

Reflections of a Drafter: Soia Mentschikoff*

It will be forty-two years in September since the Code was started. Of course, that was when Bill Schnader¹ first spoke to Karl Llewellyn.² about a uniform code. Bill Schnader was the Attorney General of the State of Pennsylvania and the Commissioner on Uniform State Laws, and at the meeting of the Commissioners on Uniform State Laws went to Karl, who was a commissioner from New York and chairman of the Commercial Act Section. The section was then in the process of deciding to revise and bring up to date all of the commercial acts which the conference had already promulgated, starting with the Negotiable Instruments Law in 1890³ and working its weary way up to the Uniform Trust Receipts Act,⁴ in about 1940.

Bill Schnader said to Karl, "Would it be possible, instead of asking for piecemeal amendment or piecemeal enactment of amended statutes, to put them all together into something that would be coherent and that could be known as the Uniform Commercial Code so that we could make all of the changes with one act of the legislature?"

And Karl, of course, never being particularly humble about these things, said, "No problem at all. I'll draw you up a little outline of what it would look like."

On the basis of Karl's statement, Schnader got up at the Conference of Commissioners meeting and as his presidential address called for a Uniform Commercial Code to replace all of the commercial acts that the conference had drafted thus far.

At that time the Commercial Act Section was working particularly on several acts: a proposed Uniform Bank Collection Code, which was to replace the American Bankers Association Bank Collection Code that was the one being adopted all over the place, and a Uniform Revised Sales Act. In 1941, because the Code was in the offing, the Commissioners had before them the 1941 version of the Uniform Revised Sales Act,⁵ and that was my first accidental involvement in this process.

I was practicing downtown and I had left one firm, become general counsel of a company, which was making mannequins, and I was in, if you would

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1. William A. Schnader, Special Deputy Attorney General of Pennsylvania, 1923-30, Attorney General, 1930-35. First Vice President of the American Law Institute. Member of the National Conference of Commissioners on Uniform State Laws (President 1939-42). He died in 1968.

2. Karl N. Llewellyn, Member New York Commission on Uniform State Laws, 1926-51. Life member Conference of Uniform State Laws. Reporter, Uniform Revised Sales Act; Chief Reporter for the Uniform Commercial Code of the Conference of Uniform State Laws and American Law Institute since 1943. He died in 1962.

3. Negotiable Instruments Law of 1890. See J. AMES, L. BREWSTER & C. MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW (1908).

4. 9C UNIFORM LAWS ANNOTATED 231 (1957).

5. See AMERICAN LAW INSTITUTE: UNIFORM REVISED SALES ACT (proposed final draft no. 1) (1944).

believe it, the fashion industry. It was great fun, but we needed steel arm locks and wrist locks and things like that, and somehow it being 1941 the Government didn't think that that was prime use for steel. Why they had this horrible thought we didn't know, but the company was about to dissolve itself.

So in 1941 I drifted over to Columbia just as Karl was finishing a draft to take to the 1941 meeting of the Commissioners. Because we worked on the warranty article and I had been his research assistant four or five years before, he said, "I don't have time. Why don't you do these warranty points?"

And I said, "Well, how much time we got?"

He said, "We got about three days."

So he sat down, redid the warranty pieces, redid my draft, then he went happily off to wherever it was the conference met. When he came back he said, "Well, it was great. We had a fine time, everybody discussed it." He said, "There's one thing I want to ask you. It looks as though the American Law Institute may get interested in this and that there may be some money for the drafting and completion of the Uniform Revised Sales Act, and if there is, would you be willing to come and work on it?"

And I said, "Why sure, but I'm going downtown to work with the firm first," which I did.

Well, to my total surprise in about October or November of 1942, he called up and he said, "Hey, guess what? I got the money."

I said, "Money for what?" His proposal had slipped my mind at that point.

And he explained, "We've got to go to work, because we're going to put it through in 1943." And he said, "We have to do this, because it's going to be very important for the future."

So I went to my firm and said I wanted four months' leave of absence, because obviously you could do a Uniform Revised Sales Act in four months max.

Anyway, they gave it to me after much screaming and yelling and horsing around, and I worked on it from January until May, and we had a Uniform Revised Sales Act. This was a joint project with the American Law Institute.

Now, I want to stop right here to tell you one of the most important and significant things in the history of the Code. This was the format which was used in the drafting of that Act. There were three representatives from the Conference and three from the Institute, who served as an advisory committee. There was Uncle Billy Lewis,⁶ who was responsible for the first round of restatements and was still director of the Institute, who acted as director for this project and chaired the meetings. The drafts would be prepared by Karl

6. The reference is to William D. Lewis. He was the director of the American Law Institute, 1923 through 1947.

and me. I was then an assistant reporter on the sales article and we had a couple of research assistants who were working on it. The drafts would be gone over with the advisors. Now, I want to tell you who the advisors were because they were an interesting group.

From the Institute, for the purpose of controlling this possible madman who was going to do this whole project, was Judge Thomas Swan⁷ of the Second Circuit, who had been dean of the Yale Law School when Karl had been a student and then an early-type professor there. There was Professor Arthur Corbin⁸ whom Karl adored and called his "father in the law."

And then there was Hiram Thomas,⁹ who had been chairman of the Merchants' Association of New York Law Committee for 25 years, and who knew everything. He ran an index of his own on sales cases which was different from West's or anybody else's, because he did it for the practical import of the cases.

On the Conference side there was Charles Hardin¹⁰ from Newark, New Jersey, who represented banks, did some secured financing for banks, and generally operated in the banking area. There was Sterry Waterman,¹¹ who at that point was just a lawyer up in Vermont involved in the dairy and milk industry and was horsing around with Washington trying to get greater subsidies for milk. But he was thoroughly aware of how the Code was developing. This is the same Sterry Waterman that later became a judge in the United States Court of Appeals for the Second Circuit. And then there was a fellow called Willard Luther¹² from Boston, who was a super draftsman and a very, very bright guy. His super draftsmanship was to eliminate all the unnecessary verbiage, and this came to be known as the "Lutherization" of the Code.

Each of these people performed a particular function at which they gradually became adept, and the functions grew by accident. It was an extraordinary group. It met for four or five days every month, and so the drafts were done over and over and over again, and we must have had any number of drafts.

Luther was magnificent, as I said, in cutting it down. Swan was very good on structure—that was his specialty. Hiram Thomas and Karl were great

7. Thomas W. Swan, Dean and Professor of Law, School of Law, Yale, 1916-27. Judge, U.S. Circuit Court, 2d Circuit, since 1927. He was an advisor for the American Law Institute on the Revision of the Uniform Sales Act.

8. Arthur L. Corbin, Member American Law Institute; Special Advisor of Contracts, Reporter on Remedies. Author, 47 *RESTATEMENT OF THE LAW OF CONTRACTS*. He was a co-reporter for the American Law Institute in 1932 and an advisor for the American Law Institute on the Revision of the Uniform Sales Act, 1942-45. He died in 1967.

9. Hiram Thomas, of New York, N.Y., was an advisor for the American Law Institute on the Revision of the Uniform Sales Act, 1944.

10. Charles R. Hardin, Director, National Newark & Essex Banking Co., American Insurance Company. Member National Conference of Commissioners on Uniform State Laws. He died in 1951.

11. Sterry R. Waterman, Judge of the U.S. Court of Appeals, 2d Circuit. He was an advisor for the Commissioners on the Revision of the Uniform Sales Act, 1944.

12. Willard B. Luther, Commissioner on Uniform State Laws for Massachusetts (member of Executive Committee) since 1934. He was advisor for the Commissioners on the Revision of the Uniform Sales Act. He died in 1962.

on policy and what was the underlying business reality. Corbin was the repository of all the case law that there ever was in contracts, and I mean that literally. There was once a discussion on the Statute of Frauds section, about which Corbin said, "I don't like this Karl."

And Karl said, "Well, I think it makes sense."

And Corbin said, "I have read 14,000 cases, and this is not supported by the cases, and it doesn't seem to make any sense in the light of the 14,000 cases that I've read."

Karl said to him, "But, Dad, have you treated the sale of goods cases as a special group?"

Corbin answered, "No, I haven't done that."

Then Karl said, "Well, if you do, this makes sense."

And Corbin said, "If you tell me that, okay, we will accept that." And they went on from there. It was that kind of confidence, that kind of care in each other, which moved the Code forward.

Now, from these groups we finally had a draft in September. By that time we were in what I might call the eighth or ninth full draft of Article 2 of the Code, then called the Uniform Revised Sales Act. That went to the Commissioners in Chicago in September of 1943.

Now, a word on the way that draft was presented to the Commissioners. First the Commercial Act Section met a week before the conference. They went over everything inch by inch, made changes and suggestions, and did rewrites. I will never forget till the day I die—you must remember, at that point I was very young, and I was really impressed with all these old men who were sitting around working like dogs on this thing—old Judge William McLaren¹³ from Seattle, Washington, because what we had to do at one point was to get clean copy, and in those days clean copy wasn't that easy to get. The stuff had been typed up, then we had to proof it. And all of these Commissioners, who I thought had at least ten feet in the grave, were sitting there doing the comparisons. We sat there all night comparing text.

Finally, after those of us in the Commercial Act Section made the changes, redid them, and then did the comparisons, we took them to the floor of the conference, and each section was presented, not in terms of the existing law because it was not that type of drafting. Let me hasten to add, there is no piece of this early part of the Code that was in any way drafted in terms of: "This is the existing law and it is in conflict, where shall we go?" *Never*. That is *not* the history of the Code, that is *not* the way it was drafted. It was drafted rather in terms of: "this is the business situation, or this is the life situation, and these are the problems. They can be resolved one way or the other. There are arguments for resolving them this way or that way. In our belief, it is

13. William G. McLaren, Assistant United States District Attorney, 1908–12. President of the Washington Bar Association, 1936. Member of the A.B.A. Board of Governors, 1937–40. He was a member of the American Law Institute and of the Conference's Commercial Act Section.

better to resolve them this way.” The latter approach made for intelligent discussion on the floor of what the policy should be, and whether the underlying situations were in fact the ones that we thought they were; so that from the beginning the Code had as a baseline the underlying factual life situations exposed for discussion by everybody who was present and who was involved in the process, and a very explicit statement as to why one choice was being made rather than another.

So, I went through the conference. The Unconscionability Section was still being drafted fifty different ways because nobody was quite happy with it, including its prime draftsman; and that process continued and redrafts were made and comments began to be written. The early comments on that Act had reached a thousand pages before somebody woke up and said, “This is absurd. You can’t have a thousand pages of comment to an act which probably is only about 40 pages of text. It’s a little peculiar. We’ve got to somehow cut back the comments.”

Nonetheless, they were not completed when the next group met, which was when it was presented to the American Law Institute at the meeting in 1944. But it was presented first to the Council of the Institute and then to the Institute itself, with a revision in between—exactly the same way that it had been presented to the Conference of the Commissioners.

And finally, over the summer, since there had been some conflicts between the action taken by the Commissioners and some actions taken by the Institute, there was a final draft brought before the Commissioners, and at the same time, in August or September of 1944, the treaty was signed—and it was called a “treaty”; not an agreement, not a pact, not a contract, it was a treaty—by two sovereign groups, the American Law Institute and the Conference of Commissioners. And they themselves felt they were sovereign groups. That treaty was funded by money from a foundation, which is Falk¹⁴ of Pittsburgh—again, Pennsylvania orientation—that had given us one hundred fifty or two hundred thousand dollars to go ahead and try to complete the Code.

The treaty was very interesting because the parties set up a small editorial board which consisted of the president of the Institute, the president of the Conference, the director of the American Law Institute, Karl, and one representative from the Institute and one from the Commissioners. The representative from the Institute was, of course, Bill Schnader. The representative from the conference was Carl Pryor.¹⁵ This was the group which continued throughout until 1953, when an enlarged editorial board was formed. That was *the* Editorial Board.

14. The Maurice and Laura Falk foundation of Pittsburgh, Pa.

15. John Carlisle Pryor, (Ph.D., Simpson Coll. 1907, J.D. Univ. of Chicago 1910.) Member, Iowa Uniform Law Commission 1933; President, National Conference Uniform Law Commissioners 1942-46; Member Editorial Board of the Uniform Commercial Code 1943-79. He died in 1979.

Now, the thing I want you to notice is there wasn't a single expert on the editorial board; that in the drafting of the Uniform Revised Sales Act, there were no experts really involved except two of the group. But each Commissioner and each member of the Institute had something to add from his life experience and his life situation; thus the Code was never presented, never, except in terms of the exposition of what the underlying situation was as perceived by the reporters, and then going on from there as to why one solution or the other was preferable.

There were some exceptions in Article 9—some particular law that had to be cleaned up—but apart from that, it ran basically the other way.

In 1944 also there had been a young fellow out in Indiana, his name was Allison Dunham.¹⁶ He was busy looking up all kinds of secured transactions and preparing all kinds of memoranda and seeing whether he couldn't turn it up into blocks involving different kinds of collateral and different kinds of transactions. And all of a sudden he found he had himself a job and later he moved on to be assistant reporter and then associate reporter for Article 9.

The more immediate things that were going forward were Articles 3, 4, and 7, when Karl appointed reporters all over the place. He asked Roscoe Stefan¹⁷ whether he would act on 3 and 4, because Stefan had been involved in the American Bankers Association Bank Collection Code. Stefan said he couldn't; he was involved in the Antitrust Division and making money on that.

So then Karl took a step, which was viewed by many as a very dangerous step, but which he thought was a very sound step: he hired me. You must understand that I came to sales not out of a sales practice; I came to sales completely innocent, you know, like the little boy looking at the emperor's clothes and saying, "But for God's sake, he doesn't have any clothes on." All right? And that was useful; that was my great utility in the drafting of the Uniform Revised Sales Act, because if I understood it, anybody could understand it. If I could set it up in a pattern, it would be intelligible to anybody who was not an expert, and that wouldn't get it all mixed up with the experts. It would move rather in a logical way as in fact, Article 2 does move, as you all know. I could do that because I wasn't hampered by any knowledge about the law to speak of. Knowledge about the law can be a great hindrance when you're trying to decide what you want to do that's sensible, as opposed to what you want to do to change the law. We never sat around asking "What are we going to do to change the law?" because we couldn't have cared less. We wanted to do something that was sensible. If it was the same as the existing law, great; if it was different, great; it made no difference. That's the history of the Code.

16. Allison Dunham. See *Reflections of a Drafter: Allison Dunham*, 43 OHIO ST. L.J. 569 (1982).

17. Roscoe Stefan, Professor of Law at Yale Law School and draftsman of the Proposed Uniform Bank Collections Act, was a member of the National Association of Commissioners on Uniform State Laws.

As I said, the first one hired was Dunham. The second one was Prosser,¹⁸ and he was hired because he also was totally ignorant about negotiable instruments, and, therefore, he'd be a very good person to look anew at this; by that time the learning on negotiable instruments was voluminous—The Negotiable Instruments Law (NIL)¹⁹ was the oldest act. There were, I think, 89 cases of actual conflict as to what the devil the act meant, and the Banker's Bank Collection Code had further confused the situation. The other members of the Conference had tried to produce drafts and there was a certain feeling that "Well, we've got to get this on the road."

Prosser said he, too, was entitled to have an expert at his side; so he was co-opted as a part of the general drafting staff. This became a new technique, because as you had reporters and associate reporters and assistant reporters for particular acts, obviously they had to meet with a central drafting staff. The central drafting staff was Karl and me, and we would meet with them apart from the advisors every three or four weeks, to see where they were going; or, if it took longer, every eight weeks. Then it would go to the advisors again, and from that point on, it would follow the same process as the Sales Act had followed, except that since the negotiable instruments articles were more complex and larger and there had been less preparation for them, they took longer. It also took longer because Prosser wanted to amend the NIL and he wouldn't sit down and rewrite it. And so it took a while to persuade him that that was ridiculous. After all, he was the reporter, so you figured experience would teach him that you couldn't do it that way. Experience in fact did teach him that he couldn't do it that way, and we rewrote it.

In rewriting the law we developed a certain facility in the use of language. It was early discovered that there are at least 12 ways in which you could write something, but the simplest way was to say, "When thus and so and thus and so, then some legal consequence." In other words, the restatement format was really a very good statutory format and it highlighted the factual presuppositions on which everything was based.

A little later, after Prosser came in, my chum over here, Fax Leary,²⁰ came in to horse around with the collections material because Prosser had gotten delayed. Prosser spent that first year or year and a half doing amendments to the NIL, and then he had the next period where he was actually working on the drafting of what became Article 3.

In the meantime, Fritz Kessler²¹ had been co-opted. He was supposed to be doing foreign remittances, traveler's checks, and letters of credit. As you know, the Code does not contain anything on foreign remittances or traveler's

18. William Prosser, Professor of Law at Hastings College of Law and former Dean of the School of Law at the University of California at Berkeley, was a member of the Editorial Board for the Uniform Commercial Code.

19. See J. AMES, L. BREWSTER & C. MCKEEHAN, *THE NEGOTIABLE INSTRUMENTS LAW* (1908).

20. Fairfax Leary. See *Reflections of a Drafter: Fairfax Leary*, 43 OHIO ST. L.J. 557 (1982).

21. Friedrich Kessler, Life member of the American Law Institute. He was a co-draftsman on Article 4 with Carl Llewellyn.

checks, and that's another story, as to why those two went out. But, of course, it does contain something on letters of credit. Kessler was, I think, the assistant reporter for Article 5. That's how the thing got started.

Grant Gilmore²² was co-opted in about 1947 because he and this fellow Axelrod²³ had written an article²⁴ where they also had tried to divide up securities into functional areas, and so that seemed like a useful thing to do, and he joined Dunham on that.

In 1948 we discovered Kripke,²⁵ and he was co-opted by the central drafting staff when it met with the Article 9 people. And in 1950-51, Peter Coogan²⁶ made the mistake of writing to Karl, and he'll tell you how he got roped in as a result of that mistake.

Lou Schwartz²⁷ was doing Article 7, did it very happily, then we ran into the warehouse receipts section. We had to change it into the form in which it now is: there was no change in substance.

There were a lot of changes in form but not much substance after 1949 or 1950. The only article that was not completed to anybody's satisfaction on the reportorial group by 1952, when the first vote by states took place, was Article 9. It still needed one more year of work, which it didn't get. As it turned out—at that time we thought it was a mistake to go for immediate enactment—it was not a mistake. Schnader was absolutely correct. He had the Pennsylvania legislature ready to go and they went for the Code.²⁸ Governor Dewey, who was supposed to send in the Act to the New York legislature, was reached by Aldrich²⁹ from the Chase, and he sent it to the Law Revision Commission³⁰ instead. It was impossible to kill the Code once it had been enacted by Pennsylvania.

The single most important decision on enactment was made by Bill Schnader, when he refused to wait another year and went to Pennsylvania with the 1952 Act, and it was a decision which only Bill and Karl thought was correct. Homer Kripke thought it was wrong, I thought it was wrong, and I think Al and Grant thought it was wrong: Schnader was right. And that's how the Code came to be. They'll fill you in on the details.

22. Grant Gilmore, Professor of Law at Vermont Law School. He died in 1982. See *In Memoriam: Judge Robert Brancher and Grant S. Gilmore*, 43 OHIO ST. L.J. ____ (1982).

23. Allen Axelrod was then an instructor of law at the University of Nebraska, College of Law.

24. Gilmore and Axelrod, *Chattel Security*, 57 YALE L.J. 517 (1948).

25. Homer Kripke. See *Reflections of a Drafter: Homer Kripke*, 43 OHIO ST. L.J. 577 (1982), and Kripke, *A Reflective Pause Between UCC Past and UCC Future*, 43 OHIO ST. L.J. 603 (1982).

26. Peter F. Coogan. See *Reflections of a Drafter: Peter Coogan*, 43 OHIO ST. L.J. 545 (1982).

27. Louis E. Schwartz, B.S. Univ. of Pa. 1932, J.D. 1935. Member of the American Law Institute.

28. April 6, 1953. 1953 Pa. Laws 3.

29. Nelson Aldrich was, at the time, President of the Chase Manhattan Bank.

30. New York Law Revision Commission.