distinction between *bargain* and *legal obligation*. But with a little bit of context, the definition as well as the distinction become mangled beyond recognition.

In one breath we are told that Article 9 “applies to security interests created by *contract* . . . ,”²¹ and a moment later that “unless the context otherwise requires” a “‘*Security agreement*’ means an *agreement* which creates or provides for a security interest.”²² Again, Section 9-312(1) refers to Section 9-316 on “*contractual* subordination,” but Section 9-316 itself speaks of “subordination by *agreement*.” Again, the warrant of merchantability “implied in a *contract*” for the sale of goods²³ is followed by the minimum requirements of merchantability. Goods must, among other things, “pass without objection” under the “*contract* description” (rather than as agreed), but may vary as “permitted by the *agreement*” (rather than the contract), and must be “labeled as the *agreement* [not the contract] may require.”²⁴

In this rapid pirouette of *agreement* and *contract*, repeated in other sections,²⁵ one sees for fleeting moments the face of bargain and the backside of obligation in one blurred image with the backside of bargain and the face of obligation. Often it is not quite clear whether the UCC is indeed speaking of *agreement* or *contract* (as defined), or whether this is one of those times when the context requires otherwise, and the words may therefore be used interchangeably.

There are other trivial but annoying examples of this process of definition-and-ignoring-of-definition by creating context that requires

19. § 1-201(3).

20. § 1-201(11).

21. § 9-102(2).

22. § 9-105(1)(h).

23. § 2-314(1).

24. § 2-314(2).

25. See, e.g., §§ 2-321, 2-503(1),(5).

another meaning. " 'Secondary party' means a drawer or endorser,"²⁶ for instance, at least until, as silently as smog, context adds to the definition "the acceptor of a draft payable at a bank or the maker of a note payable at a bank . . ."²⁷ Definition-and-ignoring-of-definition is discussed further in the account of *notice* and *knowledge*.²⁸

The sense that begins to emerge is that when a definition is preceded by "unless the context otherwise requires," we are really being told not to take the definition seriously, or—as it is sometimes said—literally. The draftsman is preparing us not for the ordinary vagaries of life or language, but for his own goofs, warning us that while we are to remember his definitions, he may forget them. His load thus lightened, the jolly draftsman finds it easy to incorporate into the UCC such traditional claptrap as

[U]nless the content otherwise requires

- (a) words in the singular number include the plural, and in the plural include the singular . . .²⁹

The formula is promptly ignored (or else serves to make the UCC incredibly complex) in such phrases as "document or documents,"³⁰ "fiduciary or fiduciaries,"³¹ "survivor or survivors"³² and "writing or writings."³³

Speaking as plainly as he can, the draftsman will never be completely successful, but he can try. He can do better than cross his fingers, throw salt over his left shoulder, and recite the formula, "unless the context otherwise requires."

B. *A Word Is a Word: The Circular Definitions*

The major difficulty in verbal explanation of words lies in finding familiar words with which to do the explaining. With children and ignoramuses you sidle up to a definition, without really giving one. "Hot is when it hurts." Or, as the UCC puts it, "[a] term or clause is *conspicuous* when . . ."³⁴ The more sophisticated child is told "animal includes a cow." Or, as the UCC puts it, "'[w]ritten' or 'writing' in-

26. § 3-102(1)(d).

27. § 3-501(1)(c).

28. See pp. 200-03 *infra*.

29. § 1-102(5).

30. § 5-103(1)(b).

31. § 8-308(3)(c).

32. § 8-308(3)(e).

33. § 9-105(1)(b).

34. § 1-201(10).

cludes printing, typewriting or any other intentional reduction to tangible form.”³⁵ Such a definition includes a cheese soufflé, and excludes hardly anything except an inadvertent belch, but it does make the UCC flexible. Ultimately, children and readers of the UCC are told, this “means” or this “is.” There is another parallel: children and readers of the UCC are both treated to nonsense definitions, but there the parallels end. With children it is strictly for sport.

Some of the things the UCC calls “definitions” have hardly any meaning—some no meaning at all—because they are circular. They define a word with the same word, or with a variation of the word so close that you return to the starting point almost unscathed by information. Sometimes the circuit is short and easy to trace; sometimes the circuit winds over hill and dale before sneaking back on itself.

One of the shorter circuits strewn through the UCC is *rights-remedies*. A definition tells you:

“*Remedy*” means any *remedial right* to which an aggrieved party is entitled with or without resort to a tribunal.³⁶

Two paragraphs on, another definition tells you:

“*Rights*” includes *remedies*.³⁷

Just like that; you are now back at *remedy*. And to make sense of both definitions you had best spell out *remedial right*, which as anyone can see means a *right*, including the *remedy*, to a *remedy*, or a *right*, including the *remedy*, for which there is a *remedy*, which means a *remedial right*, unless the context otherwise requires, in which case you can stay overnight.

Some years ago, a smiling paranoiac offered to prove to our class in abnormal psychology that he was the true Christ and that Jesus was an imposter. “It’s simple,” he said. “I am the Christ because the Christ wouldn’t lie to you.” The startling swiftness of that circular explanation is rivaled by the UCC on *identification*:

In the absence of explicit agreement *identification* occurs

- (a) when the contract is made if it is for the sale of goods already existing and *identified*.³⁸

35. § 1-201(46).

36. § 1-201(34).

37. § 1-201(36).

38. § 2-501(1).

That is to say, when you make a contract for the sale of existing goods, identification occurs when identification occurs, unless you explicitly agree that identification does not occur when it occurs.

One of the longer circuits is found in the *negotiation-holder-indorsement* syndrome.

The basic concept of the law of negotiable instruments is defined as follows:

Negotiation is the transfer of an instrument in such form that the transferee becomes a *holder*. If the instrument is payable to order it is negotiated by delivery with any necessary *indorsement*; if payable to bearer it is negotiated by delivery.³⁹

With key words italicized, it becomes clearer that to discover what *negotiation* is you first have to know what is meant by *holder* and *indorsement*.

The very next section tells you something about indorsement:

An *indorsement* must be written by or on behalf of the *holder* and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.⁴⁰

The search for the sense of *negotiation* that hinges on *indorsement* thus doubles back on the same *holder* that is a part of the definition of *negotiation*. *Holder* must be the way out. Naturally, it is defined:

"*Holder*" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or *indorsed* to him or to his order or to bearer or in blank.⁴¹

At this point your cry of despair is mingled with the shriek of the wounded draftsman who has just bitten himself squarely in the back. For the *negotiation* which led to *holder* has led to *indorsement* which leads back to *holder*. And the *negotiation* which led to *indorsement* has led to *holder* which leads back to *indorsement*.

From the dizzying shuttle between *holder* and *indorsement* there is only one escape. In order to understand the UCC definitions in the area of negotiable instruments, you must first know the law of negotiable instruments. In other words, the Code is not a code that tells a student or a banker or a lawyer what the law is. It is rather a com-

39. § 3-202(1).

40. § 3-202(2).

41. § 1-201(20).

pilation of notes that may serve to remind you of law you had better know before you read the UCC.

For example, a check drawn "Pay to the order of John Doe" is delivered to John Doe and stolen from him by Richard Roe. Roe writes on the back, "Pay to Sol Soe," and underneath that forges the name of John Doe. Sol Soe is legitimate and he indorses to another legitimate who indorses to another legitimate, Thomas Toe.

In the talk of businessmen, bankers, and even lawyers, Sol Soe took a check "indorsed to him," even though Richard Roe was a forger. Even the UCC speaks of a "forged indorsement."⁴² It also says that "unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement."⁴³ If these quotes say anything, they say that Thomas Toe, as well as Sol Soe, has become a *holder* because each took a check "indorsed to him," even though the immediate or an earlier indorsement was a forgery. But that is not the law of negotiable instruments.

It is hornbook law that no one becomes a *holder* under a forged indorsement.⁴⁴ Thus when the UCC talks about *indorsement* requiring a *holder*, and a *holder* being a person in possession of a negotiable instrument that has been drawn, issued, or *indorsed* to him, it means (though it does not say so) that that phrase of the definition doesn't mean anything unless there is already a *holder* who became a *holder* without any intervening taint of forgery. Only after you know that result can you grasp the substance so studiously omitted by the draftsmen from the UCC definitions of *negotiation* and *holder* and *indorsement*. With that knowledge—from outside the UCC merry-go-round—you are in a position to say that good faith Sol Soe (who had the misfortune of not knowing that Roe was a crook) and better faith Thomas Toe (who never dealt with a crook in his life) are not *holders* under the UCC. The check was not drawn to either, was not issued to either, and though it certainly looked "indorsed," it was not really "indorsed," because the *indorsement* was not by someone who was already a *holder*. You can make words of the UCC definitions fit the law, but you cannot learn that law from the definitions any more than John Locke's blind man could know the color red from hearing a description of it.⁴⁵

The very nature of the writings with which the UCC must deal is

42. § 3-419(1)(c).

43. § 3-402.

44. W. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 250 (2d ed. 1961).

45. 2 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 38-40 (A. Fraser ed. 1894).

made similarly obscure by UCC definitions. In Article 3, subject to context, "[i]nstrument" means negotiable instrument."⁴⁶ By itself, that would be a very short circuit indeed, except for the fact that another section quickly gives you the requisites for a *negotiable instrument*.⁴⁷ So it may be assumed that *instrument* is simply shorthand usage, like calling someone by his first name. If that usage were uniform, there would be fewer difficulties. But after that beginning, the skein of repeated *instruments* and *negotiable instruments* becomes hopelessly tangled.

For example, *draft*, *check*, *certificate of deposit* and *note* are defined in Article 3 so as to be *negotiable instruments*.⁴⁸ But "[a]s used in other Articles of this Act, and as the context may require . . . [those expressions] . . . may refer to *instruments* which are not negotiable within this Article as well as to instruments which are so negotiable."⁴⁹ That is only a starter. For one of these other articles—Article 4—adopts the Article 3 definition of *draft*, *check* and *certificate of deposit* (though not *note*, which is left to fly on its own).⁵⁰ But in saying that the Article 3 definition applies to Article 4, the reference is to Section 3-104, without specification of subsection—*i.e.*, without saying that the reference is to Section 3-104(2) which makes *negotiable instruments* of *draft*, *check* and *certificate of deposit*, or to Section 3-104(3), which says they may be "*instruments* which are not negotiable." As an added fillip, Article 4 defines *item* to mean "any *instrument* for the payment of money even though it is not negotiable but does not include money . . .,"⁵¹ so it is anyone's guess whether Article 4 is speaking of *negotiable instruments* or something else when in the same section it mentions *item*⁵² and *check*.⁵³

The mud becomes thicker in Article 9 which adopts the Article 3 definitions for *check* and *note*.⁵⁴ As with Article 4, the reference is again to Section 3-104, without specification of the negotiable or the non-negotiable subsections. In addition, Article 9 has its own definitions of *instrument*, which means not only "a *negotiable instrument* (defined in Section 3-104) . . ." but also securities and other miscel-

46. § 3-102(1)(e).

47. § 3-104.

48. § 3-104(2).

49. § 3-104(3).

50. § 4-104(3).

51. § 4-104(1)(g).

52. § 4-405(1).

53. § 4-405(2).

54. § 9-105(3).

lany.⁵⁵ Whether this *instrument* swallows up the incorporated definitions of *check* and *note*, or whether they are intended (because separately mentioned) to stand on an independent footing, is not readily apparent.

After wandering in the wilderness of the other articles, it is comforting to return to Article 3, where at least almost from the start you are told that *instrument* means *negotiable instrument*, unless of course “the context otherwise requires.”⁵⁶ You turn then to Section 3-303, “*Taking for Value*” which speaks of a holder taking “the *instrument* for value,” “a lien on the *instrument*,” “when he takes the *instrument*,” but ends with a resounding thwack—“when he gives a *negotiable instrument* for it. . . .” If that doesn’t shake your confidence in the sense of an unadorned *instrument*, you must wait until the final, bitter, unannounced passage of this same Article 3, an article devoted to impressing you with the fact that *instrument* means *negotiable instrument*. The last word says:

This Article applies to any *instrument* whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.⁵⁷

Home at last. An *instrument* is an *instrument*, negotiable or not. If you now re-examine the definition of *negotiation*⁵⁸ in the light of this last stab at the meaning of *instrument*, you may come to the conclusion that under the language of the UCC you can negotiate an *instrument* that is *not negotiable*, which ought to be the end of the line.

C. The Misleading Definitions

Haunting any draftsman is the fear that his new, sterile masterpiece will be loused up by the old law. As some of the draftsmen of Article 9 put it,

the selection of the set of terms applicable to any one of the existing forms (*e.g.* mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this Article. Since it is desired to avoid any such implication, a set of

55. § 9-105(1)(g).

56. Compare § 3-102(1)(e) with § 3-102(1).

57. § 3-805.

58. § 3-202(1); see p. 192 *supra*.

terms has been chosen which have no common law or statutory roots tying them to a particular form.⁵⁹

If it were theoretically possible to select terms without roots in the law, to achieve the requisite isolation it would also be necessary to select terms without roots in the English language. And this the Code has not done, either in Article 9 or elsewhere. It has not plumped for symbolic logic, though that could not have hurt worse than the course adopted. It has not used the device of the tax lawyers, a *Subchapter S corporation*.⁶⁰ Nor has it returned us to law French or Latin in a vain search for the distinctive.⁶¹ The only gesture towards law Latin is in the direction of utter confusion, for in Article 8 the old law expression *bona fide purchaser* is given special definition.⁶² It is not the same as the standard law usage nor the same as the UCC usage of its apparent English equivalent *good faith purchaser*.⁶³

The UCC has used for definitions words that can be loosely described as English. They have the appearance of English words. The form is English, but the guts have been scooped out and scattered.

English does have words for special use. With a warning that here is a *special bastard*, the English-speaking lawyer may prepare himself for an encounter with someone other than an ordinary bastard. With the Code, the special and ordinary are intermingled without warning. Old words are given not merely new meanings, but meanings that contradict their everyday usage in and out of the law, as well as conflicting with their meanings in other portions of the Code. The language is difficult for anyone (even the draftsman) to follow. It is as though one suddenly redefined ears to mean shoelaces, and went about telling friends, "I put on my shoes and tied my ears." After a time, a good friend might understand, whatever his private opinion might be. Anyone else would dismiss it as gibberish. A sampling of similar gibberish follows.

1. Lien Creditor

A typical example of UCC definitions (though more excusable than most instances since this one is partly inherited from the Uniform Trust Receipts Act) is *lien creditor*. It is defined in Article 9 to mean

59. § 9-105, Comment 1.

60. See generally B. BITTKER, *FEDERAL INCOME, ESTATE AND GIFT TAXATION* 740-44 (3d ed. 1964).

61. See D. MELLINKOFF, *supra* note 6, chs. VII, IX.

62. § 8-302.

63. Compare § 5-108(3)(b) with § 2-702(3).

a *creditor* who has acquired a *lien* on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.⁶⁴

Maybe there ought to be a special name for that kind of creditor. Maybe he should be a *Section 9-310(3) creditor* or a *gruck*. But the trouble with calling him a *lien creditor* is that the words individually are in ordinary English usage and in ordinary law usage. Put together as apparent English, *lien creditor* sounds like a creditor-with-a-lien. That is the substance of the definition in *Black's Law Dictionary*. Yet the linking of *lien* and *creditor* in the UCC definition eliminates thousands of creditors with liens. The whole does not equal the sum of its parts. The creditors can put up with that because they have their liens to keep them warm, but it is hard on English and on people who try to read it. This is especially so since *lien* separately and *creditor* separately are used throughout the UCC. Even worse, the UCC definition of *creditor* in Article 1 includes a *lien creditor*, without specifically adopting the special Article 9 definition. Worse still, the Article 1 definition of *creditor* opposes to *lien creditor* certain portions of the Article 9 definition of *lien creditor*:

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

.

(12) "*Creditor*" includes a general creditor, a secured creditor, a *lien creditor* and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.⁶⁵

The ordinary sense of this Article 1 definition excludes from the meaning of *lien creditor*, and includes in the meaning of *creditor*, the assignee, trustee and receiver who are specifically included in the Article 9 definition of *lien creditor*. Yet the Article 1 *lien creditor* is to be included throughout the Code wherever the word *creditor* is used, "unless the context otherwise requires." What kind of *lien creditor*? The UCC does not say.

64. § 9-301(3).

65. § 1-201(12).

2. Account Debtor

Even so, *lien creditor* is all clarity and certainty compared with the UCC's prize pseudomorph, the *account debtor*.⁶⁶ Superficially, the process of word creation is similar: Take two common words, join them, eviscerate and add new definition that contradicts the sense of the components parts. It is possible that that horrible recipe for making a *lien creditor* inspired the creators of *account debtor*. If so, the pupil has outstripped the teacher. The combination *account debtor* is different from an ordinary sense to be gathered from the common English words, *i.e.*, someone who owes money as shown on his creditor's books. Beyond that, the common English words *account*⁶⁷ and *debtor*⁶⁸ have themselves been redefined in ways foreign to their original meanings. And the UCC's combined form also contradicts the UCC's made-up meanings for the two separate words. Here are the definitions:

(1) In this Article unless the context otherwise requires:

(a) "*Account debtor*" means the person who is obligated on an *account*, chattel paper, contract right or general intangible; . . .

(d) "*Debtor*" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the *seller of accounts*, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires. . . .⁶⁹

"*Account*" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "*Contract right*" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. "*General intangibles*" means any personal property (including things in action) other than goods, *accounts*, contract rights, chattel paper, documents and instruments.⁷⁰

The Code's *account debtor* thus describes both those "obligated on an *account*," and those who are not. Some *account debtors* are those

66. § 9-105(1)(a).

67. § 9-106.

68. § 9-105(1)(d).

69. § 9-105(1).

70. § 9-106.

who by the Code's definition cannot be "obligated on an account," *i.e.*, those obligated on *chattel paper* (excluded by the definition of *account*) and those obligated on *general intangibles* (defined to exclude *accounts*). *Account debtor* also describes those obligated on a *contract right*, which sometimes does and sometimes does not produce an *account*; if the "right to payment" is under a contract for something other than sale or lease of goods or rendering of services, the definition of *account* precludes the possibility of an *account* even though the "right to payment" has been earned.⁷¹ (This is further confused by the definition of *proceeds* which "includes the *account* arising when the right to payment is earned under a contract right" ⁷² thus permitting the inference that an *account* always follows payment earned.)

The *debtor* portion of *account debtor* makes sense only by ignoring the UCC definition of *debtor*. The uncomplicated conclusion that a *debtor* is someone who owes money falls afoul of the UCC definition of *debtor*, which impartially includes people who owe money and people who don't, *e.g.*, a "seller of accounts, contract rights, or chattel paper," and sometimes "the owner of the collateral" who owes nothing.

3. Farm Products

As with *lien creditor* and *account debtor*, the UCC definition of *farm products* distorts the common understanding of the language, as distinguished from merely giving special application to words of variable content. Goods are classified as *farm products*, for example, if they are "supplies *used* or *produced* in farming operations."⁷³ Thus something may be a UCC *farm product* even though it is *used*, rather than *produced* in "farming operations"; indeed, even though it is an English language *product* of an oil well or a salt mine rather than a *farm*. For purposes of classifying security for a loan, it may be desirable to treat gasoline or salt used in farming operations in the same category with anything else that a farmer can borrow on, but it is not necessary to scuttle the English language in order to do so. When we run out of words or imagination, it will be better to join the telephone company in the candid confusion of digits than to pretend it is still English we are writing.

71. See 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 125, at 381-82 (1965); *cf.* § 9-106, Comment.

72. § 9-306(1).

73. § 9-109(3).

4. Notice, Knowledge

Notice and *knowledge* fall into another category of misleading UCC definitions. Here the definition is given the appearance of precision by such detailed refinement and subdivision of a specialized vocabulary that it is almost inconceivable that nothing has been settled. Yet on closer examination the definition turns out to be spun of a gossamer that scarcely conceals the lack of any solid substance.

Subject to the well-worn "unless the context otherwise requires,"

A person has "notice" of a fact when

- (a) he has *actual knowledge* of it; or
- (b) he has received a *notice* or *notification* of it; or
- (c) from all the facts and circumstances *known* to him at the time in question he has *reason to know* that it exists.

A person "knows" or has "knowledge" of a fact when he has *actual knowledge* of it. "Discover" or "learn" or a word or phrase of similar import refers to *knowledge* rather than *reason to know*. The time and circumstances under which a *notice* or *notification* may cease to be effective are not determined by this Act.⁷⁴

The first thing to observe about this lead-off section on *notice* is that there are three notices mentioned, and though all appear under the section heading of "General Definitions," none is defined. The first *notice*, the one in quotes in the first line, is the one that lawyers talk about as a shorthand way of saying that a person is about to be treated as though he knew something whether he does or not. The quotes should properly be about the phrase "*has notice*," for that is what is significant—that the person has it, like having measles or having a bad time. If he's got it he's stuck, like it or not. But the definition doesn't say that at all. It gives the appearance of being interested not in what you have but "when" you got it.

The second *notice* is the "*a notice*" notice, which is much different from the "*has notice*" notice. It is some sort of communication, often a piece of paper with something written on it.

The third *notice* is the "*notification*" notice. *Notice* and *notification* are used separately and interchangeably throughout the Code, and it is only an occasional redundant reference to "notice or notification" that might lead anyone to think there was a difference. The distinction that ought to be made is that *notification* is the same as the "*a notice*" notice, and so is not to be confused with the "*has notice*" notice.

74. § 1-201(25).

Concentrating then on the “*has notice*” notice, a person “has ‘notice’ of a fact when” he has *actual knowledge*, when he has *received a notice*, or when from what is *known* he has *reason to know*. *Know* and *knowledge*, the section tells us, are the same as *actual knowledge*. What is *actual knowledge*? It doesn’t say here or anywhere else in the Code, though *actual*, both in ordinary English and in the language of the law, is more a warning of uncertainty than a word.

There is some kind of an impression here that *actual knowledge* is the real McCoy—hard core knowing, as distinguished from implied or constructive knowledge. It is distinguished on the one hand from whatever cerebral twitching is caused when one has *received a notice*, and on the other from the hypothetical might-have-beens which the law sweeps under *reason to know*. Whether there would be the same gap between *actual knowledge* and *actual receipt of notice* or *actual reason to know* is unclear. In any event, now that we know that when the UCC says *know* or *knowledge* it means the *actual* stuff, we may proceed to the next step:

A person “notifies” or “gives” a *notice* or *notification* to another by taking such steps as may be reasonably required to *inform* the other in ordinary course whether or not such other *actually* comes to *know* of it. A person “receives” a *notice* or *notification* when

- (a) it comes to his *attention*; or
- (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for *receipt* of such *communications*.⁷⁵

Since *know*, by UCC definition, means *actual knowledge*, the first sentence is saying “whether or not such other *actually* comes to” have *actual knowledge*. The difference between *actually having actual knowledge* in Section 1-201(26) and only *having actual knowledge* in Section 1-201(25) is not readily apparent. But you begin to get into the swing of the thing when you read in Section 8-204 of “a person with *actual knowledge*,” which—in the light of the definition in Section 1-201(25)—means *actual actual knowledge*. That gets to the heart of the matter, which is either that plain *knowledge* doesn’t mean very much, or that no one—not even the draftsman—is expected to pay attention to these definitions.

The UCC at this point is laying the groundwork for treatment in the Code of the disappointment which often occurs in fact and in law

75. § 1-201(26).

between *sending* and *receiving*. (*Send* is separately defined in Section 1-201(38) to cover the physical acts of mailing, etc.) The draftsmen seem to be drawing a distinction between *giving* a notice and *receiving* a notice, but that is only an appearance. For in Section 1-201(26), while *giving* and *receiving* are discussed, they are not directly connected. It does not say that *A gives*, whether or not *B receives*, but that *A gives* whether or not *B "actually comes to know of it,"* which under Section 1-201(25) is not the same as *receiving a notice*.

Further, *A gives a notice* not when he takes steps to see that *B receives* it, but when he takes steps to *inform B*. And *B receives a notice* not when he *knows* about it, but when "*it comes to his attention*." These are gratuitous and unexplained complications. *Inform* and *comes to his attention* could be considered in the same category with words like *discover* and *learn* which "refer to *knowledge*."⁷⁶ But if that had been intended it would have been an easy thing to use the words already defined.

The final glittering, metaphysical mishmash comes in Section 1-201(27):

Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is *brought to the attention* of the individual conducting that transaction, and in any event from the time when it would have been *brought* to his attention if the organization had exercised due diligence

The opening words here now lump together the *has notice* of Section 1-201(25), the *a notice* (or *notification*) of Sections 1-201(25) and (26), and *knowledge*. The rapid run of the one long sentence makes it sound as though all of this is spoken of as being *received*, i.e., "[n]otice, knowledge or a notice or notification *received*." One must pause to consider not only that this "[n]otice . . . notice . . . received" would be more than usual UCC doubletalk, but also that it is only for the *a notice* (or *notification*) notice that *receives* has just been defined in Section 1-201(26). Accordingly, one must reconstruct the sentence mentally to read: "Notice . . . is effective . . . : when . . . ," "knowledge . . . is effective . . . when . . . ," and "a notice . . . received . . . is effective when"

Even if the reader can keep himself continuously aware of all this as he reads the sentence, he may yet have the uneasy feeling that he is

76. § 1-201(25).

groping at vapors. In a haze of doublethink, he must remember that an organization is to be treated as knowing something whether it knows it or not, but that treating it like that will only be “effective” (undefined) when the something is “brought to the attention [undefined] of the individual conducting that transaction.” He must also keep straight that something of which the organization has actual knowledge is not “effective” as actual knowledge until it is “brought to the attention” or “would have been brought” to the attention of the organization, though actual knowledge is something very different from having “reason to know.”

The best thing to do about the nice definitions of *notice* and *knowledge* and the precise differences between *giving* and *receiving* is to forget them. And that is just what the draftsman does whenever it becomes important. Having made the verbal distinction between *giving* and *receiving* notification, he proceeds to ignore it by using language that carefully steers between *giving* and *receiving*, without saying either. In the important definition of acceptance, the UCC says “Acceptance . . . must be written on the draft It becomes operative when completed by delivery or *notification*.”⁷⁷ Does that mean when notification is given or received? In context, since *delivery* “means voluntary transfer of possession,”⁷⁸ it is possible to conclude that the talk is about receiving something, either the draft with the acceptance on it, or a notification that the acceptance is on the draft. It is also possible to conclude that notification is opposed to delivery and so means the giving of notification, not its receipt.⁷⁹ If anyone had any confidence in the definitions, it would also have been possible to say either “by giving notification” or “by receipt of notification.”

D. *The Multiple and Missing Definitions*

As in a Russian novel where the lady known as Krupskaya in chapter I becomes Natasha in chapter V and turns out to be Dushinka in chapter XXXIX, some of the definitions in the UCC make no pretense of staying put.

Variations on an *instrument* have been discussed earlier. There are also, for instance, three definitions of *goods*.⁸⁰ None of them is incor-

77. § 3-410(1).

78. § 1-201(14).

79. § 3-410, Comment 5.

80. § 2-105(1).

porated in Articles 1, 4, 5 or 6, where *goods* is used without confining the sense to the three or any other definition.⁸¹

Document is even more itinerant. It wanders undefined through Articles 1, 2, 3 and 4, finally finding definition in Articles 5, 7 and 9.⁸² These definitions are not incorporated elsewhere in the Code, but that doesn't mean they may be ignored. The Article 5 definition stirs *document* into the same pot with *documentary draft* and *document of title*, so that *document* includes *document of title*, which itself is defined in Article 1⁸³ to include certain types of *documents*. The Article 7 and Article 9 definitions of *document* say that it "means *document of title* as defined in . . . Article 1." These definitions not only drag their own undefined *documents* into Article 5, which already defines *document*, but also into Articles 1, 2, and 3 which do not define it though they use it in a variety of ways. Article 4 ("Bank Deposits and Collections") has much to do with *documents of title*, but doesn't talk about them directly. Instead, it has a definition of *documentary draft* (different from the Article 5 definition), which uses *documents* in contrast to "securities or other papers to be delivered against honor of the draft."⁸⁴

The practice of defining, and then redefining or ignoring definition is but a special instance of a more generalized malady that affects the Code as a whole: an indifference to the draftsman's proper goal of trying to make one word have one meaning, and vice versa.

II. One Word, One Meaning, and Vice Versa

Whether it results from carelessness or addiction to "elegant variation,"⁸⁵ a change of words in mid-sentence can be jolting enough even when legal implications are not at stake. *The book was big, and George liked the volume; Peter had ten fingers and many toes; etc.* For centuries, draftsmen of the law have tried to avoid a confusing variety of words. They have been content to use the same word again and again wherever the sense was the same, in the belief that where different words are used, even a reasonable man might think some different sense is intended.

81. *E.g.*, § 1-201(9).

82. §§ 5-103(1)(b), 7-102(1)(e), 9-105(1)(e).

83. § 1-201(15).

84. § 4-104(1)(f).

85. *Cf.* H. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 148 (2d rev. ed. E. Gowers 1965).

The UCC disregards this useful practice. Its multiple definitions⁸⁶ are only one example of the liberal spirit of indiscriminate variation that gushes and spurts through the whole body of the Code.

A reader of the UCC must try to decide for himself or his client whether there is really a difference of sense or only of words in a large number of closely related and closely following pairs. For example, compare the phrases in the first column with the similar phrases in the second:

<i>continues perfected</i> ⁸⁷	<i>remains perfected</i> ⁸⁸
<i>delivery concerned</i> ⁸⁹	<i>deliveries affected</i> ⁹⁰
<i>fails to make delivery</i> ⁹¹	<i>fails to deliver</i> ⁹²
<i>imposed or permitted</i> ⁹³	<i>prescribed or permitted</i> ⁹⁴
<i>later holder</i> ⁹⁵	<i>subsequent holder</i> ⁹⁶
<i>noncompliance</i> ⁹⁷	<i>failure to comply</i> ⁹⁸
<i>person making presentment</i> ⁹⁹	<i>person presenting</i> ¹⁰⁰

As a working hypothesis, you may decide to dismiss these as inconsequential variations which merely reflect the draftsman's occasional susceptibility to the influence of non-legal prose style. But at about the time that explanation contents you, you encounter variation that is less explicable on the basis of the richness of non-legal English. Thus, *attorney's fees*¹⁰¹ and *counsel fees*;¹⁰² *conversion*¹⁰³ and *conversion to his [its] own use*;¹⁰⁴ and with reference to goods, both *loss . . . or injury*¹⁰⁵ and *loss or damage*.¹⁰⁶ Are there differences in meaning here, or only in form? Can they be ignored? And if they are ignored,

86. For a general discussion see pp. 203-04 *supra*.

87. § 9-103(3).

88. § 9-304(5).

89. § 2-616(1).

90. § 2-616(2).

91. § 2-711(1).

92. § 2-711(2).

93. § 4-108(1).

94. § 4-108(2).

95. § 3-206(4).

96. § 3-207(2).

97. § 7-210(5).

98. § 7-210(9).

99. § 3-505(1)(b).

100. § 3-505(2).

101. §§ 3-106(1)(e), 3-604(1), 9-504(1)(a), 9-506.

102. § 7-601(1).

103. §§ 2-603(3), 7-210(9), 7-309(2), 8-318.

104. §§ 7-204(2), 7-309(2).

105. § 7-204(1).

106. § 7-204(2).

then is there also no intended distinction, in spite of the clear verbal difference, between *domestic or foreign governmental regulation*¹⁰⁷ and *foreign or domestic governmental regulation or order*?¹⁰⁸

In the welter of changing words with or without changes of meaning, the verb *say* is a special case. What does the Code say when it wants to say that something says something? It could say *say*, but that is hopelessly simple. In the form *said*, it is tolerable, so the Code says *said to contain*.¹⁰⁹ Beyond that the UCC offers a dozen or more variants, some of which could carry a nuance of meaning, and some perhaps nuance on nuance, if only anyone could be certain just what nuance was intended.

A writing, instead of *saying*, may *describe, designate, disclose, express, fix, identify, indicate, name, provide, show, specify, state* and much more. In particular instances there is reason to select one of these words rather than another. Thus the UCC chooses *fixed period*,¹¹⁰ but fortunately not *fixed person*. It is better to *name* or *specify* a person; and yet there is very little reason in similar contexts sometimes to *name* him and sometimes to *specify* him:

A warehouse receipt, bill of lading or other document of title is negotiable

(a) if by its terms the goods are to be delivered to bearer or to the order of a *named person*.¹¹¹

On the other hand, a warehouse receipt ought to *embody*

a statement whether the goods received will be delivered to the bearer, to a *specified person*, or to a *specified person* or his order.¹¹²

Similarly, Article 3 includes variously "any *person* therein *specified* with reasonable certainty," "*names a payee*,"¹¹³ "a *specified person* or bearer"¹¹⁴ and "payable to a *named person*."¹¹⁵

You can also *designate* or *identify* people, so the UCC does that too, with *designate a specific payee*,¹¹⁶ and *identifies the claimant*.¹¹⁷ But if there is an intended distinction between *naming, specifying, designat-*

107. § 2-614(2).

108. § 2-615(a).

109. §§ 7-203, 7-301(1).

110. § 3-114(2).

111. § 7-104(1)(a).

112. § 7-202(2)(d).

113. § 3-110(1).

114. § 3-111(b).

115. § 3-117.

116. § 3-111(c).

117. § 8-403(1)(a).

ing and *identifying* people, the distinction does not come through loud and clear, or even in a strong whisper.

So, too, with *provide* and *state*. Why one rather than the other? Why both in the same sentence in reference to the same writing? Is some nuance of meaning intended with:

Unless the bill of lading otherwise *provides*, the carrier may deliver the goods to a person or destination other than that *stated* in the bill . . . ?¹¹⁸

Would there be any difference in meaning if the two words were reversed, or if one were used to the exclusion of the other?

The problem posed for the lawyer by any variation of word usage is that he must at least pause to consider whether variation has produced significance. It is possible, for instance, that someone was trying to convey a notion of greater generality by *providing* something rather than *stating* it. Perhaps *indicate*¹¹⁹ was intended to be even more general. Each must be fitted into a hierarchy of shading, if a hierarchy was intended. Could anything turn on the difference between *providing* for something and *indicating* it? And if “an instrument *shows* the date,”¹²⁰ is that still different from *specifying* or *indicating* it?

When you *say* something you *express* it in words. If you say that an instrument expresses something, you may be saying nothing more than that the instrument *says* it. Again you may be using the verb *express* in an older sense sometimes favored by the law, *i.e.*, the instrument says it *explicitly*. Accordingly, it is unclear when the UCC uses the forms of *express* (“expressed to be an order,”¹²¹ “expressed to be valid,”¹²² “expressed in the instrument”¹²³) whether it means merely that something is said, or that it is said in a certain way, *i.e.*, *explicitly*. Certainly that is the prime meaning of the adjectival and adverbial forms of *express*, as in *express reservation*,¹²⁴ *express terms*,¹²⁵ *expressly states*.¹²⁶ And from the use of those adjectival and adverbial forms a possible inference is that the verb form *express* means something different; such a conclusion would be questionable, for an overview of

118. § 7-303(1).

119. §§ 7-203, 9-208(2), 8-319(a).

120. § 3-503(1)(c).

121. § 3-801(1).

122. § 7-304(2).

123. § 3-503(1).

124. § 3-606(2).

125. § 1-205(4).

126. § 8-202(1).

the Code does not encourage one to reason from a premise that assumes precision of language.

The difficulty of arriving at the meaning or meanings of *express* in all its forms is complicated by another fact. While the UCC uses *express* adjectivally and adverbially to mean *explicit*, it also uses for the same purpose forms of the word *explicit* itself. Thus while Article 3 says "*express reservation*,"¹²⁷ Article 5 says "*explicit reservation*."¹²⁸ Is there a difference? Article 2 says "*explicitly extends*"¹²⁹ and "*explicitly agreed*,"¹³⁰ while Article 8 uses "*expressly states*."¹³¹ If we are dealing here with degrees of explicitness it would be helpful to know it, for the permutations are almost endless.

The uncertainty of interpretation that follows upon a helter-skelter use of *state*, *provide*, *specify*, *show*, *designate* and the rest is compounded when the modifiers *expressly*, *explicitly* and *specifically* are added to the verbs. The modifiers not only give one pause about the meaning of the combination, e.g., *expressly designated*¹³² as opposed to *specifically states*,¹³³ but also by their presence here create a doubt as to the meaning of the verb itself when the modifier is absent. For example, in another moment of promiscuous word association, the UCC speaks of

collateral already subject to a security interest in another jurisdiction when it is brought into this *state*. Such a financing *statement* must *state* that the collateral was brought into this *state* under such circumstances.¹³⁴

Apart from the stuttering shifts from one kind of *state* to another, the problem here is how explicitly must the *statement state* what the UCC says it must say? May it be stated less explicitly than in the Article 8 phrase:

even though the security *expressly states* that a person accepting it admits such notice?¹³⁵

The appearance and disappearance of these and other modifiers is a recurrent phenomenon of UCC style, raising again and again the

127. § 3-606(2).

128. § 5-110(2).

129. § 2-725(2).

130. § 2-401(1)-(3). See also §§ 2-501(1), 5-113(2)(a).

131. § 8-202(1).

132. § 5-116(1).

133. § 5-116(2).

134. § 9-402(2)(a).

135. § 8-202(1).

twin questions: What does it mean when they are there? What does it mean when they are not there? Here are some further examples:

<i>effective realization</i> ¹³⁶	<i>realization</i> ¹³⁷
<i>wholly inoperative</i> ¹³⁸	<i>ineffective</i> ¹³⁹
<i>due demand</i> ¹⁴⁰	<i>demand</i> ¹⁴¹
<i>valid rights of set-off</i> ¹⁴²	<i>right of set-off</i> ¹⁴³
<i>lawfully obtain possession</i> ¹⁴⁴	<i>obtain possession</i> ¹⁴⁵

One of the most frequently confusing uses of a modifier is the undefined combination *commercially reasonable*. This combination wanders like a troubled spirit into a hundred UCC contexts, never certain whether or not it has an identity separate from the ordinary plebian *reasonable*. The wanderlust of *commercially reasonable* is only one aspect of the uncertain use of words in the UCC; the phrase is also significant as a manifestation of the Code's bewildering mania for the use of the word *reasonable*. That particular vice must now be separately considered.

III. Unreasonably Reasonable: Or, the Draftsman Resigns

Reasonable is a fine, useful, flexible word,¹⁴⁶ but it is not a substitute for draftsmanship. Over-used, it can create more problems than it solves by making a statute as flexible as mush. Thrown into the pot, a pinch of *reasonable* here, a handful there, whenever one has the madness upon him, the results—as the old limerick says—are most horrid.

The UCC spares us a definition of *reasonable*, yet it tinkers with the word enough to succeed in creating a suspicion that a UCC *reasonable* might be a distinctive breed.

For one thing, every now and again the UCC says that something might be "*reasonable under the circumstances.*"¹⁴⁷ Since it is generally

136. § 2-704(2).

137. § 6-103(3).

138. § 3-404(1).

139. §§ 2-602(1), 6-105, 7-202(3).

140. §§ 7-206(4), 8-316; cf. § 9-404(1).

141. §§ 7-206(5), 7-210(6).

142. § 4-201(1).

143. § 9-104(i).

144. § 9-113.

145. § 8-315(1)-(3).

146. D. MELLINKOFF, *supra* note 6, §§ 119, 135.

147. § 4-103(4); see §§ 1-204(2), 2-504(a), 2-709(1)(b), 2-716(3), 3-505(1)(c).

supposed that *reasonable* is not an absolute, it may be assumed that this is lily-gilding and that even under the UCC *circumstances* will influence *reasonableness* even where the draftsman does not say so explicitly.

On that assumption, it is not unreasonable to believe that in any sort of a commercial code, the *commercial* aspects of a transaction will be among the circumstances affecting reasonableness. The UCC shakes that simple belief with a haphazard use of the expression *commercially reasonable*. The UCC says that some things are to be *reasonable* and others *commercially reasonable*, without telling us whether we are traveling up or down the scale of reasonableness. It becomes a rite of divination to decide when *reasonable* alone takes into consideration the commercial point of view, and when it does not, or to decide when and how *commercially reasonable* is different from ordinary *reasonable*.

For purposes of general application in the Code, Article 1 says that

[w]hat is a *reasonable time* for taking any action depends on the nature, purpose and *circumstances* of such action.¹⁴⁸

Accordingly, in a variety of commercial contexts the UCC speaks of *reasonable time*, e.g., for a written confirmation of a contract between merchants,¹⁴⁹ for a merchant's offer to stay firm,¹⁵⁰ for shipment or delivery,¹⁵¹ etc. In other equally commercial contexts, the UCC speaks of *commercially reasonable time*, e.g., for a merchant-seller's retention of goods after sale,¹⁵² for resale by a seller,¹⁵³ or for awaiting performance by a repudiating party.¹⁵⁴ If there is any difference between *reasonable time* in a commercial context and a *commercially reasonable time*, the UCC does not say what it is. It does manage to compound the uncertainty of any sort of time standard by requiring a CIF seller to tender the buyer's needed documents with *commercial promptness*,¹⁵⁵ thus imposing an obligation with an undefined if not undefinable difference from the obligation of other sellers to tender documents *promptly*.¹⁵⁶

148. § 1-204(2).

149. § 2-201(2).

150. § 2-205.

151. § 2-309(1).

152. § 2-402(2).

153. § 2-706(2).

154. § 2-610(a).

155. § 2-320(2)(e); see § 2-320, Comment 11.

156. § 2-504(b).

In a sentence applying alike to merchants and others, the UCC without pausing for breath speaks of *reasonable grounds for insecurity* and a *commercially reasonable* suspension of performance.¹⁵⁷ It proceeds to say that “[b]etween merchants the *reasonableness of grounds for insecurity* and the adequacy of any assurance offered shall be determined according to *commercial standards*,”¹⁵⁸ and adds a further provision applying alike to merchants and others that speaks of a *reasonable time*.¹⁵⁹ These quick leaps from *reasonable* to *commercial* and back are as difficult to follow in reading as in practice. The Comments relate the whole business to the needs of “commercial men,”¹⁶⁰ and make it at least doubtful that these differences of language are intended to convey any difference in meaning at all.

If something can be *reasonable*, it may also be *unreasonable*, which the UCC expresses in a number of ways. A buyer “may ‘cover’ by making in good faith and without *unreasonable delay* any reasonable purchase”¹⁶¹ With that double negative the draftsman has hit upon one of the only ways of complicating *within a reasonable time*. The Comments, with a hint of some kind of “in” knowledge, tell us that the test here is only “similar to that generally used in this Article as to reasonable time and seasonable action.”¹⁶² This possibility of an inverted or hidden delicacy of meaning is accentuated elsewhere in the UCC where *reasonable instructions* are opposed to those *not reasonable*,¹⁶³ which is a hair and a holler away from an *unreasonable instruction*.

The final breakdown of communication and of the distinction between what is *reasonable* and what is not occurs in Article 5:

Unless otherwise specified the customer bears as against the issuer *all risks of transmission* and *reasonable translation* or interpretation of any message relating to a credit.¹⁶⁴

What kind of risk does the customer bear? Since the wording makes it “all risks of transmission,” but only “all risks of . . . *reasonable translation*,” it ought to be a good guess that the risk is not unlimited. A good guess, but not good enough. Comment 3¹⁶⁵ tells us that

157. § 2-609(1).

158. § 2-609(2).

159. § 2-609(4).

160. § 2-609.

161. § 2-712(1).

162. § 2-713, Comment 2.

163. § 2-603(1).

164. § 5-107(4).

165. § 5-107, Comment 3.

[s]ubsection (4) distributes the risks, as between customer and issuer, of errors in transmission and translation by placing them on the customer in the absence of specific agreement to the contrary.

If that is what the draftsman meant, the *reasonable* here throws you off completely. It gives the impression that someone is talking about some expectable degree of error; yet as interpreted, the risk of *reasonable translation* can mean the risk of *unreasonable mistranslation*. After that, the possibilities inherent in trying to measure *reasonableness* by standards *not manifestly unreasonable*¹⁶⁶ seem almost endless.

Reasonable tends to be self-multiplying. The more it is used, the less it is used up, and the more one feels the need to use it. The very fact that one thing has been qualified by *reasonableness* makes it seem proper that almost anything should be so qualified, and at the same time raises frightening conjectures about possible interpretations if *reasonable* is not mentioned at all.

Article 2 is one of the more unreasonably *reasonable* articles of the UCC. Section 2-706, for example, hooks *commercially reasonable* on to method, manner, time, place and terms of sale. It also includes *reasonable* notification, notice and inspection, and a "*reasonably identified*." Inevitably, it speaks not of an *available* market but of one *reasonably available*,¹⁶⁷ which (says the Comment) is a question of "*commercial reasonableness in the circumstances*."¹⁶⁸ On the other hand, elsewhere in Article 2 a "carrier becomes *unavailable* . . . but a commercially reasonable substitute is *available* . . ."¹⁶⁹ and goods are to be kept *available*.¹⁷⁰ (In Article 7, "adequate facilities for weighing" are made "*available*,"¹⁷¹ and in Article 9 by agreement a secured party "may require the debtor to assemble the collateral and make it *available*. . . .")¹⁷² Can it be thought that the UCC actually intends *reasonable availability* in some of these cases and *absolute availability* in the others? It seems more likely that when a draftsman thinks of it, he is as appalled at absolutes as most other people,¹⁷³ and even less sure of his ground. So every now and then, but without consistency, he drops in a *reasonable* to reassure and protect himself.

So it goes. Not only *available* and *reasonably available*, but also

166. See §§ 1-102(3), 4-103(1), 8-402(2),(3)(b), 9-501(3).

167. § 2-706(4)(b). See also § 8-104(1)(a).

168. § 2-706, Comment 9.

169. § 2-614(1).

170. § 2-503(1)(a).

171. § 7-301(3).

172. § 9-503.

173. D. MELLINKOFF, *supra* note 6, at 395.

<i>assurance</i> ¹⁷⁴	<i>reasonable assurance</i> ¹⁷⁵
<i>expense incurred</i> ¹⁷⁶	<i>expenses reasonably incurred</i> ¹⁷⁷
<i>identify</i> ¹⁷⁸	<i>reasonably identify</i> ¹⁷⁹
<i>indicate</i> ¹⁸⁰	<i>reasonably indicate</i> ¹⁸¹
<i>induce</i> ¹⁸²	<i>reasonably induce</i> ¹⁸³
<i>necessary</i> ¹⁸⁴	<i>reasonably necessary</i> ¹⁸⁵
<i>promptly</i> ¹⁸⁶	<i>reasonably prompt</i> ¹⁸⁷

Reasonable is not the villain. The problem is the lack of consistency.

IV. Clarity and the Long, Long Sentence

It is possible to be unclear in a relatively short sentence, as the UCC demonstrates time and again.

Take for example, *the person to pay*:

In this Article unless the context otherwise requires

-
(b) An “order” is a direction to pay and must be more than an authorization or request. *It must identify the person to pay with reasonable certainty.* It may be addressed to one or more such persons jointly or in the alternative but not in succession.¹⁸⁸

Once you have identified *the person to pay*, what happens? Does he get paid, or does he pay? To old commercial law buffs, the person to pay in this definition of *order* is most certainly the person to do the paying, not the person to get paid. A careful reading of the three sentences can lead you to the right conclusion, especially if you know in advance what you are looking for, as most students and businessmen and non-commercial lawyers do not. If you know in advance that the *order* being defined here is the *order* later referred to as an *order to*

174. § 8-402(1), (1)(b), (c).

175. §§ 8-401(1)(b), 8-402(4).

176. § 4-503.

177. §§ 7-209(1), 2-711(3).

178. §§ 8-403(1)(a), 5-104(2), 4-206, 3-509(2).

179. §§ 1-206(1), 5-116(2)(b).

180. §§ 3-105(1)(f), 7-301(1), 2-611(1), 8-319(a), 1-206(1), 2-201(1)

181. §§ 2-709(1)(b), 2-716(3).

182. § 5-113(2).

183. § 2-608(1)(b).

184. §§ 7-209(1), 7-307(1).

185. §§ 2-503(1), 2-511(2).

186. §§ 2-504(b), (c).

187. § 4-204(1). *See also* § 4-406(1).

188. § 3-102(1)(b).

pay,¹⁸⁹ and not the order referred to in *payable to order*,¹⁹⁰ it will help. It will also help if you know that the predecessor Uniform Negotiable Instruments Law, in Section 1(5), covered this point with the words:

Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

It will be especially helpful if you learn, perhaps a bit wistfully, that on the Continent they say about the same thing with a shocking directness:

A bill of exchange contains:

. . . .
3. The name of the person who is to pay (drawee).¹⁹¹

Once you have learned, however, that *person to pay* is not on the receiving end, your troubles are not over. Apart from learning the myriad possibilities of the UCC definition of *person*,¹⁹² you must face up to the fact that "a person who has engaged in a transaction or made an agreement within this Act" is a *party*,¹⁹³ unless, of course, the context, etc. You will accordingly conclude that the UCC is still talking about the person who has to pay when it says:

[U]nless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination¹⁹⁴

Having made the leap from *person to pay* to *party to pay*, you are ready to examine Section 3-304(1), which says:

The purchaser has notice of a claim or defense if

- (a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to *the party to pay*.

Does this still mean someone who has to pay, or someone who gets paid? It is less than clear. The drawee, for example, need not have engaged in any transaction or agreement whatsoever until he becomes an acceptor; until then he is not a party to the instrument. Who then

189. § 3-104(1)(b).

190. § 3-104(1)(d).

191. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, annex I, art. I(3), 143 L.N.T.S. 259, 275.

192. §§ 1-201(30), (28).

193. § 1-201(29).

194. § 3-506(2).

is *the party to pay*? If he is not the person to do the paying, perhaps the UCC could be talking about the person who is to get paid.

Equally short and unclear is the phrase *one of two or more*.

No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of *one of two or more* makers or acceptors create a presumption that the signature is for the accommodation of the others.¹⁹⁵

Can this mean what it says? Does it apply only to *one of two or more*, or would it also apply when the words were added to the signatures of *two of three or more*, etc.? Does it mean what it says, or does it mean that the presumption arises when the words are added to the signatures of *less than all of the makers or acceptors*?

Ambiguity is a hazard of any draftsmanship, but there is at least one road to ambiguity that has proved itself infallible over the years. That is the long, long sentence. The long, long sentence cannot be determined by some arbitrary word count. It is characterized by a preference for squeezing too much law into one sentence, a practice which has for centuries caused trouble for lawyers. The genesis of the trouble in an age of illiteracy¹⁹⁶ hardly recommends the practice to 20th century lawyers. But it persists, and has led the draftsmen of the UCC into a course that made it much easier to be ambiguous than precise.

For an easy start, take for example the definition of *presentment*: Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.¹⁹⁷

To anyone searching for information, this definition is as misleading as to say:

A mouse is what is eaten or caught by a trap or a cat.

Each is a relatively short long, long sentence, and each is intelligible only if you already know what it is trying to say. Unless you know in advance that traps don't eat mice you are in trouble. Similarly, to read the UCC section you must know in advance that you present to makers and acceptors for payment but not for acceptance; the Code makes grammatical sense but commercial-law nonsense. Yet nothing in the law

195. § 3-416(4).

196. D. MELLINKOFF, *supra* note 6, §§ 82, 83, 106, 125.

197. § 3-504(1).

requires this peculiar phraseology.¹⁹⁸ It is just a needlessly big mouthful. Several smaller bites would make it easy.

A similar and less readily resolvable ambiguity occurs in the chock-full lead sentence of Section 3-110, "Payable to Order":

An instrument is *payable to order* when by its terms it is *payable to the order* or assigns of any person therein specified with reasonable certainty, or to him or his order, or *when it is conspicuously designated on its face as "exchange" or the like and names a payee*.¹⁹⁹

Experience with the Uniform Negotiable Instruments Law, Section 8 ("[T]he instrument is payable to order where it is *drawn payable to the order* . . .") will lead the initiated to recognize at once that this is saying something more than that an instrument is *payable to order when it is payable to the order*. After a time you can live with the burden of knowing that *payable to order* is being used first in the sense of a legal conclusion and next in the sense of the exact wording of a writing, a sense often conveyed by italics or quotation marks.

But with the typical run-on style of the long, long sentence, it is not as easy even for the initiated to digest the effect of the word cluster surrounding "*exchange*." Taken literally, the UCC language would mean that any instrument—bill or note—with a named payee, becomes payable to order if it conspicuously bears the magic word "*exchange*." It has been so interpreted.²⁰⁰ The Assistant Reporter for Article 3 gives the language a somewhat different reading. He suggests that the UCC here "nods toward international unification of the law."²⁰¹ "Compare," he says, "UCC § 3-110(1) making negotiable a *bill* designated on its face '*exchange*' or the like, with the civil law rule making the words '*bill of exchange*' a substitute for words of order."²⁰² Does that mean, then, that the words of the Code are to be pulled apart and—as in the case of *presentment*—applied distributively, so that *exchange* will make an order instrument of a bill of exchange but not of a promissory note?

The problem of interpretation here is that the word *exchange* has very little to do with making instruments *order* paper either in En-

198. Cf. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 145.

199. § 3-110(1).

200. Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MT. L. REV. 1, 24 (1953).

201. Leary, *Commercial Paper: Some Aspects of Article 3 of the Uniform Commercial Code*, 48 KY. L.J. 198, 203 (1960). See also NEW YORK LAW REVISION COMMISSION FOR 1955, REPORT NO. 2, STUDY OF THE UNIFORM COMMERCIAL CODE 813-14.

202. Leary, *supra* note 201, at 203 n.14 (emphasis added).

gland or on the Continent. In both areas, if there is a named payee, an instrument may be transferred by indorsement, whether it be a bill of exchange or a promissory note, and whether or not the word *order* is used, so long as the instrument itself does not prohibit transfer.²⁰³ In England, both bill and note are said to be “payable to order” without the word “order.”²⁰⁴ In Europe, both bill and note, “even if not expressly drawn to order, may be transferred by means of endorsement.”²⁰⁵ The only relevance of “*exchange*” is that in the Continental practice, a *bill of exchange* (or *lettre de change*) is supposed to contain those very words, as a *promissory note* (or *billet à ordre*) must contain those words, and a *cheque* that word.²⁰⁶

That leaves the UCC halfway to nowhere. *Exchange* certainly sounds like a reference to a *bill of exchange*. On the other hand, in view of the language of the section, there is as much reason to make it apply to a note as to a bill. Another possibility is that a very well hidden meaning lurks in the phrase “‘*exchange*’ or *the like*.” It is possible that “or the like” does not refer to another word that looks or sounds like the word *exchange*, but rather to a word which in the Continental practice would have like effect on negotiability. If *exchange* has the effect of the Continental *bill of exchange*, then what has the effect of *promissory note*?

With the long, long sentence, it is an easy matter to dump a problem and forget it, to assume it is taken care of because mentioned, without too much concern about what human beings may make of it.

In this same category is Section 1-102(3), a subject for treatises yet unborn:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that *the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed* by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Pause for a moment over the italicized words only. What *obligations*

203. Cf. § 3-805.

204. The Bills of Exchange Act, 45 & 46 Vict. c. 61, §§ 8(4), 89(1) (1882).

205. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, *supra* note 191, art. 11, at 277; *id.* art. 77, at 305; Convention Providing a Uniform Law for Cheques, March 19, 1931, annex I, art. 14, 143 L.N.T.S. 357, 377.

206. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, *supra* note 191, art. 1(1), at 275; *id.* art. 75(1), at 303; Convention Providing a Uniform Law for Cheques, *supra* note 205, art. 1(1), at 377.

of *care* are these words talking about? Is this like *payable to order*, which can refer either to a legal conclusion or to those very words? Are we talking here about *obligations of care* as a legal conclusion, whether or not the precise word *care* is used? Or is it only *care* described as *care* that is an *obligation of care* "prescribed by this Act"? Further, does the *obligation of care* mean both senses of care that the UCC deals with? There is *care* in the sense of *being careful*, variously described as *care*,²⁰⁷ *ordinary care*,²⁰⁸ *reasonable care*,²⁰⁹ and the care of a *reasonably careful man* "under like circumstances."²¹⁰ There is also *care* in the sense of *taking care of something*, e.g., goods—"caring for and selling,"²¹¹ *care and custody*.²¹²

Both senses of *care* being essential to many commercial transactions, it often happens that the UCC tells us how careful we must be in taking care of something. Sometimes, without using the word *care*, the UCC merely spells out the action to be taken.²¹³ Sometimes it explicitly uses *care* (being careful) in the context of taking care of something.²¹⁴ Does the prohibition against disclaimer apply to all of these obligations? Section 1-102(3) does not supply the answer, not even when contrasted with the similar but different language of Article 4.²¹⁵ This is not a case where a lawyer may simply note for future reference that the Code is deliberately flexible. It is rather a problem of being unable to determine from the language of the UCC whether or not any consideration at all was given to the possible ambiguity of the language used.

Here is another sentence, which by trying to make too much sense succeeds only in mixing sense and nonsense:

Unless he has the rights of a holder in due course any person takes the instrument subject to

- (a) all valid claims to it on the part of any person; and
- (b) all defenses of any party which would be available in an action on a simple contract; and
- (c) the defenses of want or failure of consideration, nonperformance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

207. §§ 4-406(4), 5-109(2)

208. §§ 4-103(1), (3), (5), 4-202(1), 4-212(4)(b), 4-406(3).

209. §§ 2-602(2)(b), 4-406(1), 9-207(1).

210. §§ 7-204(1), 7-309.

211. § 2-603(2).

212. §§ 2-710, 2-711(3), 2-715(1).

213. §§ 2-603(1), 2-604, 4-204(1), 9-207(2).

214. §§ 2-602(2)(b), 4-202(1), 7-204(1), 9-207(1).

215. § 4-103(1).

- (d) *the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. . . .*²¹⁶

Taken as written, this says in English that

[u]nless he has the rights of a holder in due course any person takes the instrument subject to . . . the defense that he . . . acquired it by theft. . . .

The negative implication here that a thief might have the rights of a holder in due course is careless error, contrary to the express provision of Section 3-201(1). Nonetheless, error or not, that is what it implies. The draftsman has sacrificed accuracy and clarity to satisfy his penchant for getting it all into one sentence.

Bogged down in an even gummier quagmire is that monstrosity the *holder in due course acting in good faith*.²¹⁷ No one has yet given a satisfactory explanation of what is meant by language which says that

[a]ny person who obtains payment . . . warrants to a person who in good faith pays . . . that

. . . .

- (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a *holder in due course acting in good faith*
- (i) to a maker with respect to the maker's own signature; or
 - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
 - (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; . . .²¹⁸

Under this section a holder in due course is to be preferred over a peasant when he has knowledge that a signature is phony. To protect him in that guilty knowledge, the law presumably permits him to present for payment without requiring from him a false warranty of his ignorance. How he may walk up to the pay window with a black conscience ("an obvious fraud")²¹⁹ and still be *acting in good faith* ("hon-

216. § 3-306.

217. § 3-417(1)(b), (c); cf. § 4-207(1)(b), (c).

218. § 3-417(1).

219. See § 3-417, Comment 4.

esty in fact")²²⁰ is an unexplained mystery. Nestled in the protective camouflage of a 245-word sentence, *holder in due course acting in good faith* may be unobtrusive enough. Flushed out, it amounts to double-talk. The time for rationalizing the language was in the drafting stage.

Every reader of the UCC will find his own candidate for first place in the cross-country sentence derby.

Some will prefer the relatively short wallop of the definition:

"*Buyer in ordinary course of business*" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. . . .²²¹

So much has been stuffed into the space between the head and tail of this dog that the draftsman manages to create doubt as to whether the *pawnbroker* referred to is a buyer or a seller. In the rambling flow of words, "a person in the business of selling goods of that kind" is joined to the exception of the pawnbroker, and the connection is made stronger by the stubborn refusal to punctuate. A comma before "but" would have helped stop the flow of words, but only radical surgery would effect a complete cure. None of this deviousness was present in the language of the section's predecessor, which said quite bluntly:

"Buyer in the ordinary course of trade" does not include a pledgee, a mortgagee, a lienor or a transferee in bulk.²²²

Other readers can pass many hours untangling *party* and *adverse claimant*, each referred to in three different ways in the space of one sentence.²²³ Some may ponder the effect of the "failure . . . in effecting any required presentment" when it is "effective or unnecessary."²²⁴ Another may wonder if Mark Twain would have been as critical of the German language if he had read the UCC on "publishing . . . in a newspaper . . . an advertisement."²²⁵

One final exhibit. The numerous possibilities raised by covering too much in one sentence very often mean that in the end not enough has been covered. Take for instance this bewildering grab bag of bits and pieces reciting the consequences of an *installment contract*:

220. § 1-201(19).

221. § 1-201(9).

222. UNIFORM TRUST RECEIPTS ACT § 1.

223. § 3-603(1).

224. § 3-606(1)(a).

225. § 6-103(8).

(2) The buyer may reject any installment which is non-conforming if the *non-conformity* substantially impairs the value of that installment and cannot be cured or if the *non-conformity* is a defect in the required documents; but if the *non-conformity* does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.²²⁶

As a matter of ordinary English, the first half of paragraph (2) draws a clear-cut distinction between two types of non-conformity, and implies that there is at least a third type of non-conformity. Type A Non-Conformity has two characteristics: it substantially impairs value and it is incurable. Type B Non-Conformity is an unqualified absolute—"a defect in the required documents." The unmentioned Type C Non-Conformity (which could be further subdivided) is what is left: the whole of the commercial law's menagerie of non-conformities minus only Type A and Type B. Reading no further than the semicolon, one may reasonably conclude that there may be rejection not only for Type A, but also that there may be a rejection for a Type B Non-Conformity even though it leaves value unimpaired and is curable. The apparent sharp disparity between the requirements in the two cases could be rationalized on the basis of the traditional commercial interest in the certainty of documents.²²⁷ Down to the semicolon, Type C Non-Conformity continues to float in limbo.

Beyond the semicolon lies chaos. The UCC now says "*the non-conformity*," as though all along it had been talking of only one sort. It also talks about "*assurance of cure*." Does that apply to one, two or three of the types of non-conformity? It surely cannot apply to Type A. An assurance of curing the incurable smacks of more snake oil than the UCC ought to tolerate, although if you can revoke the irrevocable²²⁸ even this cannot be ruled out entirely. Does it apply only to Type C, the non-conformity that wasn't mentioned before the semicolon? Or

226. § 2-612(2), (3).

227. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 214, 226 (1963).

228. § 5-106(2).

does it apply also to Type B Non-Conformity (of documents)? This could be justified on the ground that "[t]he buyer may reject . . ." states a general rule (before the semicolon), and that this general rule is qualified by the particular rule "the buyer must accept" (after the semicolon). The language is ambiguous and opinions vary.²²⁹

Perhaps what it all means could be said more coherently if (adopting a suggestion)²³⁰ we talked first of what the UCC puts last—"breach of the whole." Perhaps it would also help to say quite plainly what the statute applies to and what it does not apply to. All of this must rest in perhapses, because one must still guess at the sense of the words the statute has used; but here is a stab at what the UCC might be saying in Section 2-612:

(2) *Breach of the whole contract*: buyer or seller may cancel an installment contract *only if* a default by the other substantially impairs the value of the whole contract. This right to cancel the whole contract—insofar as it is based on default in a particular installment—is waived if

- (a) the buyer accepts a non-conforming installment without seasonable notification of cancellation; or
- (b) buyer or seller
 - (i) brings an action relating only to past installments; or
 - (ii) demands performance as to future installments.

(3) *Breach of an installment*:

- (a) *Default by buyer*: Not covered by this subsection.
- (b) *Default by seller*: The buyer may reject a particular installment *only if*
 - (i) he cancels the contract under Section 2-612(2); or
 - (ii) an incurable non-conformity of goods substantially impairs the value of that installment; or
 - (iii) there is an incurable non-conformity in the required documents; or
 - (iv) the seller fails to give adequate assurance (Section 2-609) that he will cure any other non-conformity.

V. The Next Time

The collection of UCC language vices in the preceding pages is by no means exhaustive. It is, however, a sampling extensive enough to make it very clear that there is more than enough of a bad thing, enough to make it relevant to inquire (1) why this has happened, and (2) whether anything can be done about it.

229. See, e.g., Peters, *supra* note 227, at 225-27; cf. § 2-612, Comment 4.

230. *Id.* at 227.

A. *Why UCCtalk is like that*

By word of mouth a canard passes among lawyers that a dead man is responsible for all the language ills of the UCC. If Karl Llewellyn had any failing it was not illiteracy, and in any event there is ample evidence that the UCC had not one but scores of draftsmen.²³¹ Too many cooks did not improve the broth, but even that is not a sufficient explanation of the tortured phrasing. The Code itself is the best evidence that the language of the Code was the least important consideration.

What the draftsmen intended was to change the law, and then—above everything else—to make it everywhere the same. The 18th century British dictum that “in all mercantile transactions the great object should be certainty”²³² was taken to mean in the context of the American system that what was needed was uniformity. And the path to uniformity was conceived to be the adoption by everyone of the same statutory words, regardless of what those words were, regardless of whether those words might be so ambiguous as to result in a thousand varying interpretations that ultimately achieve the very opposite of uniformity. Accordingly, the managers of the operation set about drafting and re-drafting, patching and revising, bargaining to achieve agreement among lawyers and carriers and businessmen, bankers and brokers and candlestick makers. Each dickered-out section has its own history of travail.²³³ Once agreement was reached, the compromise formula became sacrosanct, no matter what the ingredients. This was *it*. The result is not so much a code, as a paste-up memorandum of agreement. Some of the participants in the individual struggles doubtless knew at the moment of accord what the memorandum meant as to their particular little bargain; and so it was sealed with the understanding that it would go into the ultimate master memorandum unchanged.

That other stated purpose of the UCC—“to . . . clarify . . . the law,”²³⁴—has been taken as a prelude to uniformity, rather than a necessary element of uniformity. *Clarify* has been understood in the limited sense of ironing out some of the conflicts in the law of commercial transactions: an acceptance “must be written on the draft,”²³⁵

231. UNIFORM COMMERCIAL CODE, Comment to *Title*.

232. *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng. Rep. 1012, 1017 (1774) (Mansfield, L.J.).

233. See, e.g., account of Article 9 in 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 288-94 (1965).

234. § 1-102(2)(a).

235. § 3-410(1).

a "payee may be a holder in due course,"²³⁶ and many others. An admirable purpose indeed, but certainly not the whole nor even the ordinary sense of *clarify*. It requires a mastery of doublethink to believe it possible to achieve clear law with unclear language. You must take Mansfield's criterion of *certainly*, equate it with *uniformity*, strain it carefully through Orwell, and come up with the proposition that you clarify the law by making it *uniformly unclear*.

Yet that is very nearly the position of the Permanent Editorial Board—a sort of French Academy of the UCC charged with guarding the purity of UCC talk. In its first report of stewardship, the Board came out foursquare against the notion that clarity was at least as imperative a purpose of the UCC as uniformity. "We certainly do not have any authority," they declared, "to undertake a rewriting of the Code or to make amendments merely because someone feels that a particular provision might have been drafted with greater clarity. The only justification for 'clarifying amendments' must be found in clause (d) of Article SEVENTH . . ." ²³⁷ And as clause (d) explains, "[a]mendments shall be approved and promulgated when . . . an amendment or a group of amendments would, in the opinion of the Board after investigation, lead to the wider acceptance of the Code by states which have not as yet enacted it, and would likely be enacted by those states which have already adopted the Code."²³⁸

That of course is UCCtalk. It means that there won't be any "clarifying amendments" unless they help sell the Code to some still uncommitted pigeon. It is a candid if unreasonable expression of preference for uniformity over old-style clarity, ignoring in passing a general welfare clause that gives the Board a suitably ambiguous authority to propose amendments when experience shows that the Code ". . . for any other reason obviously requires amendment."²³⁹ Thus the Board has given an initial blessing to any confusion which crept into the Code in its whirlwind metamorphosis from inspiration into holy writ in but slightly more time than it takes to grow a voter.

B. "*In due time . . .*"

It might be supposed that this was merely a tactical retreat, *i.e.*, uniformity first, to be followed rapidly by clarification. But the Per-

236. § 3-302(2).

237. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 1, at 9 (1962).

238. *Id.* at 14.

239. *Id.* at 12, 14.

manent Editorial Board evidences no intention of moving in that direction. Its second report, a remarkable document which takes 301 pages to say "No," rejects every change by the adopting states. If that sounds arbitrary, the Board has explained its long range views in these terms:

Lest the position of the Board be misunderstood, it may be worth while to say that the Board does not take the position that the 1962 Official Text is "the last word" and that the Code may not be improved as experience under its provisions develops. In due time, the Board intends to make a comprehensive examination of the Code from beginning to end. But experience has taught those interested in the uniformity of our statutory law that it has been much easier to get "uniform laws" on the books in the first instance than it has been to interest legislatures in bringing them up to date by amendment.²⁴⁰

"In due time" translates out of UCCtalk into English as "when the sky rains potatoes." But even if that happens, the Board's gloomy forecast of the unlikelihood of getting any amendments generally adopted carries with it an implied resignation to living with a statute that lacks clarity, so long as it is *uniformly unclear*. The uniformity the UCC aims at ignores the internal discords of the statute in favor of sticking with something that reads pretty much the same from jurisdiction to jurisdiction. True, the UCC pleads for construction that will promote continued uniformity,²⁴¹ but the lack of internal consistency and clarity in the statute itself is the best possible assurance that in the long run construction will not be uniform. It is a good bet that whatever uniform "clarification" of the law is to be achieved by the UCC has already been achieved, except that unroped Louisiana may yet be rounded up and branded.

C. *From here on*

The official resistance to "clarifying" the UCC does not mean that it is fruitless to criticize the Code's draftsmanship. Even if we are to be stuck with UCCtalk for another generation or so, if we are sufficiently annoyed with this language midden we may be aroused to do something about it the next time around. Before we start on UCC, Jr., or some other as yet unconceived crusade for nationwide conformity

240. REPORT No. 2, *supra* note 10, at 12.

241. § 1-102.

(perhaps even in the course of the "restudy in depth" of Article 9),²⁴² it may be possible to get some broad agreement on how the thing is to be drafted.

First must come a recognition that it is not enough to be concerned merely with *what* is said and not with *how* it is said. Having been burned more often than most people, lawyers ought to know by now that *what* and *how* are inseparably joined, and that when *how* gets drunk, *what* stumbles.²⁴³

Second, UCCtalk ought to convince us that there is nothing to lose by at least trying to write a statute of this sort in the best ordinary English that can be mustered for the job. Here we act in public; we draft, not for draftsmen alone, not even (in a field like commercial transactions) only for lawyers. If technical terms must be used, let them be kept to a minimum and explained where necessary. Where a unique definition has an overriding utility, it ought to be used and used consistently. But where the English that laymen and lawyers use every day is more than adequate to the task, there is no reason to ignore it. And one-sentence paragraphing has long since ceased to be the hallmark of the literate.

Third, at the earliest possible stage, the draftsmen ought to sift each scrap of draft and reproduce its essential language in the form of an index or concordance. Each such index, placed in the hands of a central drafting staff, should then be included in a cumulative index of the growing statute and made available to successive draftsmen of individual portions of the statute, so that everyone will know the vocabulary being used. Periodically, the central drafting staff could revise the index, eliminating duplications and inconsistencies. At the least this would help avoid calling the same thing by different names. At best it could focus attention on lack of uniform usage generally. It could raise questions as to reason or lack of reason for variant usage before opposing draftsmen became too stubbornly dug in behind their favorite verbiage. In a statute which represents as vast an undertaking as does the UCC, the computer might be of assistance in the indexing process.

Fourth, anyone who wants to play the game of Uniform Law ought to agree in advance on the basic rules of the game. Not the least of these

242. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 8, at x (1967).

243. Cf. S. CLEMENS, *Those Extraordinary Twins*, in 16 WRITINGS OF MARK TWAIN 205 (Stormfield ed. 1929).

is that when the players arrive at Memorandum of Agreement, they are only at a checkpoint, not at the end of the game. Ultimately, each Memorandum of Agreement should be recast to conform to an overall language pattern of the statute or code. The recasting should be done by one draftsman or one small group of draftsmen, with knowledge not only of the details of each bargain, but of the grand plan of the statute.

* * *

These are minimum essentials. Without agreement on these, the pursuit of “uniformity” will achieve something truly remarkable: it will make monstrosity available to everyone, and in the end achieve not uniformity but chaos.