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# Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103

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# Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103

*David Frisch\**

## I. INTRODUCTION

From its inception, the Uniform Commercial Code (the Code or U.C.C.)<sup>1</sup> was perceived by its drafters to be "a semi-permanent piece of legislation."<sup>2</sup> There would be no need, or so the drafters thought, to subject the Code to the reviser's pen to keep it reflective of evolving social and economic conditions. Rather, this job was seen as properly belonging within the bailiwick of an enlightened judiciary suitably armed with the tools of change provided by the drafters.<sup>3</sup> Notwithstanding this original intent, recent years have witnessed the official revision of existing articles,<sup>4</sup> the revision process begun as to

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1. Unless otherwise indicated, all references and citations to "the Code" or "U.C.C." in this Article are to the official text and comments of the 1987 revision of the Uniform Commercial Code.

2. U.C.C. § 1-102 comment 1 (1987).

3. The view that the judiciary would bear the principal responsibility for the accommodation of commercial law to existing economic and social realities is confirmed by the explicit direction of U.C.C. section 1-102. In particular, subsections 1 and 2 provide:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
  - (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
  - (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102 (1987).

We are told in comment 1 to this section that its purpose is "to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices." For a further discussion of U.C.C. section 1-102, see *infra* notes 188-91 and accompanying text.

4. Articles 8 and 9 have received rather vigorous overhauls. The 1972 revision

others,<sup>5</sup> and even the addition of a new Article to deal with the ever expanding field of personal property leasing.<sup>6</sup> Most recently, the Permanent Editorial Board for the U.C.C. (the P.E.B.), a joint American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) board, has decided that the time may be right for a re-examination of Article 2. At its March 1988 meeting, the board decided to go forward with a formal study of the need for revision. The study was to be completed within two years.<sup>7</sup>

This fervor for statutory reform is hardly surprising. Several factors can be suggested to explain it. First, is a need to respond to the difficulties or uncertainties of statutory application that have, over the passage of time, been encountered in actual commercial practice. Second, is that many types of transactions are no longer conducted as they were when the Code was first drafted; in particular, the increased use and importance of the noncertificated security and the use of electronic messages to effect the transfer of deposit institution credit and to consummate sales transactions. Finally, the quest for change may be, in part, a reflexive response to critics who view statutory lawmaking as a codification of past and

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had as its principal target Article 9. The 1972 amendments have been adopted by forty or more jurisdictions. The 1978 revision had as its principal target Article 8. The 1978 version has been adopted by California, Colorado, Connecticut, Delaware, Massachusetts, Minnesota, Montana, New York, Ohio, Oklahoma, Texas, Virginia, West Virginia, and Wyoming. Maine has added a special section to its code covering the non-certificated security.

5. A drafting committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) has been considering the revision of Article 6 since 1985. For background, see Harris, *The Article 6 Drafting Committee's New Approach to Asset Acquisitions*, 42 BUS. LAW. 1261 (1987). Articles 3 and 4 have been the subject of the revision process for quite some time. The current project, under the joint sponsorship of NCCUSL and ALI, is entitled "Commercial Code—Current Payment Methods." Contemplated are amendments to sections of Articles 3 and 4. A new article, Article 4A—Wire Transfers, dealing with commercial electronic fund transfers, was approved by the ALI and NCCUSL in 1989. For background, see Miller, *Report on the New Payments Code*, 41 BUS. LAW. 1007 (1986).

6. The ALI approved Article 2A in May, 1987 and NCCUSL gave its final approval in August, 1987. For background, see Boss, *The History of Article 2A: A Lesson for Practitioners and Scholars Alike*, 39 ALA. L. REV. 575 (1988).

7. The study committee created for this purpose is chaired by Professor Richard E. Speidel of Northwestern University Law School. At its Fall, 1989 meeting, the P.E.B. authorized the additional study of Article 9 similar to the study of Article 2.

often obsolete practices which cannot be easily adapted to the ever changing social and economic environment.<sup>8</sup> But to say commercial life has changed since Karl Llewellyn and his crew of drafters first presented a code that was ready for adoption<sup>9</sup> is not to say that revisions are currently needed. The Code, after all, has its own internal mechanism for non-legislative self-revitalization.<sup>10</sup> These changes also reveal nothing about the appropriate style in which a new and improved code should be drafted.<sup>11</sup> The nature of a new and improved Code will depend on the existence and perceived development of principles of law and equity that are outside of the Code, and the propriety of selectively borrowing those principles to supplement the Code's provisions. This vast and rich body of "outside" law may be just the tonic with which to maintain that often delicate symbiosis between commercial law and commercial reality.<sup>12</sup> To be sure, no decision on whether to revise the Code, or the form that any revisions should take, can be made without first considering the availability of non-Code law as a source of law in commercial disputes ostensibly falling within the ambit of the Code's subject matter. The almost casual assumption in the recent dialogue of revision that

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8. See, e.g., G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979).

9. The Code is now forty years old, having first seen the light of day at a joint ALI-NCCUSL meeting on May 18-21, 1949.

10. See *supra* note 3.

11. For some thoughts on the several possibilities open to the drafters of a new Article 2, see Leary & Frisch, *Is Revision Due for Article 2?*, 31 VILL. L. REV. 399, 465-70 (1986).

12. It was Llewellyn's belief that "until the rules of law themselves are effectively and realistically adjusted to what commerce needs immediately, and to what All-Of-Us need indirectly, we are doomed to an unfortunate measure of waste in legal work, of unsatisfactory uncertainty and too frequent nonsense in result." Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 178 (1946). Consider, for example, how a court is able to avoid the effect of the Statute of Frauds rule of U.C.C. section 2-201 to the extent its operation is viewed as being out of step with commercial life. To this end non-statutory exceptions flourish. Although promissory estoppel is the most frequently asserted exception, see, e.g., *Allen M. Campbell Co. v. Virginia Metal Indus.*, 708 F.2d 930 (4th Cir. 1983); *R. S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182 (7th Cir. 1979); *Warden & Lee Elevator, Inc. v. Butten*, 274 N.W.2d 339 (Iowa 1979). There are other exceptions. See, e.g., *H.B. Alexander & Son v. Miracle Recreation Equip. Co.*, 314 Pa. Super. 1, 460 A.2d 343 (1983) (statute of frauds waived through course of dealing and conduct).

common law and equitable principles may be invoked at will in deciding Code cases is striking.<sup>13</sup> What is problematic with this assumption, however, is that it completely ignores the complexity of the "displacement" inquiry necessitated by U.C.C. section 1-103.<sup>14</sup>

Most recently, this assumption surfaced in a memorandum submitted to the P.E.B. by Professors Speidel and Mooney.<sup>15</sup> The memorandum's stated purposes were "to identify various areas of inquiry for the proposed Preliminary Study on the Revision of U.C.C. Article 2"<sup>16</sup> and to "provide a useful agenda, for the work of an Article 2 study group."<sup>17</sup> This memorandum was probably instrumental in the P.E.B.'s decision to conduct a formal study. Referring to the potential tension between the general theory of contract in the *Restate-*

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13. This is not to suggest that the issue has gone unnoticed; it has not. See, e.g., R. HILLMAN, J. McDONNELL & S. NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* (1985); Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code" Methodology*, 18 B. C. INDUS. & COM. L. REV. 655 (1977); Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291; Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1 (1977) [hereinafter Nickles, Part I]; Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part II: The English Approach and a Solution to the Methodological Problem*, 31 ARK. L. REV. 171 (1977) [hereinafter Nickles, Part II]; Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part III: Using the Proposed Approach to Resolve the Methodological Problem*, 34 ARK. L. REV. 1 (1980) [hereinafter Nickles, Part III]; Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906 (1978). It is merely an observation that the issue's current importance to the revision process has been overlooked.

14. It is U.C.C. section 1-103 which sanctions the use of non-Code principles of law and equity. It states:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

U.C.C. § 1-103 (1987).

However, determining when the Code has displaced a particular principal is no easy matter. See *supra* note 13, and *infra* notes 170-204 and accompanying text.

15. Proposal for a Preliminary Study on a Possible Project for the Revision of Article 2, Uniform Commercial Code, by Richard E. Speidel and Charles W. Mooney, Jr. (Nov. 23, 1987). Shortly before this Article was scheduled for publication the study group appointed by the ALI-P.E.B. to examine Article 2 issued a preliminary report, the principal drafter of which was Professor Richard E. Speidel.

16. *Id.* at 1.

17. *Id.*

ment (Second) of Contracts and Article 2, the authors raised the possibility that some concepts now found in both may be dropped without consequence from Article 2.<sup>18</sup> The unstated assumption is that these concepts will remain part of a larger body of commercial law, concurrently available to courts as a source of law for deciding cases under the Code.<sup>19</sup>

Another example of this assumption can be found in the recently issued P.E.B. proposed supplementary commentary on U.C.C. section 2-507.<sup>20</sup> In particular, the issue addressed is whether the seller's right of reclamation should be limited by the ten day requirement of U.C.C. section 2-702(2).<sup>21</sup> The Board rejected this absolute limitation, noting that common law principles such as waiver, estoppel, or ratification of the buyer's property interest are available to defeat an attempted reclamation after excessive delay.<sup>22</sup>

Courts too, have often failed to explain adequately the justification for their use of non-Code law. Although many courts are guilty, they are guilty to different degrees. At one end of the spectrum lie courts which seemingly fail to recognize that there are any constraints on their freedom to pick and choose from the vast array of non-Code rules. Hence, nowhere in their opinions can the slightest effort at justification be found. An excellent example is *Noonan v. First Bank Butte*.<sup>23</sup>

In *Noonan*, disgruntled borrowers brought suit against their bank to recover damages allegedly caused by the bank's

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18. *Id.* at 2 n.2. They use as examples the duty of good faith and the doctrine of unconscionability. The former appears in the RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) and U.C.C. § 1-203 (1987). The latter appears in the RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) and U.C.C. § 2-302 (1987).

19. Those charged with the revision of Articles 3 and 4 must have been of the same mind when they considered, but ultimately rejected, the inclusion of a statutory prohibition on the freedom of courts to recognize non-Code claims involving Code subjects. This prohibition would have brought to an abrupt end the circumvention of the bank-oriented rules of the statute by effectively curtailing an increasing judicial willingness to resort to extra-Code doctrines. The idea was eventually abandoned because of its unknown effects. See Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the U.C.C.*, 43 BUS. LAW. 621, 652-53 (1988).

20. U.C.C. § 2-507 proposed commentary (Supp. 1990).

21. U.C.C. section 2-702(2) allows a seller to reclaim goods delivered on credit to an insolvent buyer upon demand if the demand is made within ten days after receipt.

22. U.C.C. § 2-507 proposed commentary (Supp. 1990).

23. 227 Mont. 329, 740 P.2d 631 (1987).

decision to call in the borrowers' loans and proceed against the collateral. The jury returned a verdict in favor of the customers after having been instructed on the tort of bad faith. On appeal, the Supreme Court of Montana, without so much as a hint of the reason why, summarily rejected the bank's contention that the implied covenant of good faith and fair dealing could not apply where a statutory duty of good faith exists.<sup>24</sup> The court, nevertheless, reversed because the definition of good faith in the jury instruction was the Code definition<sup>25</sup> that was not descriptive of behavior which was "arbitrary, capricious or unreasonable, and exceeded plaintiffs' justifiable expectation"—the requirements of the common law cause of action for the tort of bad faith.<sup>26</sup>

Fortunately, the majority of courts have seen the need to legitimize the incorporation of non-Code law into their opinions. But for most, legitimization involves no more than a passing reference to U.C.C. section 1-103. The result is that just about any non-Code rule is available for the picking, even if its application would conflict with an express Code provision.<sup>27</sup> Occasionally courts will seek to address the issue in

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24. The doctrine of good faith is codified in U.C.C. § 1-203 ("Every contract or duty within [the Code] imposes an obligation of good faith in its performance or enforcement.").

25. The Code defines the term as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201 (1987). Article 2 further refines this definition by requiring of a merchant not only honesty in fact, but also "the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b). Courts are not in accord on whether this latter, more stringent standard is ever applicable to Article 9 cases. Some cases hold that section 2-103(1)(b) does not apply to Article 9 cases. *See, e.g.,* *Martin Marietta Corp. v. New Jersey Nat'l Bank*, 612 F.2d 745, 751 (3d Cir. 1979); *General Electric Credit Corp. v. Humble*, 532 F. Supp. 703, 706 (M.D. Ala. 1982); *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648, 651 (Del. 1972); *Massey-Ferguson, Inc. v. Helland*, 105 Ill. App. 3d 648, 653, 434 N.E.2d 295, 298; *but see, e.g.,* *Swift v. J. I. Case Co.*, 266 So. 2d 379, 381 (Fla. Dist. Ct. App. 1972) (objective standard of U.C.C. § 2-103(1)(b) applicable for purposes of U.C.C. § 9-307(1)).

26. *Noonan*, 227 Mont. at —, 740 P.2d at 635.

27. *See, e.g.,* *First Bank v. Pillsbury Co.*, 801 F.2d 1036 (8th Cir. 1986) (U.C.C. § 9-307(1) supplemented by the principle that the party best able to prevent the harm should bear the loss); *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201 (1981) (promissory estoppel invoked to bar U.C.C. § 2-201 statute of frauds defense); *Producers Cotton Oil Co. v. Amstar*, 197 Cal. App. 3d 638, 242 Cal. Rptr. 914 (1988) (equitable doctrine of quantum meruit allowed on a set-off claim otherwise precluded by U.C.C. § 9-318(1) and (2)); *Universal C.I.T. Credit v. State Farm Mut. Auto. Ins. Co.*, 493 S.W.2d 385 (Mo. Ct. App. 1973) (U.C.C. § 2-312(2) supplanted by Missouri common law that an auctioneer warrants good title unless he discloses the name of his

some detail. Unfortunately, however, these opinions often leave the reader lost in an analytic wasteland. The reasoning is less than persuasive and the division in rationale and result is startling.

The accuracy of this observation is no more evident than when considering the plethora of warranty cases. These cases have attempted to establish the domain of warranty law under the Code and the tort theories of strict liability and negligence.<sup>28</sup> Broadly stated, the issue is whether the Code preempts the field. This broad issue, however, affects several more specific issues. For example, in deciding whether strict liability is an available theory of recovery in a personal injury case, the Supreme Court of Delaware was compelled to remark that "those courts that have been faced with the question have chosen either to avoid it . . . or to conclude cursorily that no preemption exists."<sup>29</sup> On yet another specific issue—

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principal); *Chaq Oil Co. v. Gardner Machinery Corp.*, 500 S.W.2d 877 (Tex. Ct. App. 1973) (U.C.C. § 2-314 supplemented by Texas common law rule that there is no implied warranty of merchantability in the sale of used goods).

28. Credit for the emergence of the strict liability doctrine in the products liability area belongs to Dean Prosser. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). The doctrine has since been adopted as section 402A of the *Restatement (Second) of Contracts*. This section, provides in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF CONTRACTS § 402A (1981).

29. *Cline v. Prowler Indus.*, 418 A.2d 968, 971 (Del. 1980) (U.C.C. prevents extension of strict liability to the law of sales). A similar criticism was voiced years earlier:

It is striking that those who would use tort law to protect consumers in defective-product cases do so with only the most cursory explicit recognition that there may already be a body of law directed toward regulating the rights of buyers and sellers, and a statutory body at that. The courts are operating at the border of an area considered by draftsmen at great length and framed in legislation arguably relevant to the cases before the courts. Yet, these judges appear either unaware of the merging of the tort and sales lines or else unwilling to consider the possible limitations legislation may impose on traditional judicial primacy in tort law . . . . At best we have judicial lack of awareness of the possible relevance of sales law. At worst we have open judicial defiance of apparent statutory commands.



whether plaintiffs may utilize a strict liability or negligence cause of action to recover for physical damage to the defective product—some courts have answered yes,<sup>30</sup> some have answered no,<sup>31</sup> and some have answered maybe.<sup>32</sup> Even where most courts agree on the resolution of an issue there is usually no consensus on a rationale.<sup>33</sup>

The primary purpose of this article is not to end the long-standing malaise surrounding section 1-103, but to illuminate its existence and encourage a serious reconsideration of the extent to which common law and equitable principles serve as sources of law in resolving cases under the Code. A greater appreciation of the importance of this issue to commercial law development will result in an approach which makes the law more predictable and which better facilitates the essential need to keep the Code responsive to commercial practice.<sup>34</sup>

Part II of this article introduces the context within which section 1-103 will be discussed. This discussion involves the use of a recurring Code problem. Part III examines various

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Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 989-90 (1966).

30. See, e.g., *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982).

31. See, e.g., *Sharp Brothers Contracting Co. v. American Hoist & Derrick Co.*, 42 U.C.C. Rep. Serv. (Callaghan) 1246 (Mo. 1986).

32. See, e.g., *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981) (recovery permitted if product was potentially dangerous to persons or other property); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983) (recovery permitted if damage caused by sudden, violent event).

33. A majority of courts have denied recovery in tort for pure economic loss. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 286 (Alaska 1976) ("To extend strict tort liability to reach the [plaintiffs'] case would in effect be an assumption of legislative prerogative on our part and would vitiate clearly articulated statutory rights."); *Moorman Mfg. Co. v. National Tank Co.*, 911 Ill. 2d 69, —, 435 N.E.2d 443, 447 (1982) ("Although warranty rules frustrate just compensation for physical injury, they function well in a commercial setting."); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, —, 332 N.W.2d 39, 43 (1983) ("The Restatement sections referred to [§§ 323, 395, & 402 A & B] are applicable only where the product causes physical harm.").

34. Professor Hillman has noted that:

[C]ourts . . . need more specific guidelines than those provided in section 1-103 for determining when it is permissible to invoke common law. The absence of guidance has enabled courts to pick and choose - the very antithesis of predictability. Even more disturbing, courts have often times been able to maintain their common law bias under the guise of adhering to the Code's mandate.

R. HILLMAN, *supra* note 13, at 673.

solutions offered by courts and commentators to resolve this problem and shows why those solutions should be rejected. Part IV suggests that the answer to the problem lies in the application of the non-Code doctrine of mistake. Finally, Part V considers several methodological approaches to the application of section 1-103 and the degree to which each aids in deciding whether the doctrine of mistake has been displaced by the Code in the context of the problem. The conclusion reached is that section 1-103 is hopelessly indeterminate in its current form.

## II. THE PROBLEM

The effectiveness of a remedy must be judged, in part, on the degree of satisfaction it gives to its ultimate consumer, the successful plaintiff.<sup>35</sup> Legal battles are seldom fought for moral victories. Absent a backdrop of legal sanctions worth the rigors of litigation, the Code's substantive rules would be unable to accomplish their intended purpose and function.<sup>36</sup> In this regard, Article 2 can be seen as a giant step in the liberalization of the law of remedies. First, and most importantly, Article 2 stands as a monument to freedom of contract. Buyers and sellers are permitted to craft their own remedies to suit their own needs. For example, it is not uncommon to find that a buyer has contractually surrendered the available remedies under the Code for the sole right to have the seller repair or replace the defective good or its parts.<sup>37</sup> Second, Article 2

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35. There are policy considerations in remedial law which go far beyond consumer satisfaction. For example, the remedy must be able to effect the policy of the substantive rule that decided the case in the first place. Economic efficiency is also a relevant criterion for assessing a remedy. See *RESTATEMENT (SECOND) OF CONTRACTS* ch. 16 introductory comments (1981).

36. The threat of legal sanctions is not solely responsible for each party's willingness to play according to the Code's rules. There are extra-legal sanctions as well.

The promisor may simply regard keeping his promise as the "right" thing to do. Or he may fear that if he breaks his promise the promisee will not keep the return promise, that the promisee and others will not deal with him in the future, or that his general reputation will suffer.

E. FARNSWORTH, *CONTRACTS* § 12.1 (1982).

However, it is not unreasonable to assume that the willingness to enter into a contract for future performance depends more on the existence of legal rather than extra-legal sanctions.

37. See U.C.C. § 2-719(1)(a) (1987). This section provides in pertinent part: the agreement may provide for remedies in addition to or in substitution for

substantially increases the value of pre-existent remedies by permitting the accumulation of remedies<sup>38</sup> and by formalizing a call for their vitalization.<sup>39</sup>

However, despite this seemingly progressive step and the drafters' belief that "it is of the very essence of a sales contract that at least minimum adequate remedies be available,"<sup>40</sup> a disappointed buyer may not have an adequate remedy. The traditional illustration of this problem is the purchase of a new car.<sup>41</sup> Perhaps this is because the frequency and significance of the transaction help bring home the importance of the problem. In keeping with tradition, consider the case of *Crume v. Ford Motor Co.*<sup>42</sup>

In *Crume*, the plaintiffs purchased a new flatbed truck from the defendant dealership. The truck was manufactured by the co-defendant Ford Motor Company. Immediately after delivery the plaintiffs noticed problems with the truck, including a howling noise in the rear end. Several attempts to repair the truck to the plaintiffs' satisfaction were made over the course of the next year, but none were successful. Finally, the plaintiffs informed the dealership that they were revoking their acceptance.<sup>43</sup> The dealership refused to accept the re-

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those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts . . .

*Id.*

38. The drafters intended to reject "any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature. . . ." *Id.* § 2-703 comment 1. See also *Id.* § 2-608 comment 1 ("the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him"). For the full text of U.C.C. section 2-608 see *infra* note 43.

39. According to U.C.C. section 2-716(1), specific performance is available "where the goods are unique or in other proper circumstances." Apparently hoping to foster a liberalization of the remedy, the drafters offered an expanded definition of "uniqueness" that takes into account "the total situation which characterizes the contract. . . . [and] 'other proper circumstances' " that might include the inability to cover. U.C.C. § 2-716 comment 2 (1987).

40. *Id.* § 2-719 comment 1.

41. See, e.g., Warren & Rowe, *The Effect of Warranty Disclaimers on Revocation of Acceptance Under the Uniform Commercial Code*, 37 ALA. L. REV. 307, 312-23 (1986).

42. 60 Or. App. 224, 653 P.2d 564 (1982).

43. U.C.C. section 2-608 gives a buyer the right to revoke acceptance. It provides as follows:

turn of the truck, and the plaintiffs sold it through another dealer.

Certainly, in this type of case, where the subject matter of the contract is the proverbial lemon, the right to revoke suggests itself as a necessary remedy if the buyer's expectations are to be legitimately secured. Without this remedy it is doubtful that the buyer will perceive the situation as corrected.<sup>44</sup> True, there may be an entitlement to damages from either the manufacturer or dealership, but damages are hardly adequate compensation for being unable to return that which is no longer wanted. If the buyer can satisfy the requisites for revocation in U.C.C. section 2-608, the question of how revocation can be prevented arises. To find the answer, it is helpful to examine *Crume* more carefully.

In typical fashion, the contract signed by the plaintiffs took much more from them than it gave. They received Ford's standard twelve-month or 12,000 mile repair and re-

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(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

U.C.C. § 2-608 (1987).

44. See Warren & Rowe, *supra* note 41, at 316-17:

Buyer is not interested in the prospect of litigation for damages. Even a successful conclusion of this type of lawsuit would leave him with a car he does not want and cannot use, the burden and potential liability involved in selling a defective vehicle, and the obligation to satisfy the bank on a secured installment loan. Buyer would prefer the *status quo ante*, a return of his money for a return of the car. By undoing the transaction, Buyer would be freed of a time-consuming and generally traumatic personal crisis.

*Id.* One legislative response to the plight of the buyer of an automotive lemon has been the passage by more than thirty states of what is descriptively called a "lemon law." Under these laws, if the breach of warranty is substantial and is not timely remedied after a specified number of attempts, the manufacturer must either refund the purchase price or provide a new vehicle. For a survey and comparison of the legislation adopted by the various states, see Honigman, *The New "Lemon Laws": Expanding U.C.C. Remedies*, 17 U.C.C. L.J. 116 (1984).

placement "warranty," but little else.<sup>45</sup> Ford disclaimed all other warranties, express or implied<sup>46</sup> as did the dealership.<sup>47</sup> Moreover, the contract made clear that the repair and replacement warranty was extended by Ford, not the dealership.<sup>48</sup>

The problems created by this adhesion contract are severe. If interpreted literally, the disclaimer by the dealership would operate to deprive plaintiffs of all recourse.<sup>49</sup> All that was contractually required of the dealership was to deliver an object which minimally met the description of the vehicle in the contract.<sup>50</sup> Thus, as the court held, "[b]ecause there was

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45. The text of this so-called warranty is not part of the opinion but it does appear in *Clark v. Ford Motor Co.*, 46 Or. App. 521, 612 P.2d 316 (1980), a case decided shortly before *Crume*. It read, in pertinent part, as follows:

Ford warrants for its 1977 model cars and light trucks that the Selling Dealer will repair or replace free any parts, except tires, found under normal use in the U.S. or Canada to be defective in factory materials or workmanship within the earlier of 12 months or 12,000 miles from either first use or retail delivery.

... ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS IS LIMITED TO THE 12-MONTH/12,000-MILE DURATION OF THIS WRITTEN WARRANTY.

TO THE EXTENT ALLOWED BY LAW, NEITHER FORD NOR THE SELLING DEALER SHALL HAVE ANY RESPONSIBILITY FOR LOSS OF USE OF THE VEHICLE, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS OR CONSEQUENTIAL DAMAGES.

*Clark*, 46 Or. App. at — n.1, 612 P.2d at 317 n.1. The reference in the text to the repair or replacement obligation as a warranty is consistent with the parlance of courts and commentators but is conceptually inaccurate. Because its purpose and effect is to restrict the remedies available to the buyer once there has been a breach, its proper characterization is a contractual limitation of remedies. However, it is also pregnant with warranty, *i.e.*, a future performance warranty that the vehicle will remain defect-free for a particular period of time.

46. *Id.* at —, 612 P.2d at 317.

47. *Id.*

48. *Id.*

49. If no express warranties were given by the dealership, the contract would seem to insulate it from all liability if the vehicle turns out to be in any way defective. See U.C.C. § 2-316 (1977) ("Exclusion or Modification of [Implied] Warranties"). Implicit is the assumption that state law does not prohibit a disclaimer of implied warranties. See generally Millsbaugh & Coffinberger, *Sellers' Disclaimers of Implied Warranties: The Legislatures Strike Back*, 13 U.C.C. L.J. 160 (1980). Another assumption is that the dealership can "pass on" Ford's undertaking with impunity. The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1988), may, however, prove this assumption to be false. See, e.g., *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (App. Div. 1981) (delivery of manufacturer's warranty makes dealer a "supplier" of a written warranty and invalidates dealer's disclaimer); *Marine Midland Bank v. Carrol*, 98 A.D.2d 516, 471 N.Y.S.2d 409 (1984) (same). See also *infra* notes 83-90 and accompanying text.

50. The description of the vehicle in the contract could be construed as an express

no 'nonconformity' . . . revocation of acceptance was not authorized."<sup>51</sup> It does not appear that the plaintiffs would have fared any better if they had sought to revoke as to Ford. Once again, they would have encountered a contractual obstacle—the limitation of their remedies to repair or replacement. This obstacle, however, would not have been insurmountable. The Code intends to foster freedom of contract, but not to the extent that a party is deprived "of the substantial value of the bargain."<sup>52</sup> To this end, if a limited remedy has failed of its essential purpose, then the door is opened to the full range of Code remedies.<sup>53</sup> The conclusion that failure has occurred usually follows from an inability or unwillingness on the part of the seller to cure the defects.<sup>54</sup> Because the plaintiff's truck continued to howl after several attempts at repair, and no replacement truck was offered, it seems reasonable to conclude that the essential purpose of the repair or replacement warranty had not been met, and that the limited remedy did not bar revocation.<sup>55</sup>

The conclusion that the limited remedy was not a bar to revocation, however, does not necessitate the conclusion that revocation was readily available. Remember that the plain-

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warranty that the vehicle will conform to certain expectations of the buyer. For more on this point, see *infra* notes 64-79 and accompanying text.

51. *Crume v. Ford Motor Co.*, 60 Or. App. 224, —, 653 P.2d 564, 566 (1982).

52. U.C.C. § 2-719 comment 1 (1987).

53. See *id.* § 2-719(2) ("Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."). Case law leaves doubt as to whether a contractual limitation or exclusion of consequential damages is also vitiated by a failure of a limited remedy clause. For cases that have refused to permit recovery of consequentials, see *Kaplan v. RCA Corp.*, 783 F.2d 463 (4th Cir. 1986); *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage*, 709 F.2d 427 (6th Cir. 1983). For cases that have permitted their recovery, see *R. W. Murray v. Shatterproof Glass Corp.*, 758 F.2d 266 (8th Cir. 1985); *Koehning Co. v. A.P.I.*, 369 F. Supp. 882 (E.D. Mich. 1974).

54. Unfortunately, no guidance is offered as to when such a failure occurs, and as a result, the case law is voluminous. For a small sampling of recent cases, see *Matco Machine & Tool v. Cincinnati Milacron Co.*, 727 F.2d 777 (8th Cir. 1984) (repair and replacement remedy fails where defect persists despite numerous repair efforts by both parties); *Lewis Refrigeration Co.*, 709 F.2d at 427 (repair remedy fails when seller is unable to promptly repair the product); *Consolidated Data Terminals v. Applied Digital Data Sys. Inc.*, 708 F.2d 385 (9th Cir. 1983) ("limited" repair remedy fails when seller is unable to repair the product).

55. The essential purpose of the remedy is, or ought to be, to accommodate the buyer's expectation of having a defect free vehicle for the period of the warranty.

tiffs' contract was with the dealership, not with Ford. Where the defendant is not the seller of the goods, most courts continue to pay homage to the venerable doctrine of privity by denying the right to revoke.<sup>56</sup> Thus, while the plaintiffs could have recovered damages from Ford, they still would have been forced to retain ownership of the truck.

In this analysis, the Code norm of freedom of contract can be seen as a blanket license for sellers to exploit that freedom opportunistically by exchanging a "pseudo-obligation"<sup>57</sup> for "a real price."<sup>58</sup> This problem is further exacerbated by the analytical chaos it has caused. Predictability of reasoning and result has all but vanished because it is now impossible to tell beforehand whether a court will blindly accept the logic of cases like *Crume*<sup>59</sup> or maneuver around them to reach its perception of a more satisfactory and just result.

### III. ASSESSING CODE APPROACHES TO THE PROBLEM

The freedom given to parties to set the guidelines of their respective bargain can be oppressive in operation. Because of the bargaining position of well-leveraged sellers, it is not unusual to encounter attempts at opportunistic exploitation of the right to contractually modify remedies and disclaim warranties. If these attempts by a seller are unchecked, the risk of the goods turning out to be completely worthless will be

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56. In addition to the *Crume* court, other courts with similar holdings include *Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208 (6th Cir. 1974); *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976); *Fleetwood Trailer Co. v. Stanley*, 424 S.W. 2d 579 (Ky. 1968); *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 461, 184 S.E.2d 727 (1971). But see *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. Ct. App. 1978); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977).

57. U.C.C. § 2-313 comment 4 (1987).

58. *Id.*

59. The *Crume* court was not entirely unsympathetic to the plaintiffs' situation. Responding to the contention that the failure of the limited remedy should permit revocation as to the dealership the court stated:

Although that rationale may be tempting, it is tantamount to saying that a seller may not disclaim all warranties, express and implied, which, in our opinion, is directly contrary to [§ 2-316]. Perhaps a seller should not be permitted to disclaim all warranties, but we believe the remedy is with the legislature.

*Crume v. Ford Motor Co.*, 60 Or. App. 224, —, 653 P.2d 564, 566-67 (1982).

shouldered by the buyer who will be left without effective recourse. There are several U.C.C. based approaches offered by courts and commentators to explain the absence or continued presence of the buyer's right to revoke acceptance in these circumstances. Each approach has identifiable problems which illustrate the inadequacy of a Code approach to these situations. An effective approach, however, that is non-Code in origin is conceivable.

### A. The Formalistic Approach

The term "formalistic approach" is used to describe an analysis of the Code which tends to be singularly mechanical in its reasoning and offers a devastatingly simple solution to a complex problem. More fundamentally, it is reflective of the ultimate objective of preserving the Code's internal harmony by a conscious effort to avoid manipulation, distortion, or misconstruction of its provisions. What can occur, however, as the price of non-manipulation, is the perception of an unjust result.<sup>60</sup> This approach, and what is tantalizingly close to an admission of injustice is illustrated by *Crume v. Ford Motor Co.*<sup>61</sup>

Despite a professed concern for the buyers' situation, the *Crume* court thought itself helpless to provide the buyers with the right to revoke acceptance, or any other remedy against the seller. Any reform to provide a remedy was held to be in the control of the legislature, not the court. The helplessness admitted by the court flowed naturally from a heavy dose of Code literalism. Turning to section 2-608, the court focused on the requirement of a "nonconformity" in the goods received. It explained:

[T]he dealer disclaimed all warranties, express or implied. The only warranty was the limited one made by the manufacturer, not by the dealer. This truck conformed to the contract between plaintiffs and the dealer because plaintiffs got the vehicle that they had selected and had requested [the dealer] to obtain for sale to them. If the

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60. See *id.*

61. 60 Or. App. 224, 653 P.2d 564 (1982). Another case emanating from the same court of appeals that is exemplary of this approach is *Clark v. Ford Motor Co.*, 46 Or. App. 521, 612 P.2d 316 (1980).



limited remedy provided by the manufacturer failed of its essential purpose, that does not render the goods nonconforming under plaintiffs' contract with the dealer, absent a warranty of merchantability.<sup>62</sup>

Although the result in *Crume* may be correct, something basic is missing from an opinion that relies exclusively on a most superficial reading of Code provisions. Statutory language alone cannot completely explain why a particular result has been reached, unless it is further shown that the result is the inevitable consequence of the language. The real problem with *Crume* is that there is shown to be an inevitability which simply does not exist. Whether intentionally or unintentionally, the court completely ignores several obvious, and not so obvious, analytical alternatives.<sup>63</sup> Because choices do exist, any attempt to explain a result will inevitably go awry when the attempt is made in a theoretical vacuum.

## B. The Warranty Approach

The approaches described as grounded in warranty are those that succeed in establishing a good's nonconformity by locating a surviving warranty in the morass of contract language. One of the most familiar analyses associated with this approach focuses on the express warranty of description as codified in section 2-313(1)(b). According to this section "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."<sup>64</sup> In this analysis, the contract's

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62. *Id.* at —, 653 P.2d at 567.

63. The court does make brief mention of attempts by courts in other jurisdictions to reach a contrary result, but explains these as merely a perversion of the U.C.C. *Id.* at —, 653 P.2d at 566.

64. At common law, confusion surrounded the treatment of descriptions as to the kind or quality of goods sold. Two competing views emerged. One looked upon words of description as warranties, either express or implied. *See, e.g., Lessberger v. Kellog*, 78 N.J.L. 85, 73 A. 67 (1909). The other view saw these words not as warranties but as conditions precedent to any obligation on the part of the buyer. *See, e.g., Columbian Iron Works & Dry-dock Co. v. Douglas*, 84 Md. 44, 34 A. 1118 (1896). The significance of the distinction lies in the buyer's rights once the goods are accepted. *See Lumbrazo v. Woodruff*, 256 N.Y. 92, —, 175 N.E. 525, 527 (1931) ("When description was a condition, no right of recovery survived acceptance, whereas, for breach of warranty the buyer could retain the goods and sue to get his damage.").

A giant step towards unanimity of opinion was taken with the promulgation of the Uniform Sales Act. Section 14 of the act provided:

description of the goods being sold is seen as an express warranty that the delivered goods will correspond with the description.<sup>65</sup> Because the Code mandates that a conflict between an express warranty and a disclaimer of that warranty be resolved in favor of the former, its immunization against the effects of the disclaimer is assured.<sup>66</sup> Thus, despite

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Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

UNIF. SALES ACT, 1 U.L.A. 14 (1950) (act withdrawn 1962). Professor Williston had this to say about the decision to classify the warranty as "implied:"

This usage is based on the idea that a warranty is a promise and a promise is implied from the descriptive words. The warranty is better called express, because it is based on express words, sometimes of promise, sometimes of representation. The term "implied warranty" or better still, "constructive warranty," should be preserved for warranties imposed by law without any such basis.

8 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 969 at 482 n.2 (3d ed. 1964).

The change brought about by the Code is relatively minor. The description warranty now resides in the section on "express" warranties. For a brief discussion of why the change was made, see R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 72 (1970). It would seem that the major impact of the change will be to ensure the continued existence of the warranty in the face of a general disclaimer of implied warranties. Yet, there were those who thought the implied warranty of description under the Uniform Sales Act was a different breed and could not be disclaimed. See Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 386-87 (1937).

65. Descriptions can run the gamut "from epic to haiku," Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 48 (1978-79), and can arise from such diverse sources as "brochure advertisements, repair logbooks, quotation forms, labels, and order forms. They may also derive from the spoken word . . . ." *Id.* at 46 (citations omitted).

66. See U.C.C. § 2-316(1) (1987). This section reads:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

*Id.* In U.C.C. section 2-313 comment 4, the drafters elaborated on the relationship between a general disclaimer and a description warranty as follows:

Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

*Id.* § 2-313 comment 4.

For a small sampling of cases making this point, See *Horne v. Claude Ray Ford Sales, Inc.*, 162 Ga. App. 329, 290 S.E. 497 (1982); *Jensen v. Seigel Mobile Homes*

the seller's attempt to promise nothing of substance, the contract will impose a very real obligation.

For example, imagine a contract for the sale of a "new 1979 Ford Bronco" in which all warranties are conspicuously disclaimed.<sup>67</sup> Now imagine an admittedly absurd scene where the seller tenders a rather fine specimen of a horse with a steering wheel neatly tied to its neck. The issue becomes whether the buyer may rightfully refuse to take possession and hold the seller liable for damages. Even though the answer is intuitively obvious, one still has to ask in what manner the seller is in breach. After all, all warranties were disclaimed except for the description warranty that the good would be a new 1979 Ford Bronco. It is hardly revolutionary to suggest that a horse, no matter how it is clothed, falls far short of the mark.

A description warranty assumes that a standard can be found by which the good tendered and the good described can objectively be compared. What is needed are articulated criteria for identifying the basic nature, function, and quality of goods. Without these criteria this approach will assist only the buyer in a small fraction of cases—those that involve tenders so extreme (a horse impersonating a car) that the deviation from the warranty cannot be questioned. Most real world tenders that leave buyers complaining are far less shocking. What is received will at least superficially resemble what is described. A more commonplace cause for disappointment is that the quality of the good is simply inadequate.

Consider, for example, what the unfortunate buyer received in *Bicknell v. B & S Enterprises*.<sup>68</sup> The contract description was of a used "1974 Pontiac Firebird 2 - Dr." A mechanic to whom the buyer brought the car found the following problems:

the cam shaft was worn, the gaskets were worn, . . . the automobile had been wrecked, the side was bent in, filled

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Group, 105 Idaho 189, 668 P.2d 65 (1983); *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

67. With the exception of a disclaimer that may not have been in technical compliance with U.C.C. section 2-316, this was the car and contract purchased in *Blankenship*, 95 Ill. App. 3d at 303, 420 N.E. 2d at 167.

68. 160 Ga. App. 307, 287 S.E.2d 310 (1981).

with bondo, . . . the car had been repainted and not very well; the car lacked an air-conditioner; the car lacked a radio; . . . the brakes were leaking; the master cylinder needed replacing; the muffler would need replacement within a short future; three tires were bald. It was missing a jack. The tape deck didn't work. The shock on the left . . . side needed replacing. The car was missing a horn. And . . . various vacuum tubes and air hoses needed replacement.<sup>69</sup>

The court gave short shrift to the buyer's argument that this car, with all of its defects, did not conform to the contract description: "there is no question that the automobile was in fact a 1974 Pontiac Firebird with two doors."<sup>70</sup> The court, however, does not reveal what standard it is applying. Supposing the car had been without an engine, the same result could have been reached. It could be argued, however, that a car minus an engine would fall so far below that level of performance which is expected of a car, that it is, in reality, something else.<sup>71</sup> Put another way, what quality of performance is promised by a description warranty?<sup>72</sup> At least one court<sup>73</sup> and several commentators<sup>74</sup> have suggested something akin to

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69. *Id.* at —, 287 S.E.2d at 311.

70. *Id.*

71. Compare a car that will not run to an impotent bull which the court in *Cotter v. Luckie*, [1918] N.Z.L.R. 811, thought was only "nominally" a bull.

72. It is important to remember that there are various types of descriptions, each presenting their own peculiar brand of interpretive difficulty. For example, the connotations of the adjective "new." Compare *Horne v. Claude Ray Ford Sales, Inc.*, 162 Ga. App. 329, —, 290 S.E.2d 497, 498 (1982) ("It may be considered an intrinsic quality of car sold as new that it has been neither damaged nor used to any significant extent.") with *General Motors Corp. v. Green*, 173 Ga. App. 188, —, 325 S.E.2d 794, 795 (1984) ("There is nothing unreasonable or inconsistent in an affirmation, promise or description by a manufacturer that its vehicle is 'new' and its recognition that . . . the vehicle might contain factory-damage . . ."). The present discussion is confined to generic descriptions such as "car."

73. See, e.g., *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

74. See, e.g., J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 9-4 at 397 (3d ed. 1988) (footnote omitted). Professor Spanogle views cases in which a disclaimer purports to go too far as reminiscent of the English cases on fundamental breach. See Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 956-57 (1969). The doctrine of fundamental breach can be described in the following terms: "Every contract contains a 'core' or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting

merchantability.<sup>75</sup> If this is the correct quality of performance promised, then despite an otherwise effective disclaimer of implied warranties, the warranty of merchantability lives on in the guise of an express warranty of description.

The idea is appealing enough. Regardless of the seller's machinations, the buyer will always be guaranteed a fair good for a fair price. The soundness of the idea, however, is questionable. It must be kept in mind what it means to say that a warranty has been breached. Not only would return of the goods be permitted, but most significantly, the seller would be responsible for all damages suffered by the buyer, including consequential.<sup>76</sup> It would seem that rather than striking a just balance between over-protection and under-protection of the buyer's interests, an expanded concept of warranty threatens to undermine the very allocation of risk agreed to by both parties.<sup>77</sup> Moreover, this strategy for buyer protection would

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clause has been inserted which purports to protect him." Guest, *Fundamental Breach of Contract*, 77 L. Q. REV. 98, 99 (1961).

75. The standards of merchantability are found in U.C.C. § 2-314(2) (1987).

76. The statement in the text assumes the absence of any limitation on the buyer's remedies. Although this assumption will, in most cases, belie reality it is an appropriate one to make. Code imposed liability should be assessed in the context of available Code remedies. To say that contractual counter-measures are possible is hardly a justification for the imposition of liability without them.

77. Briefly put, when one considers the expectations of the parties at the time of contracting, it becomes abundantly clear that they encompassed something far less than the seller's obligation to deliver a merchantable good and liability in damages for not doing so. Certainly, the seller sought to rid itself of the downside risk of an unmerchantable good, and presumably, thought that it had. To find that the seller is in breach reallocates not just a portion of that risk—the obligation to retake the good and return the purchase price—but the entire risk. Further, to the extent the risk of unmerchantability is shifted to the seller, it would produce a windfall to the buyer. If the seller had agreed to "guarantee" the good the buyer would have paid for that guarantee. If we say that a description guarantees a merchantable good we would give that same guarantee free of charge. See *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967) ("as is" disclaimer upheld because evidence disclosed dealer sold for less because of it). See also Special Project, *supra* note 65, at 49 n.68 ("How much a buyer pays for goods may well reflect what he expects from them. . . . [H]is acceptance of a contract disclaiming implied warranties may indicate his willingness to gamble on receiving more quality than the seller has guaranteed"). One could also argue that the description, even if it would otherwise incorporate a standard of merchantability, never amounted to a warranty because it was not part of the basis of the bargain. See *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. (Callaghan) 26, 32 n.9 (W.D. Wash. 1980) ("Although a seller cannot disclaim express warranties, a disclaimer may prevent an expressed warranty from arising in the first place. By making it unreasonable for the buyer to rely on contrary quality representa-

run counter to the clear import of the Code that so long as the requirements of section 2-316 are met, the risk that the good is less than merchantable can be shifted to the buyer.<sup>78</sup>

If the warranty of description does not promise a merchantable good, what it does promise is uncertain. It is here that reliance may be necessary, at least in part, on intuitions about the inherent characteristics of goods. It is known, without the need for rationalization, that a horse is not a car. In contrast, the same can not be so easily said for a car without an engine. Perhaps it would be more fruitful to put the problem in a larger context. It would be possible to simply define the scope of a description warranty by reference to fundamental notions of good faith.<sup>79</sup> After all, this is the minimal obligation that the use of disclaimers is intended to achieve and that every buyer has the right to expect. Returning to the problem of the car without an engine: is it a car? Who knows. Would it qualify as a good faith tender? Hardly.

Unfortunately for the buyer, good faith is no panacea. Although the doctrine of good faith may be appropriate to police the most extreme examples of aggressive salesmanship, it is hardly adequate to provide a remedy in the paradigmatic case of the honest seller with the unexpectedly defective good. In short, the description warranty with its good faith content seems better suited for guaranteeing the buyer a particular standard of behavior rather than an acceptable quality of merchandise.

A warranty approach is also descriptive of a plethora of other analyses that result in the conclusion that a seller's warranty exists, either expressly or impliedly.<sup>80</sup> Each, however,

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tions, a disclaimer may keep those representations from becoming 'part of the basis of the bargain' as required by § 2-313(1).").

78. See *infra* notes 96-99 and accompanying text.

79. For the Code's formulation of the good faith doctrine, see *supra* note 25. At least one court has intimated a willingness to use the Code obligations of good faith and reasonableness to limit the effectiveness of disclaimers. See *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 850 (3d Cir. 1967) ("Section 1-102(3) of the Code's General Provisions states that standards which are manifestly unreasonable may not be disclaimed and prevents the enforcement of unconscionable sales where, as in this instance, the goods exchanged are found to be totally worthless.").

80. See, e.g., *Greenspun v. American Adhesives, Inc.*, 320 F. Supp. 442 (E.D. Pa. 1970) (disclaimer ineffective because printed in only slightly contrasting type); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968) (disclaimer ineffective

has an uncertain presence in the law of sales. It is often difficult to determine from the cases how much of the analysis is paternalistically motivated and how much follows from a dispassionate reading of the Code.<sup>81</sup> Nor is it possible to find a common theoretical thread. Rather, there is the marked absence of a workable theory independent of a strict application of statutory text to fact-specific situations.<sup>82</sup> The instances in which a court will proceed to manufacture a warranty are, therefore, virtually impossible to identify. Although most of these judicial frolics are insignificant in terms of doctrinal impact, there is one that cannot be so easily minimized.

In *Ventura v. Ford Motor Corp.*,<sup>83</sup> the contract between the buyer and the dealer contained the standard disclaimer of warranties, but it also expressly referred to the standard manufacturer's warranty. In addition, the contract contained a commitment "to promptly perform and fulfill all terms and conditions of the owner service policy."<sup>84</sup> In dictum,<sup>85</sup> the court suggested that the combination of the transmittal of and reference to the manufacturer's warranty, together with the undertaking to perform on its behalf, somehow gave rise to a warranty in contradiction of the attempted disclaimer.<sup>86</sup>

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because not brought to buyer's attention); *Society Nat'l Bank v. Pemberton*, 63 Ohio Misc. 26, 409 N.E.2d 1073 (Mun. Ct. 1979) ("as is" clause ineffective to disclaim warranties made by salesman); *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969) (disclaimer ineffective because delivered after sale).

81. For example, it should come as no surprise to discover that a court is more likely to conclude that a disclaimer is conspicuous if the buyer is not a consumer. *See, e.g.,* *Soo Line R. Co. v. Fruehauf*, 547 F.2d 1365 (8th Cir. 1977); *American Elec. Power Co. v. Westinghouse Elec.*, 418 F. Supp. 435 (S.D.N.Y. 1976).

82. Missing is a legal principle that speaks directly to the contractual allocation of product risk which, the seller claims, leaves the buyer without a remedy. The approaches used, by contrast, are focused more on the form that the bargaining process takes and the way that the bargain is packaged than its substance. To convincingly explain why a buyer should be permitted to recover, more attention must be paid to the real expectations of the parties.

83. 180 N.J. Super. 45, 433 A.2d 801 (1981).

84. *Id.* at —, 433 A.2d at 807.

85. The case was actually decided under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. However, the court in dicta, drew conclusions regarding the status of the warranty. 15 U.S.C. §§ 2301-12 (1988). *See supra* note 49.

86. *Ventura*, 180 N.J. Super. at —, 433 A.2d at 807-08. *But cf.* *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966) (the manufacturer did not deny that the warranty ran from both it and the dealer, a position which the court adopted); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978) (both the manufacturer and the dealer acknowledged that their undertaking was a warranty);

The problem with cases like this is that they tend to expand the concept of warranty to a point where its difference from other contract terms becomes hopelessly blurred. When this happens, warranty liability will attach to contract language when this liability was never contemplated.<sup>87</sup>

In *Ventura*, the court suggested that the dealer's decision to act as a source of information concerning the buyer's rights and remedies against the manufacturer gave rise to a warranty regarding the quality of the car.<sup>88</sup> However, section 2-313(1)(a) provides that an express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods . . . ." Communicating information about the manufacturer's warranty is an affirmation of fact, but it is not one which relates to the goods. The dealer itself is saying nothing about what can be expected from the car, but rather, is letting the buyer know what the manufacturer has said. Therefore, under the U.C.C., the buyer would not have had a remedy against the dealer unless the dealer related some information regarding the manufacturer's warranty that was misleading. That is, under the U.C.C., a dealer in the *Ventura* situation assumes responsibility only for the accuracy of the information related not the quality of the car.

Next, consider the dealer's promise to perform the manufacturer's service obligations. This too falls short of creating a warranty. Although quite clearly a promise, it says nothing about the car.<sup>89</sup> Moreover, there is a serious question of

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Stutts v. Green Ford, Inc., 647 N.C. App. 503, 267 S.E.2d 919 (1980) (the warranty was expressly written as a joint warranty); Clark v. Ford Motor Co., 46 Or. App. 521, 612 P.2d 316 (1980) (the warranty contained an express disclaimer stating that it was not the dealer's warranty).

87. Warranty liability provides the buyer with the full panoply of Code remedies, not the least of which is the right to recover, in an appropriate case, consequential damages under section 2-715. This discussion is proceeding on the assumption that the range of remedial options has not been contractually limited. See *supra* note 76.

88. *Ventura*, 180 N.J. Super. at —, 433 A.2d 801, 807-10.

89. Because it is a promise, a duty of performance arises, but it is independent of any warranty. Liability for breach must, therefore, be distinguished from warranty liability. What measures recovery is the loss directly attributable to a refusal to repair or improper repairs, not, as with a breach of warranty, the nonconformity of the good. Conceptually, the situation is no different than the buyer contracting for repairs with an independent service company. Unfortunately this point escaped the court in *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985). The court was correct in its observation that the dealer's liability was "based not upon any warranty . . . but upon



whether a promise can ever rise to the level of a warranty. If a promise is viewed as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made,"<sup>90</sup> then it makes no sense to say that it relates to the goods. After all, a good could never conform to a person's commitment to future behavior.<sup>91</sup> The inclusion of promises as a basis for express warranties does, however, serve the laudable purpose of easily capturing those affirmations of fact cast in promissory form.<sup>92</sup> In sum, neither transmitting the manufacturer's warranty nor promising service qualifies as a warranty. If neither alone is sufficient, what metamorphosis takes place when they are in combination? No explanation was given and none seems to exist.

### C. The Unconscionability Approach

An unconscionability approach represents a distinct shift in focus from those approaches already considered. No longer is the concern with the substance of the parties' agreement, but rather it is with matters external to that agreement. What is attempted is the formidable task of formulating an appropriate standard by which enforceable disclaimer provisions can be distinguished from those that should be unenforceable. The license for such an attempt is the now famous, or to some, infamous section 2-302.<sup>93</sup> It is important here to interject a

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the dealer's obligation to repair manufacturer's defects under the manufacturer's warranty," *Id.* at 467. However, the court was wrong in its conclusion that this liability permitted revocation of acceptance.

90. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981). See also A. CORBIN, CONTRACTS § 13 ("A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future . . .").

91. Under section 2-313(1)(a) the express warranty is "that the goods shall conform to the affirmation or promise." U.C.C. § 2-313(1)(a) (1987).

92. Professor Nordstrom takes a different view of section 2-313(1)(a). He sees affirmations of fact as the awkward basis for express warranties. Nevertheless he commends their inclusion as a much needed step towards the declassification of tort and contract. See R. NORDSTROM, *supra* note 64, § 65.

93. U.C.C. section 2-302 provides in pertinent part as follows:

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

cautionary word or two. Basic in the use of section 2-302 to police warranty disclaimers is the belief that the section was intended to serve this type of function.<sup>94</sup> A small cadre of courts and commentators following the influential lead of Professor Leff have argued that it was not.<sup>95</sup> What makes debate inevitable is that the drafters' intent is hopelessly clouded. Central to the controversy is section 2-316.<sup>96</sup> With a great degree of specificity, it instructs how to go about the business of disclaiming warranties,<sup>97</sup> all done without a reference to section 2-302 in either text or comments. It is difficult to determine whether to assume, therefore, that a properly constructed disclaimer is outside the realm of the

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U.C.C. § 2-302(1) (1987).

This section has occasioned a substantial outpouring of scholarly commentary. An incomplete listing includes: Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHICAGO-KENT L. REV. 199 (1985); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969). To date, Professor Leff has been the most virulent critic of section 2-302. "[A]morphous unintelligibility" is just one of his many pejorative descriptions of the section. Leff, *supra*, at 488.

94. This belief has both judicial support; *see, e.g.*, *Martin v. Joseph Harris Co.*, 767 F.2d 296, 299 (6th Cir. 1985); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 420 (5th Cir. 1980); *A. & M. Produce v. FMC Corp.*, 135 Cal. App. 3d 473, 484, 186 Cal. Rptr. 114, 120 (1982); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 950-51 (Ind. App. 1982) and academic support; *see, e.g.*, R. DUSENBERG & L. KING, *SALES AND BULK TRANSFERS UNDER THE U.C.C. § 7.03[2]* (1980); Ellinghaus, *supra* note 93, at 793-803; Murray, *supra* note 93, at 45-49; Weintraub, *supra* note 93, at 80-83.

95. Professor Leff's position is unequivocal: "It appears to be a matter of common assumption that Section 2-302 is applicable to warranty disclaimers. I find this, frankly, incredible." Leff, *supra* note 93, at 523. Several courts; *see, e.g.*, *Avery v. Aladdin Prod. Div.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973); *Ford Motor Co. v. Moulton*, 511 S.W.2d 690 (Tenn. 1974); *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. (Callaghan) 26 (W.D. Wash. 1980) and commentators agree; *see, e.g.*, N.Y.L. REVISION COMM'N, *A STUDY OF THE UNIFORM COMMERCIAL CODE* 586 (1955); J. WHITE & R. SUMMERS, *supra* note 74, § 12-12, at 481 ("One of us believes . . . that the draftsmen never intended 2-302 to be an overlay on the disclaimer provisions of 2-316.").

96. For a comprehensive listing of the statutory weapons in each side's arsenal, *see* Phillips, *supra* note 93, at 219-23.

97. The purpose of the section is "to protect a buyer from unexpected and unbar-gained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." U.C.C. § 2-316 comment 1 (1987).

unconscionability doctrine, or whether section 2-316 should be read as establishing a threshold level for that which is otherwise conscionable.

All things considered, it would seem that those who attribute to the drafters the intention of mandating, by application of section 2-316, a sort of super-conscionability standard for warranty disclaimers have the upper hand.<sup>98</sup> If the arguments that start and end with little more than Code literalism are disregarded and, instead, a bit of common sense is used, this view is not so "incredible." It would be paradoxical for the drafters of section 2-302, to have armed the courts with a new and potent weapon for removing the evils of the market place from the process of contracting, but to have made it inapplicable where it is often needed the most.<sup>99</sup> Moreover, as Professor Spanogle has noted:

Since section 2-316 deals only with the form of the final written contract, it cannot isolate either bad faith or unconscionable conduct in the contract formation process. The form of the agreement reflects only a small aspect of the seller's conduct, and a section with such a narrow focus should not preempt a doctrine that considers all aspects of the seller's conduct.<sup>100</sup>

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98. The term super-conscionability is used to describe the cumulative effect of a requirement that a disclaimer be conscionable under section 2-302 and that it be presented to the buyer in attention-grabbing form under section 2-316.

99. For an abbreviated statement of purpose, see comment 1 to section 2-302 which reads, in part, as follows:

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

U.C.C. § 2-302 comment 1 (1987).

It must be understood that unlike other potentially unfair or one-sided provisions in the contract, a warranty disclaimer, if valid, takes from the buyer an entire theory of recovery. Professor Phillips makes this point in his comparison of warranty disclaimers and remedy limitation provisions. "A liability disclaimer attacks a particular *theory of recovery* and, if valid, eliminates *all* damage recoveries under that theory. A valid remedy limitation, on the other hand, only blocks the recovery of certain *kinds of damages*, leaving the theory of recovery intact and permitting the recovery of other damages under that theory." Phillips, *supra* note 93, at 222 (emphasis in original).

100. Spanogle, *supra* note 93, at 957.

If the freedom of courts to scrutinize the fairness of warranty disclaimers is accepted and the unpredictability of results flowing from the extreme indeterminacy inherent in the unconscionability doctrine is acceptable,<sup>101</sup> it is possible that this is the only tool needed to put reins on the opportunistic seller. Ironically, the major weakness of an unconscionability approach is its potential to "unfairly" reallocate all commercial risks to the seller.<sup>102</sup> It is never enough to say in justification of a particular doctrine of buyer protection that the doctrine works; it is the totality of its impact that is vital. The concern here is that a finding of unconscionability does not strip the contract of its asymmetries, but simply shifts them in favor of the buyer.

Fortunately, few have been fooled by the highly misleading statement in comment 1 to section 2-302 which states that "[t]he principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." Professor Murray succinctly describes what he sees as a judicial dilemma: "If courts are now supposed to explicitly police against contracts or clauses which are unconscionable . . . how can a court help but disturb the allocation of risks?"<sup>103</sup> But perhaps this reac-

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101. Nowhere in the Code can a definition of the term unconscionable be found. The only guidance given by the drafters is the statement in comment 1 to section 2-302 that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Professor Leff, in usual elegant fashion, puts it this way: "If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative." Leff, *supra* note 93, at 487. He suggests, as a guiding principle, his now well-known distinction between "substantive" unconscionability and "procedural" unconscionability. For an overview of this and other theories of unconscionability, as well as the factors that courts have found persuasive, see Phillips, *supra* note 93, at 214-19.

102. If a warranty disclaimer is unconscionable it will be stricken. The buyer then will receive the full benefit of the Code's implied warranties and the remedies for their breach. The fact that the contract in its judicially restructured form may be different from what it would have been had the seller foreseen the change is the reason the reallocation of risks is described as unfair. It seems reasonable that in many cases, because no warranty was anticipated, little thought was given to limiting remedies for breach. *Cf.* U.C.C. § 2-316 comment 2 (1987) ("If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.").

103. Murray, *supra* note 93, at 40. "Indeed, since many unconscionability cases involve situations where superior bargaining power has produced a one-sided allocation

tionary concern for the seller is overstated. In Professor Leff's opinion, the response of sellers would be to pass back the reallocated risks in the form of higher prices.<sup>104</sup> Thus, the net effect of denying enforcement to disclaimers would be the socialization of product risks through the forced purchase of an "insurance policy" against defects.<sup>105</sup> Although the socialization of risk of defective products may be an acceptable rationale for mandatory insurance in other contexts, it is weak support for the ad hoc refusal to enforce warranty disclaimers. One objection is that any judicial interference in the allocation of risk would disappoint an indeterminable number of buyers who would gladly trade a little risk for a lower price. These buyers would have no alternative but to pay a premium for a policy they do not want. On the other hand, if disclaimers are given full effect, those who wish to insure against particular risks can still do so. Thus one commentator was led to the conclusion that "the prohibition against disclaimers yields a non-optimal result: some buyers regard themselves as worse off . . . and no buyers regard themselves as better off."<sup>106</sup>

Furthermore, this is not a situation where all buyers shoulder the same risks. Unlike warranty liability, tort liability for personal injuries cannot be so easily disclaimed.<sup>107</sup> This

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of risks, the quoted comment language is self-contradictory in many of the common contests where the doctrine is applied." Phillips, *supra* note 93, at 216 n.122.

104. Professor Leff states:

When, however, one thinks of the situation as involving a directive to a manufacturer not to sell risky or defective "goods" to the public, one is more likely to recognize that the risk has not been bounced permanently to the maker-seller, but has been lobbed back temporarily, so that he can slip it into his price base and allocate it ratably to the whole class of buyers.

Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 352 (1970).

105. *Id.* See also Phillips, *supra* note 93, at 249-51 (discussing the economic costs of invalidating disclaimers).

106. Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1058 (1977). But see Phillips, *supra* note 93, at 252 (arguing that Professor Schwartz's assumptions do not square with market place realities).

107. One can distinguish between strict liability and negligence. The *Restatement (Second) of Torts* would restrain the attempted disclaimer of strict liability. Comment m provides: "The consumer's cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands." RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965) Taking this comment a step further is *Sterner Aero AB v. Page Airmotive*, 499 F.2d 709 (10th Cir. 1974) (commercial buyer

suggests that irrespective of the judicial treatment of warranty disclaimers, this risk is already reflected in the purchase price. From this perspective, it is primarily the risk of economic loss that is most affected by the absence or presence of warranties.<sup>108</sup> The obvious problem is that the probability of economic loss and the potential magnitude of losses could be dramatically different for different purchasers, yet each would be charged the same premium. If an insurance system is to function efficiently, some individual risk assessment, through a method of risk classification, must be involved.<sup>109</sup> The point is that to treat unequals equally may have the salutary effect of distributing risk, but it would do so in undesirable ways.<sup>110</sup> Moreover, an unknown percentage of purchasers who pay extra for insurance would not be covered. Surely, many disclaimers would go unquestioned, and of those that are questioned, some will inevitably be upheld.

In the end, the complicating effects of section 2-302 would be minimized if its use could be made to depend on the remedy the buyer is seeking. The best approach is one which recognizes that to allow a full range of remedies to the buyer is apt to create more unfairness and inefficiency than it cures. What is needed instead, is a better balance of interests. This can be achieved by doing no more for the buyer than ensuring that the right to revoke acceptance and recover the purchase price is preserved. Unfortunately, the language of section 2-302 is remedy neutral.<sup>111</sup> It is not what the buyer is seeking

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not affected by disclaimer). *But see* *Keystone Aeronautics Corp. v. R.J. Enstrom*, 499 F.2d 146 (3d Cir. 1974) (suggesting that a freely negotiated and clearly expressed disclaimer could be effective against a commercial buyer). Although there is no per se rule of invalidity with regard to negligence disclaimers, the judicial tests of enforceability would seem to preclude their effectiveness where a consumer is the purchaser. *See generally* Phillips, *supra* note 93, at 205 n.36 (surveying the tests for a valid disclaimer).

108. *See supra* note 33.

109. *See* K. ABRAHAM, *DISTRIBUTING RISK* 64-100 (1986) (discussing efficiency and fairness in risk classification).

110. Professor Abraham states:

The heart of any insurance system is its method of classifying risks and setting prices. Different methods of classification can produce very different safety incentives, distributions of risk, and protection against loss. Classification practices have enormous economic significance, but they also have moral implications since risk classification is a method of distributing risk.

*Id.* at 64.

111. *But see* *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973) (whether

that is important; what solely matters are the circumstances existing at the time of the making of the contract.<sup>112</sup> In short, while the unconscionability doctrine protects the buyer, it goes much too far in that direction.<sup>113</sup> A more subtle approach is needed.

#### D. The Remedial Independence Approach

Implicit in each of the foregoing approaches is the premise that the buyer's right to revoke acceptance under section 2-608 is dependent upon the presence of express or implied warranties. From this perspective, there can be no "non-conformity"<sup>114</sup> if there is no warranty to which the goods must conform.<sup>115</sup> Accordingly, if the buyer's expectations are to be protected, either a warranty must be found or the disclaimer must be overcome. There are, however, occasional instances of judicial rhetoric which create the impression that although breach of warranty may be a sufficient prerequisite to revocation, it is never a necessary one. It cannot be determined to any degree of certainty whether this impression stands up to careful scrutiny. It is surprising that some commentators seem certain that it does.<sup>116</sup> These same commentators, however, can find comfort in their reading of the cases because the cases also espouse a right of revocation independent of warranty.<sup>117</sup> Before considering whether this position has Code support, it is necessary to examine the cases.

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disclaimer is unconscionable may depend on the remedy being sought—disclaimer held unconscionable in suit for personal injuries); *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 A.D.2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 282 N.E.2d 126, 331 N.Y.S.2d 40 (1972) (same).

112. U.C.C. § 2-302 (1987).

113. See Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315 (1975) ("[W]hen the doctrine of unconscionability is used in its substantive dimension . . . it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good.").

114. U.C.C. § 2-608(1) (1987) ("The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him . . ."). Under section 2-106(2) "goods . . . are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." *Id.* § 2-106(2).

115. Explicit adoption of this view can be found in *Crume v. Ford Motor Co.*, 60 Or. App. 224, 653 P.2d 564 (1982). For a discussion of that case see *supra* notes 42-51 and accompanying text.

116. See *infra* notes 120 & 124.

117. See *infra* notes 131-35 and accompanying text.

Generally speaking, the cases fall into two groups. In one, the reasoning of the court is obscured, and in the other it is confused. Typical of the first group is *Blankenship v. Northtown Ford, Inc.*<sup>118</sup> In *Blankenship* the buyers sought to revoke their acceptance of a new vehicle after defects resulted in eleven separate occasions for repair. In affirming a judgment against the dealer, the court did not rest its decision solely upon the non-compliance of the warranty disclaimer with section 2-316. The court stated:

Initially, we note that revocation of acceptance under section 2-608 of the UCC is not limited to goods which are not merchantable but rather contains a more subjective standard: rescission may be sought if the non-conformity of the goods substantially impairs their value to the buyer. In this case, the evidence unequivocally demonstrated that the substantially defective nature of the vehicle clearly impaired its value to the plaintiff and thus revocation of acceptance is appropriate even if the dealer has properly disclaimed all implied warranties.<sup>119</sup>

It is unclear what the court was trying to convey with this statement.<sup>120</sup> Apparently, it was enough for the court that the vehicle failed to conform to what the buyers thought they were getting—a merchantable automobile.<sup>121</sup> The court does not attempt to relate the non-conformity to the terms of the contract. On this reasoning, a contract for sale would always incorporate a warranty of merchantability even if it is expressly and properly disclaimed. However, when the opinion is read in full, a more traditional basis for decision emerges. The court, for example, notes that the disclaimers did not comply with section 2-316.

Of particular note is the court's emphatic reference to the contract's specification of the vehicle to be sold as a "new car"

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118. 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

119. *Id.* at —, 420 N.E.2d at 170.

120. The point, as stated by one commentator, is that "In essence, there are contractual breaches other than a breach of warranty that give the buyer a remedy and, specifically the remedy of revoking acceptance." Hiller, *Limitation or Exclusion of Remedies: Impact on Revocation of Acceptance*, 19 U.C.C. L.J. 159, 165 (1986).

121. The more reliance there is on a subjective standard of non-conformity, the more the analysis will begin to resemble the application of certain common law doctrines of contractual excuse that focus attention on the thoughts, opinions or desires of one or both of the parties. See *infra* notes 139-164 and accompanying text.



and to the seller's obligation to deliver what was bargained for.<sup>122</sup> In this case, there might be only the recognition of an express warranty of description which was unaffected by the disclaimer. This basis for the decision is hardly an acceptance of a subjective standard of conformity and certainly does not deviate from a requirement of breach of warranty as the fundamental ingredient for revocation.

Other cases in this group follow similar patterns. *Seekings v. Jimmy GMC*<sup>123</sup> is said also to exemplify an expansive interpretation of the term "non-conformity" in section 2-608.<sup>124</sup> Ironically, not even the buyers urged such a broad reading of this section as the court felt compelled to give:

[W]e do not find that the disclaimer precludes the remedy of revocation of acceptance. The parties apparently believe that [2-608's] reference to non[-]conformities refers only to failures to conform to an express or implied warranty. We do not read [2-608] so narrowly. Had the drafters of the U.C.C., who poured over the code for years, meant for the remedy to apply only when a warranty is breached, they would have stated so expressly. Rather, we find that revocation may be available whenever goods sold fail to conform to the seller's representation of the goods if the nonconformity "substantially impairs" the value of the goods to the buyer.<sup>125</sup>

One difficulty in grasping the true meaning of the court's holding is that the language it uses is perilously close to being self-contradictory. It is unclear that there is any real difference between non-conformity to a warranty and non-conformity to "the seller's representation of the goods." Muddying the opinion still further is the court's application of its test to the *Seekings* facts; the issue thus becoming the manner in which the buyers' new mobile home failed to conform. The court viewed the repeated failure of the dealer to remedy the defects in the home as meaning that it did "not conform to the

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122. See 95 Ill. App. 3d at —, 420 N.E.2d at 171.

123. 130 Ariz. 596, 638 P.2d 210 (1981).

124. See Warren & Rowe, *supra* note 41, at 323-25. Also included in this first group of cases are *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985) (relies on *Blankenship* for proposition that absence of warranties does not foreclose right to revoke); *Hub Motor Co. v. Zurawski*, 157 Ga. App. 850, 278 S.E.2d 689 (1981) (same).

125. *Seekings*, 130 Ariz. at —, 638 P.2d at 216.

representation that it can be made like new within a reasonable time.”<sup>126</sup> This type of representation was thought to be the only reasonable or objective meaning to attach to the circumstances surrounding the transaction. After all, in this case the buyers paid a new mobile home price and received a package of manufacturers’ warranties from the dealer. However, this is just an alternate way of stating that the dealer manifested a warranty that the buyers were purchasing a “new” home. Accordingly, the only difference between this case and *Blankenship* is that this court does not rely on conventional words of warranty. This added dimension raises the issue of whether what is being read expansively is not section 2-608 but rather section 2-313.

The cases in the first group do illustrate, if nothing else, that giving full credence to explicit language in an opinion may be an analytical error where other factors appear to determine the outcome. The same holds true for the cases in the second group. In the second group, the courts’ actual conception of section 2-608 is clouded by discussions that are more harmonious with an attempt to limit remedies under section 2-719. A good example is *Advanced Computer Sales, Inc. v. Sizemore*.<sup>127</sup> In one sentence the court states that section 2-608 “is an available remedy even where the seller has attempted to limit its warranties,”<sup>128</sup> but in the following sentence—“[w]here circumstances cause an exclusive or limited remedy to fail of its purpose, remedy may be had as provided in the commercial code”<sup>129</sup>—the court quotes, almost verbatim, from section 2-719.<sup>130</sup> The court’s failure to adequately distinguish between these two distinct concepts leads to an ambiguous decision. Consequently, persuasive authority for divorcing revocation from warranty must be found elsewhere.

The lack of coherent analysis in these cases has induced commentators to reconcile their arguable premise of a war-

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126. *Id.* at —, 638 P.2d at 217.

127. 186 Ga. App. 10, 366 S.E.2d 303 (1988). See also *Esquire Mobile Homes, Inc. v. Arrendale*, 182 Ga. App. 528, 356 S.E.2d 250 (1987).

128. 186 Ga. App. at —, 366 S.E.2d at 305.

129. *Id.*

130. See U.C.C. § 2-719(2) (1987) (“Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”).

warranty independent section 2-608 with the "letter and spirit" of the Code.<sup>131</sup> The analyses they offer are similar. It is maintained that the requisite non-conformity lies in the failure of the remedy under the manufacturer's warranty to achieve its essential purpose.<sup>132</sup> However, whether one points to a breach of warranty by the dealer or by the manufacturer, it is still a breach of warranty that purportedly gives the right to revoke. What these commentators have unwittingly done is suggest, in a rather backhanded way, that the dealer has assumed the obligations of the manufacturer. This is the only acceptable explanation for the statement that the "failure of *remedy* should serve to revive all *remedies* available under the U.C.C. against both Dealer and Manufacturer."<sup>133</sup> In this context it is senseless to speak of remedies without a correlative breach.<sup>134</sup> Yet, a concept of entity separation between dealer and manufacturer must assume the independence of obligations.<sup>135</sup> Thus, the nature of the dealer's breach becomes important because it

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131. According to Warren & Rowe, *supra* note 41, at 325, "[a]lthough no clear line of authority has yet developed, the decision in *Seekings* finds ample support in the letter and spirit of the U.C.C." The authors then proceed to support their proposition. *Id.* at 325-29. See also Hiller, *supra* note 120, at 166-69.

132. In support of their position that the term "non-conformity" in section 2-608 is not limited to a breach of warranty, Warren & Rowe borrow several Code definitions. From the definition of "conform," see *supra* note 114, they move to "contract"; a term defined as "the total legal obligation which results from the parties' agreement." U.C.C. § 1-201(11) (1987). The authors contend these "obligations" include a good deal more than warranties; they "include the total mix of terms and conditions . . . which form the bargain of the parties." Warren & Rowe, *supra* note 41, at 326. But this focus on definitions gives us a false view of section 2-608. This section does not speak about non-conformity to contractual obligations generally, but specifically of non-conforming goods. Hiller commits the same error of misconstruction. She equates the broad remedial right to reject a non-conforming tender under U.C.C. section 2-601 with the right to revoke acceptance. Hiller, *supra* note 120, at 166-69. One need only compare the language of section 2-601 ("if the goods or the tender of delivery fail in any respect to conform to the contract . . .") with that of section 2-608(1) ("a lot or commercial unity whose non-conformity . . .") to see very clearly that the two sections were never intended to have the same scope. One other difference of key importance between these sections deserves to be mentioned. The privilege of revocation is lost when the buyer knew or should have known of the non-conformity at the time of acceptance and did not receive the seller's assurances of cure. U.C.C. § 2-608(1)(b) (1987).

133. Warren & Rowe, *supra* note 41, at 327. (emphasis added).

134. Although not all remedies are dependent upon a breach, see *infra* note 165, all Code remedies are. See U.C.C. § 1-201(34) (1987). (" 'Remedy' means any remedial right to which an *aggrieved party* is entitled with or without resort to a tribunal.") (emphasis added).

135. See *supra* notes 84-92 and accompanying text.

is, or ought to be, the starting point for deciding the issue of nonconformity. In sum, neither the courts nor the commentators provide a meaningful answer.

#### IV. THE EXTRA-CODE DOCTRINE OF MISTAKE

The difficulties presented by the Code confined approaches to the problem of severely defective goods are largely caused by their failure to address the most basic issue: the scope of the parties' consensual allocation of risks.<sup>136</sup> This ought to be the starting point for deciding which contracts may be rescinded and which may not.<sup>137</sup> Even the doctrine of unconscionability, which comes closest to making this type of an assessment, falls short because of its myopic neglect to consider the extent to which a finding of unconscionability undermines the risks assumed by the seller.<sup>138</sup> What is necessary is a more balanced doctrine, one that preserves contractual stability without losing sight of the fundamental principles on which contractual obligations rest. The most likely approach appears to be the doctrine of mistake.

Despite a well-entrenched acceptance of the objective theory of contracts, the notion that consent is the moral foundation of contract has never been entirely lost.<sup>139</sup> As evidence

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136. Much of contract law is responsive to the allocation of risks associated with performance of the contract. For example, underlying several doctrines—most notably impossibility, frustration and mistake—is the notion that contractual duties should not be enforced if to do so would be at odds with such an allocation, either express or implied.

For a discussion of the role risk allocation has played in the development of the impossibility doctrine, see Wladis, *Impracticability as Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, 22 GA.L. REV. 503 (1988). One commentator has remarked that, "one of the substantial contributions of the *Second Restatement* to the law of mistake is the articulation and emphasis of the concept of risk allocation." Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41-59 (1984). See also *infra* notes 159-67 and accompanying text.

137. Where full performance of the contract is discharged without fault of either party, the relief granted will be by way of rescission, including restitution. See RESTATEMENT (SECOND) OF CONTRACTS § 158 (1981). Whether a party's right to pursue an action for rescission survives the Code's adoption is by no means clear. What is clear is that if contractual duties are excused in the absence of a breach, the Code's explicit remedies are inappropriate. See *infra* notes 165-67 and accompanying text.

138. See *supra* notes 101-13 and accompanying text.

139. According to Professor Kessler, "[w]ithin the framework of a free-enterprise system the essential prerequisite of contractual liability is volition, that is, consent freely given, and not coercion or status." F. KESSLER, C. GILMORE, & A. KRONMAN, CON-

that it survives, one need only begin to consider the confusing and richly complex jurisprudence surrounding the law of mistaken assumptions.<sup>140</sup> At its center is a belief that where consent is lacking because of some mistake by one or both parties, justice may require that contractual obligations be excused or the contract rescinded.<sup>141</sup> Although there are several categories of mistake, here the only concern is mistaken assumptions relating to facts that exist at the time the contract is made.<sup>142</sup> This aspect of mistake is most effectively reviewed by examin-

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TRACTS (3d ed. 1986). This belief in the centrality of consent is shared by most contemporary writers. See, e.g., Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Cf. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1984). But see Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139 (arguing that a relational approach should supercede consent as the guiding principle of contract law).

140. At this juncture it is important to realize that generalizations in this area may be uncommonly misleading and should be taken with the proverbial "grain of salt". Commentators have made no secret of the doctrinal disarray in which the law of mistake presently finds itself. See, e.g., Newman, *Relief for Mistake in Contracting*, 54 CORNELL L. REV. 232, 236-37 (1969) (stating that the law is in "almost insoluble confusion."); Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273, 1275 (1967) ("Unfortunately neither lawyer, judge, nor student can find anywhere a satisfactory short statement of what factors will be controlling in each case."); Note, *Mistake in the Formation and Performance of a Contract*, 11 COLUM. L. REV. 197, 197 (1911) ("The law relating to mistake is in a state of great confusion. . . .").

141. Judge Learned Hand, in his now famous explanation of the objective theory of contracts, recognized that some mistakes may influence the degree to which contracts are enforced.

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, *unless there were some mutual mistake, or something else of the sort*.

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (emphasis added). See also Newman, *supra* note 140, at 232 ("In situations where one or both of the parties have entered into a contract on the basis of a mistake, however, the objective test must often be relaxed in the interest of justice.").

142. Other traditional categories of mistake, such as misunderstanding and mistake in written expression, show that no single category could encompass all the situations where one or both parties could be said to have made a mistake at some point during the contracting process. See RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 155 (1981).

ing the doctrinal model adopted by the *Restatement (Second) of Contracts*. To avoid grappling with the appropriateness of the time-honored distinction between mutual and unilateral mistake,<sup>143</sup> it will be assumed that if there is a mistake, both the seller and the buyer are mistaken and their mistakes are materially the same.<sup>144</sup>

Whether a mutual mistake has occurred will depend upon whether both parties share "a belief that is not in accord with the facts."<sup>145</sup> This conception of a mistake would seem to easily encompass the sale of the severely defective good. Both parties entered into the transaction believing that the good was not so defective that it could not be made to perform adequately with no more than customary repairs. Both parties were wrong. But this mistaken belief is not of itself sufficient to justify rescission. It is merely a threshold inquiry which, if satisfied, gets the analytical ball rolling.<sup>146</sup> One must look to the other requirements established by the *Restatement (Second)*.

Before the aggrieved buyer can get relief there must be a

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143. Although, strictly speaking, a mistake of only one party never absolutely precluded relief, see A. CORBIN, CORBIN ON CONTRACTS § 608-09 (1960), there was substantial authority that it did and should. See S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1573, 1577-80 (3d ed. 1970). Except where one party's mistake was known to the other, the *Restatement of Contracts* reflected the view of its reporter, Professor Williston, in stating that a mistake by one party does not render the transaction voidable. RESTATEMENT OF CONTRACTS § 503 (1932). The *Restatement (Second) of Contracts* treats the matter differently.

Where a mistake by one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . . and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). See also Rabin, *supra* note 140, at 1277-79 (arguing that the distinction between mutual and unilateral mistake is misleading).

144. The stated assumption in the text is meant to eliminate any doubt about the mistake being mutual. Although the *Restatement (Second) of Contracts* is unclear on this point, the *Restatement of Contracts* treated as unilateral different mistakes of the parties relating to different matters. See RESTATEMENT OF CONTRACTS § 503 (1932).

145. RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981).

146. See *id.* comment a ("Mistake alone, in the sense in which the word is used here, has no legal consequences. The legal consequences of mistake . . . are determined by the rules stated in the rest of this Chapter.").

showing that the mistake "goes to a basic assumption on which the contract was made."<sup>147</sup> The meaning of the term "basic assumption" is an elusive one.<sup>148</sup> Saying that the mistake should be important states the obvious, but does little to advance the inquiry. At what point along the spectrum does important become basic? It would seem that the point is reached somewhere beyond "material."<sup>149</sup> It is not enough to show that had the truth been known there would have been no contract.<sup>150</sup> The mistake must be one which upset "the very basis for the contract."<sup>151</sup> But this does no more than substitute one indeterminate conceptual formula for another. Consider the explanation offered by Professor Von Mehren:

Whatever the term [basic] means, it is not supposed to refer to anything like the older civil-law distinction between essentials and accidentals or the similar common-law distinction, drawn by Pomeroy, between "essentials" and "incidentals," or that drawn by older courts between facts that are "collateral" and those that make a thing the "very object" of the contract. These distinctions are condemned as unreal by Williston, by both Restatements, and by most contemporary authors. . . .

The common law, like the civil law, faces the difficulty of having to appraise the significance of a mistake either by reference to the interest of the parties or by reference to custom, neither of which furnishes much guidance. To the extent that the common law has emancipated itself from traditional and somewhat arbitrary limits, it has found itself confronted with the problem facing jurists everywhere, of interpreting very general

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147. *Id.* § 152.

148. The comment to section 152 is only superficially helpful in this regard. We are told that the term, which is taken from U.C.C. section 2-615, has the same meaning as it does in connection with the doctrines of impracticability and frustration. *See id.* §§ 261, 265. Aside from the fact that the term has no established meaning in these other contexts, one finds notable and puzzling the decision to separate the treatment of questions of assumption and allocation of risk in connection with mistake, *see id.* § 154, but include those same questions within the basic assumption element of impracticability and frustration, *see id.* § 261, comment b.

149. That the terms "basic" and "material" mean something different is strongly suggested by the *Restatement of Restitution*. Where restitution is sought because of a misrepresentation of fact, the fact must be material; but where relief is sought on the basis of mistake, the fact must be basic. *RESTATEMENT OF RESTITUTION* § 9 (1932).

150. *See RESTATEMENT (SECOND) OF CONTRACTS* § 152, comment c (1981).

151. *Id.* comment a.

principles without the help of any articulate theory of what these principles are supposed to do.<sup>152</sup>

Clearly, an accurate articulation of a definition of "basic assumption" is probably impossible and thus actual cases will have to be decided on an ad hoc basis. However, it would not seem overly expansive to view "a wide variety of assumptions, such as those concerning the existence, identity, quantity, or, *quality* of the subject matter [as] 'basic.'"<sup>153</sup> So viewed, the aggrieved buyer should have little difficulty with this requirement.

Next is the requirement of the *Restatement (Second)* that the affected party "must show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out."<sup>154</sup> A word of caution is warranted. The imbalance in the agreed exchange should not be confused with hardship, although the two are often inextricably entwined. To make the point, Professor Rabin gives two examples. In the first, the parent buys an expensive wedding dress for a daughter who, unknown to the parent, is dead. In the second, the facts are identical, except that the parent buys an

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152. A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 870 (1977).

153. E. FARNSWORTH, *supra* note 36, § 9.3 at 654 (emphasis added). Since Professor Farnsworth served as a reporter for the *Restatement (Second) of Contracts* it is safe to assume from the quoted statement in the text that section 152 was intended to reject the identity of subject matter test which historically served as a guide for many courts. Under this test, relief would be granted only if what was received was not what the buyer bargained for. Thus, mistakes as to quality or value would not make the transaction voidable. See, e.g., *Hecht v. Batcheller*, 147 Mass. 335, 17 N.E. 651 (1888) (relief denied to purchaser who mistakenly purchased worthless promissory note); *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885) (relief denied to seller of diamond who mistakenly thought it was a stone). But see *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887) (relief granted to seller of fertile cow who mistakenly thought it was barren). Ninety-five years following its decision in *Sherwood*, the Supreme Court of Michigan rejected the substance-quality test in *Lenawee County Board of Health v. Messerly*, 417 Mich. 17, 331 N.W.2d 203, 209 (1982) ("the better reasoned approach is a case-by-case analysis whereby rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performance of the parties."). If the substance-quality test were applied to the case of the defective good, the analysis would be strikingly similar to that which is needed to determine whether a description warranty has been breached. See *supra* notes 64-74 and accompanying text.

154. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981). Professor Rabin has commented: "In certain kinds of mistake cases it has been observed that the size of [the] mistake may be the most important single factor in determining whether relief will be granted." Rabin, *supra* note 140, at 1288.



annuity for the daughter, not a wedding dress.<sup>155</sup> Both cases result in a hardship, but only in the latter is there an inequality of exchange.<sup>156</sup> Professor Rabin quite properly maintains that what is relevant is whether "A's getting something unexpectedly less valuable than that for which he bargained, or . . . B's getting something unexpectedly more valuable than that for which he bargained."<sup>157</sup> When a newly purchased good turns out to be a lemon, the exchange becomes significantly less advantageous to the buyer *and* significantly more advantageous to the seller.<sup>158</sup> It appears that an unexpectedly unequal exchange of the requisite severity has occurred.

The last requirement of the *Restatement (Second)* goes to the very foundation of contractual obligation—the intention to be legally bound.<sup>159</sup> Assuming that an operative mistake was made, we must ask whether the affected party deliberately assumed that risk as part of the bargain.<sup>160</sup> In short, if the parties consensually allocated certain risks, a mistaken apprehension of facts bearing on those risks should not serve as a basis for avoiding the contract. The seller will argue that the fact that a contractual disclaimer provision was used is a clear indication that the buyer accepted the risk that what she was getting was qualitatively different from that which she anticipated receiving. The problem with this apparent intent is that it is based on a contractual view which ignores the context of the transaction. To get a true picture of what risks are con-

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155. See Rabin, *supra* note 140, at 1282-83.

156. In the former, if the parent's purpose is substantially frustrated, relief may be had, if at all, under RESTATEMENT (SECOND) OF CONTRACTS § 266(2) (1981). The availability of the frustration doctrine will depend upon the propriety of its introduction through U.C.C. section 1-103.

157. See Rabin, *supra* note 140, at 1282.

158. Referring to the need to show a material effect upon on the agreed exchange, the *Restatement (Second) of Contracts* provides that:

Ordinarily [the adversely affected party] will be able to do this by showing that the agreed exchange is not only less desirable to him but is also more advantageous to the other party . . . Sometimes it is so because the other party will give, and the adversely affected party will receive, something less than they supposed.

RESTATEMENT (SECOND) OF CONTRACTS § 152 comment c (1981).

159. See *supra* note 139 and accompanying text.

160. See RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981) ("[a] party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties . . .").

sciously being allocated by a standard form disclaimer, the court must consider "all the circumstances of the case including the nature of the subject matter and the nature and customs of the trade or business concerned."<sup>161</sup>

Consider, for example, the statement by one commentator that "if a man buys a secondhand car, the implied warranties of fitness being expressly excluded, he cannot be permitted by the law to send the car back because he mistakenly believed it was a sound car when it was not."<sup>162</sup> Even if correct in its conclusion, this cannot confidently be said about the disappointed buyer of a new car. The expectations of the buyer in each of these situations are significantly different. The very same commentator goes on to say that "[w]here an error is serious and unexpected, a wide clause which purports to put all risks of error on to one of the parties might well be disregarded as having no vital bearing on the merits of the case."<sup>163</sup> The argument might be made that, in the case of a new car, neither the buyer nor the dealer could fairly be regarded as having contemplated the risk that with a little bit of professional tinkering the car could not be made to run like new.<sup>164</sup>

It is difficult, therefore, to explain and give content to the disclaimer. It may be that all the parties consciously contemplated was that the buyer's expectation interest would be left unprotected.<sup>165</sup> There is no better way to insulate oneself

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161. Kavanagh, *Mistake and Related Matters: Impact of the Sales Article of the Uniform Commercial Code*, 1 OTTAWA L. REV. 113, 114 (1966).

162. Sutton, *Reform of the Law of Mistake in Contract*, 7 N.Z.U.L. REV. 40, 49 (1976).

163. *Id.*

164. A somewhat similar view has surfaced elsewhere. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 152 comment g (1981) ("The effect, on a buyer's claim of mistake, of language purporting to disclaim the seller's responsibility for the goods is governed by the rules on interpretation stated in Chapter 9."); Kavanagh, *supra* note 161, at 115 ("The argument might be made that a buyer, on reading this abstract disclaimer . . . could not fairly be regarded as having consciously contemplated the risk of the machine being inadequate to fulfill the particular purpose for which he bought it."); Rabin, *supra* note 140, at 1296 ("Undoubtedly the average retail customer buying from a dealer intends to assume fewer risks and is less likely to consider a sale a contest of wits than would be the case where two dealers are trading with each other.").

165. Remedies for breach of warranty are quite different than those for mistake. The former permits the buyer to recover his expectancy, which, if the good is retained, is generally based on the value that a conforming good would have had. See U.C.C. § 2-714(2) (1987). In contrast, relief for the latter will merely involve avoidance of the contract. Notice also that the Code is less protective of the seller's interest where the

from liability for damages than to provide that the unintentional tender of a defective good is not a breach. This no warranty/no breach strategy is suggested by the many pitfalls that surround more direct attempts to limit and exclude the buyer's remedies.<sup>166</sup> If the basic protection which the seller sought was against the threat of having to pay general and consequential damages, rescission for mutual mistake would work an acceptable compromise. The seller retains the protection it desired, and the buyer recovers the money it has paid.<sup>167</sup> One major flaw in several other approaches to the buyer's plight is avoided: their one-sided nature.

The above discussion is intended to do no more than suggest that the doctrine of mistake is the appropriate vehicle for deciding which transactions should not be enforced. True, the doctrine is presently uncertain in its application,<sup>168</sup> however, unlike others, it has the advantage of requiring courts to consider both the intention of the parties and the interests of justice.

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claim is for revocation of acceptance than it is where the object of the action is damages. Compare *id.* § 2-608 comment 2 (seller's advance knowledge as to the buyer's particular circumstances is not a factor) with *id.* § 2-715 (1987) (recovery of consequential damages is dependent upon advance knowledge as to the buyer's particular circumstances).

166. Not only must the seller fret a judicial finding that an attempted limitation of remedies "failed of its essential purpose," *Id.* § 2-714(2) but upon such a finding, the seller may lose the benefit of a provision excluding the recovery of consequential damages. Compare, e.g., *R.W. Murray v. Shatterproof Glass Corp.*, 758 F.2d 266 (8th Cir. 1985), *Koehring Co. v. A.P.I.*, 369 F. Supp. 882 (E.D. Mich. 1974) (cases that have held that the exclusion of consequential damages is also vitiated by a failure of a limited remedy clause) with *Kaplan v. RCA*, 783 F.2d 463 (4th Cir. 1986), and *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427 (6th Cir. 1983) (cases that have held that the exclusion of consequential damages is not vitiated by a failure of a limited remedy clause).

167. The assumption in the text that restitution resulting from avoidance of the contract involves only a reversal of performances, i.e., the seller returns the purchase price and the buyer returns the good, may not be quite accurate. Restitution may need to reflect the use value of the good to the buyer and the profits earned on the purchase price by the seller.

168. No better summary of the state of the doctrine can be found than that offered by Professor Newman. "It may be stated with assurance that our legal system has no firm test, even in the most general terms, for telling in what cases it is proper, and in what cases improper, to allow rescission for either mutual or unilateral mistake." Newman, *supra* note 140, at 237.

## V. THE INDETERMINACY OF U.C.C. SECTION 1-103

It seems clear enough that if application of mistake or some similar doctrine<sup>169</sup> is to substitute for the manipulation or distortion of Code provisions to reach a "just" result, its use must be legitimated by U.C.C. section 1-103.<sup>170</sup> The language of section 1-103 tells us very little about the appropriate result in a particular case. In all but the uncommon "easy case,"<sup>171</sup> courts seem free to open the door to common law and equitable principles to whatever extent they choose. Perhaps the best way to posit that the section is indeterminate with respect to a given case is to consider and compare the several methodologies of construction offered by those commentators who have considered the section's scope. It will be seen that each approach is different and each does little to guide and restrict a court's decision making. The following discussion is not intended as a criticism of these efforts, but is designed to show that there is presently no workable way to determine which common law and equitable principles have been displaced by the Code. During a short span of time in the late 1970s, three significant and relevant articles were published by Professors Summers,<sup>172</sup> Hillman,<sup>173</sup> and Nickles.<sup>174</sup>

Professor Summers confined his analysis to the supplementation or modification of Code rules by use of general equitable principles.<sup>175</sup> He saw section 1-103 as a necessary legislative strategy to deal with the unforeseen or exceptional case. With this section on the books, Summers stated that

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169. A buyer who claims mistake may also seek rescission on the ground of existing frustration. Instead of having to show that the mistake had a material effect on the agreed exchange of performances, the buyer must show that his contractual purpose was substantially frustrated. See RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981). Because frustration is largely undeveloped and has only been employed sporadically by American courts, a buyer who argues mistake is more likely to be successful. See generally Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DE PAUL L. REV. 1 (1953).

170. For the full text of this section, see *supra* note 14.

171. An example of an easy case is the Code's explicit displacement of the pre-existing duty rule. See U.C.C. § 2-209(1) (1987) ("An agreement modifying a contract within this Article needs no consideration to be binding.").

172. See Summers, *supra* note 13.

173. See Hillman, *supra* note 13.

174. See Nickles, *Part I*, *supra* note 13; Nickles, *Part II*, *supra* note 13; Nickles, *Part III*, *supra* note 13.

175. See Summers, *supra* note 13.

even the most literal-minded judge has a duty to reach the equitable result.<sup>176</sup> Equitable principles are viewed, under Summers's theory, as applicable to an extent which includes modification and the creation of exceptions in any Code case where they are not displaced.<sup>177</sup> However, regardless of how expansively Professor Summers wants to read section 1-103, he must still come to grips with its displacement language. The clearest possible case for displacement is described as one in which: (1) the text of the section explicitly displaces the principle; (2) the purposes of the section and the Code as a whole are served only by displacement; (3) the analogies within the Code indicate displacement; and (4) the history of the section indicates displacement.<sup>178</sup> Professor Summers then observed that to his knowledge no Code provision meets all of these requirements and concludes that there is no definitive method for determining displacement in a given situation.<sup>179</sup>

As if to underscore the fact that his model is invariably destined to provide inconclusive results, Professor Summers proceeds to examine what he admits is a close case. The example he uses deals with the principle that equities between two parties will be protected against a third party without a superior equity, and whether that principle has been displaced by sections 9-312(3) and 2-702 in the context of a priority dispute between a cash seller and the buyer's financing bank.<sup>180</sup>

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176. *Id.* at 909 ("the section imposes a *duty* on the judge to reach the equitable result unless the general equitable principle has been displaced."). The methodology proposed by Professor Summers is limited to use in situations where application of a Code rule results in perceived inequity.

177. Professor Summers views section 1-103 as more than just a gap-filler; he dismisses the idea that resort to equitable principles is permissible only where the Code is silent. Rather, he asserts that the language and background of the section together with the examples cited therein lead to the conclusion that courts are free "to carve out exceptions to or otherwise modify the effect of legal rules." *Id.* at 935. Interestingly, Professor Hillman points out that the section's legislative history suggests that it "was intended to be a narrow outlet to common law." Hillman, *supra* note 13, at 683.

178. Summers, *supra* note 13, at 938.

179. *Id.* Despite this admission, Professor Summers confidently puts forth as a clear case of displacement the effect of section 9-312(5) on equities arising from knowledge of a prior in time security interest. *Id.* at 937-38. This confidence may, however, be misplaced. See Nickles, *Part III, supra* note 13, at 72-103 (arguing that a race-notice interpretation of section 9-312(5) is preferable).

180. Summers, *supra* note 13, at 939-40. Because a bounced check forms the basis

In the end, he finds that he cannot answer this question clearly:

The wording of both sections indicates that the drafters thought about the *general* priority problem at hand. The drafters appear nonetheless to have provided that parties in the position of the [seller] can protect themselves only via sections 9-312(3) and 2-702. Thus, while neither text nor comments expressly displace the general equitable principle, it appears that the relevant sections are themselves of a basically displacing character. Accordingly, some courts have found displacement.<sup>181</sup>

If substituted for Professor Summers's close case is the question of whether the equitable doctrine of mutual mistake has been displaced by the Code's warranty sections, in particular, section 2-316, the answer is just as elusive.<sup>182</sup> It is possi-

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for the seller's reclamation right, the relevant section should be section 2-507, not section 2-702. The hypothetical is drawn from the case of *In re Samuels & Co.*, 510 F.2d 139 (5th Cir. 1975), *rev'd on rehearing*, 526 F.2d 1238 (1976).

181. Summers, *supra* note 13, at 940 (footnote omitted & emphasis added).

182. The case is not made easy by the reference in section 1-103 to mistake as a supplemental principle. No displacement issue can be divorced from its context. Without question, its use is appropriate in certain contexts. The problem, however, is to know what those contexts are. For example, a contrary conclusion may be called for where rescission is sought not by the buyer, but by the seller of an item thought to be considerably less valuable than it was. See, e.g., *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887); *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885). Although the displacement discussion in the text of this article centers on section 2-316, there is the companion issue of whether rescission, the remedy for mistake, survives the adoption of section 2-608. See U.C.C. § 2-608 comment 1 (1987) which provides that section 2-608 no longer speaks of 'rescission,' a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as 'revocation of acceptance' of goods tendered under a contract for sale and involves no suggestion of 'election' of sort. In the context of a cause of action based on breach of contract, rescission is probably not available. See, e.g., *Fernandez v. Western Rail Road Builders, Inc.*, 112 Idaho 907, 736 P.2d 1361 (1987); *Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345 (1982). But see *Perry v. Goff Motors, Inc.*, 12 Kan. App. 2d 139, 736 P.2d 949 (1987) (rescission has not been affected by the Code). The situation is far different, however, where contractual duties are excused in the absence of a breach. Cf. U.C.C. § 2-721 (1987). See also J. WHITE & R. SUMMERS, *supra* note 74, § 8-1 at 295 ("If the seller has not committed mistake, fraud, or the like, we believe that the Code preempts the field and that the buyer's only rights to return the goods are those stated in Article Two."). The issue is largely ignored in this article for two reasons. First, the indeterminacy of section 1-103 can be shown by the discussion of mistake alone. Second, whether the Code has displaced rescission only matters to the aggrieved buyer if mistake has not been displaced. Because the latter issue can not be decided here, there is no need to decide the former.

ble to argue that the drafters in section 2-316 sought to permit by contract a notion of caveat emptor in its most extreme form. By following one of the section's methods, a seller is able to shift to the buyer *all* risk of product defect. The procedural protection which envelops the section suggests that the drafters thought about the possibility that the buyer would be stuck with a worthless good.<sup>183</sup> Thus, it could be said that section 2-316 is "of a basically displacing character."<sup>184</sup> But this ignores the fundamental difference in effect between an action for breach of warranty and one grounded in mistake. Once full account is taken of the remedial consequences of these two actions it still cannot be said with any degree of certainty what this section of a basically displacing character actually displaces.

One theme of early Code literature was that the Code was a "true code" calling for a continental code methodology of interpretation.<sup>185</sup> Theoretically, this meant that resort to outside law was precluded; interpretive problems were to be solved and gaps filled by reference to the Code itself, in particular, its purposes and policies.<sup>186</sup> This true code ideology was premised on section 1-102 which was thought to embody the drafters' philosophy that "the [C]ode not only has the force of law, but is itself a source of law."<sup>187</sup> Section 1-103 was seen as

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183. See *supra* notes 96-100 and accompanying text.

184. See *supra* note 165.

185. The leading proponent of a true code methodology was Professor Hawkland. See generally Hawkland, *supra* note 13. See also Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951). This view was rejected by Professor Nickles in what is by far the most extensive study of the Code's true nature to date. See Nickles, *Part I*, *supra* note 13; Nickles, *Part II*, *supra* note 13.

186. The difference between a true code and a statute is best described as follows:

A 'statute' . . . is a legislative enactment which goes as far as it goes and no further: that is to say, when a case reveals a gap in the statutory scheme or situation not foreseen by the draftsmen . . . then the court should put the statute out of mind and reason its way to decision according to the basic principles of the common law. A 'code,' . . . is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus, when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.

Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961).

187. Franklin, *supra* note 185, at 333. According to Hawkland, courts should "(1) use analogy, rather than 'outside' law to fill code gaps; (2) rely somewhat more heavily

a pragmatic recognition of the inevitability of the need to borrow from outside sources of law in some cases.<sup>188</sup> It was the perceived tension between sections 1-102 and 1-103, and the concomitant "over-usage of section 1-103"<sup>189</sup> which prompted Professor Hillman to offer a methodology that would keep the Code safe from these forces that threatened its ideals of "uniformity, simplification, and modernization of commercial law . . . ." <sup>190</sup>

Although Professor Hillman purports to accord only a limited function to section 1-103, his interpretive approach, if put into practice, may accomplish just the opposite. What he offers is a three-step methodology which requires that, in the interpretive process, priority is given first to the express language of the Code, then to its underlying purposes and policies, and finally to sources of law outside the Code. According to this priority system, non-Code law is legitimately applied only when the meaning of the text is difficult to determine and Code purposes and policies conflict or are vague. Thus, common law and equitable principles are not explicitly displaced only by text, but can be displaced by Code objectives as well.<sup>191</sup> This approach, however, does not dictate a clear result in a difficult case.

The problem with an analysis emphasizing policy is that the Code is replete with conflicting policies and goals. Consequently, there is nothing to prevent their manipulation to reach a desired outcome.<sup>192</sup> Once policy becomes the sole ar-

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on the decisions of other code states in making their own decisions; and (3) give their own decisions somewhat less permanent precedential value." Hawkland, *supra* note 13, at 313. For the relevant text of section 1-102, see *supra* note 3.

188. Hawkland maintained that section 1-103 was a necessary adjunct to a true code for the following reasons:

(1) Relevant outside law, of course, must be used from time to time, because . . . no law or set of laws can exist in isolation.

(2) [A] true code, for policy reasons of its own, may intentionally put beyond its scope certain rules falling squarely within its field of law.

Hawkland, *supra* note 13, at 311.

189. Hillman, *supra* note 13, at 659.

190. *Id.*

191. If a requirement of explicitness, which is mentioned in comment 1 to section 1-103, is read into the section, Professor Hillman suggests that section 1-102(1) explicitly displaces the common law where there are conflicting Code purposes and policies. See *id.* at 683.

192. To make this same point, one commentator observed that:



biter of decision, courts will be free to decide cases on a statutory or common law basis almost without restriction. Therefore, to the extent a methodology seeks to derive certain answers from uncertain expressions of the drafters' intent, the objectives of certainty, predictability and uniformity of commercial law cannot be achieved. To see how this three-step methodology plays out in the context of a difficult case it can be applied to the problem of mutual mistake.

The first issue to resolve is whether the express language of the Code is determinative. Support for a definitive answer is weak. Certainly a reconciliation of the following is possible, but hardly compelling: (1) the listing of mistake in section 1-103; (2) the inclusion of a seller impracticability section, but no section on other excuse doctrines; (3) the comprehensiveness of the sections on warranty and their disclaimer; (4) the substitution of the breach-based remedy of revocation for that of rescission; and (5) a specific reference to rescission in section 2-721.

Because the express Code position on mistake is ambiguous, the fate of the doctrine must rest on a perception of Code purposes and policies. A crucial premise underlying Article 2 is that the parties are free to establish the terms of their contract.<sup>193</sup> To this end, many Code provisions explicitly state that they are variable, and even those that do not may be variable as well.<sup>194</sup> The warranty area itself best illustrates the scope of this freedom. Implied in a contract for sale may be several different warranties, but the parties, if they wish and if they follow the correct procedures, can disclaim each and

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[t]he mandate to interpret the Code so as to further its objective does not furnish any real guide to construction because the purposes are of 'an essentially neutral nature' and 'a great deal will depend upon the vantage point of the one contemplating the problem.'

R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE: CUMULATIVE SUPPLEMENT 13 (2d ed. 1974) (citing *In re Moore*, 7 U.C.C. Rep. Serv. (Callaghan) 578, 594 (D.Me. 1969)).

193. See U.C.C. § 1-102(3) (1987) ("[t]he effect of provisions of this Act may be varied by agreement except as otherwise provided in this Act . . ."). See also Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. INDUS. & COM. L. REV. 59 (1960).

194. See U.C.C. § 1-102(4) (1987) ("The presence in certain provisions of this Act of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).").

every one.<sup>195</sup> Furthermore, in section 2-303, the drafters were concerned only with the allocation of risks and burdens, and the section is in every way consistent with the idea of freedom of contract.<sup>196</sup> By contrast, the operation of mistake could be seen as opposing this ideal. It is possible to argue that a buyer's assertion of mistake is merely an after-the-fact attempt to disable the disclaimer. Presumably, however, the buyer assumed the risk of a bad decision when the contract was made.<sup>197</sup>

On the other hand, freedom of contract under Article 2 is not without restriction. Throughout, one encounters instances where the emphasis is on protection and a concern for unfairness. For example, section 2-302 offers a way of disarming unconscionable bargains and section 1-203 provides that the parties may not disclaim the prescribed "obligations of good faith, diligence, reasonableness and care."<sup>198</sup> Applying a mistake analysis to justify rescission of a contract is consonant with these policies; each works in its own way to ensure a substantial equivalency of exchange.

According to Professor Hillman, the effect of finding that not all Code policies are circumvented by a judicial application of mistake is to permit its use.<sup>199</sup> Acknowledging the reality that in most cases of textual silence or ambiguity there is at least one Code policy that is arguably consistent with the non-Code rule is to recognize that the door to supplementation may be open a bit wider than is desirable. It is also decision making by default. It is unclear that where Code policies

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195. See *id.* §§ 2-312, 2-314 to -316.

196. *Id.* § 2-303 ("Where this Article allocates a risk or a burden as between the parties 'unless otherwise agreed', the agreement may not only shift the allocation but may also divide the risk or burden.").

197. The buyer will argue, however, that the parties never contemplated nor allocated the risk that the good could not be made to function properly. See *supra* notes 159-67 and accompanying text. It may be that when viewed in this light, the surface inconsistency between mistake and freedom of contract does not exist.

198. They may, however, "determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." U.C.C. § 1-102(3) (1987).

199. Assuming an inability to glean an answer straight from the text, it is only when clearly defined Code policies are in harmony with each other, but conflict with the common law that Professor Hillman would have a court conclude that the common law was purposely displaced. See Hillman, *supra* note 13, at 686-88.

conflict, the one deemed consistent with the non-Code rule must always prevail. Courts need never confront directly the need to decide in favor of one policy or the other.

Professor Nickles meticulously developed another methodological approach to the displacement theory.<sup>200</sup> What he offers is a union of the methodological techniques of sections 1-102 and 1-103 which embodies both the liberal construction and analogical interpretation important to other approaches, but which does not subordinate the common law to the same degree. His methodology allows outside law a role in parity with that of the statute when the application of outside law would further the goals of the Code. Expressed in terms of a legislative directive, here is what he suggests:

**PURPOSES; RULES OF CONSTRUCTION; SUPPLEMENTARY PRINCIPLES OF LAW APPLICABLE**

(1) This Act shall be construed and applied to further the orderly conduct of commercial transactions by promoting underlying purposes and policies of this Act which are

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

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

(c) to make uniform the law among the various jurisdictions; and

(2) The purposes and policies stated in subsection (1) shall be promoted or effectuated either

(a) by liberally construing and applying the provisions of this Act, or

(b) by supplementing its provisions with principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause,

whichever method tends more certainly in any particular case or class of cases to further the orderly conduct of commercial transactions.<sup>201</sup>

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200. Nickles, *Part I*, *supra* note 13; Nickles, *Part II*, *supra* note 13; Nickles, *Part III*, *supra* note 13.

201. Nickles, *Part II*, *supra* note 13, at 230.

This proposed statutory formula for decision making is not significantly different from Professor Hillman's approach. Both see as vital to the resolution of the displacement issue an assessment of Code purposes and policies generally, as well as an assessment of those that are specific to the sections potentially relevant to the case. However, Professor Nickles purports to take his approach one step beyond Professor Hillman's.<sup>202</sup> Recognizing how difficult such an interpretive inquiry into purposes and policies might be, Professor Nickles seeks to give them content by formally institutionalizing pertinent commercial practices and circumstances, which he terms "commercial realities,"<sup>203</sup> as factors for judicial consideration. The decision whether to apply a common law rule will, therefore, turn on the extent to which that rule promotes the orderly conduct of commercial transactions.

Professor Nickles is correct when he says that, when we seek to discern purposes and policies, a conclusion cannot be reached that is independent of commercial realities. But commercial realities may not provide a clear criterion for decision making. Despite their importance, empirical observations cannot provide us with answers to normative questions. Knowing what actors in a particular type of commercial transaction normally do, does not tell us what they ought to do. What most courts will do ultimately depends on their perception of what the commercial realities should be, albeit at a more informed level.<sup>204</sup> In sum, the efforts of these three commentators suggest a practical indeterminacy. Whatever the interpretive methodology, resolution of the displacement issue must inevitably rest on such amorphous underpinnings as the drafters' intent and statutory purposes and policies. As things now stand, courts are left free to decide issues of displacement

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202. Nickles, *Part III, supra* note 13, at 7. ("[T]he approach goes one step beyond Professor Hillman's. It recognizes that a consideration of the Code's purposes and policies is central to the displacement issue, including those of the Code as a 'code' and as a collection of rules and principles each having its own underlying purposes or policies.").

203. *Id.* at 6.

204. Professor Nickles himself seems to recognize this. Before applying his methodology to specific displacement issues, he makes the following observation: "Not everyone will agree that the commercial realities or purposes or policies emphasized in each case are the controlling ones or that the rules and results advocated here more certainly promote the orderly conduct of commercial transactions." *Id.* at 9.

almost without restraint. This means outcomes that are highly unpredictable and subject to much judicial discretion.

## VI. CONCLUSION

If the Code is to hold out much promise for producing "intelligent and workable commercial law,"<sup>205</sup> it must at times be ignored. That is, courts must have the occasional freedom to turn to common law and equitable principles. To proscribe selective supplementation is to invite judicial subterfuge<sup>206</sup> or suffer the inherent vices of codification<sup>207</sup>—hardly a comforting choice. To minimize the likelihood of a court having to face such a dilemma, the drafters specifically authorized, by way of section 1-103, the development of a judicially inspired commercial law jurisprudence. Where, however, the Code ends and the common law begins remains a mystery. A meaningful interpretation of the only textual clue—the "[u]nless displaced" language of section 1-103—has not been achieved.

Concern about section 1-103's present inadequacy to dictate predictable results should not divert attention from its importance. Awareness of its indeterminacy can be seen,

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205. 1 STATE OF NEW YORK LAW REVISION COMMITTEE REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 113 (1954) (Karl Llewellyn's statement before the New York Law Revision Commission on the aim of the Code) [hereinafter N.Y. LAW REVISION REPORT].

206. Llewellyn referred to the various means used by courts to achieve desired results as "covert tools." K. LLEWELLYN, *THE COMMON LAW TRADITION* 365 (1960). He emphasized that:

[T]his kind of thing does not make for good business, it does not make for good counseling, and it does not make for certainty. It means you never know where you are, and it does a very bad thing to the law indeed. The bad thing that it does to the law is to lead to precedent after precedent in which language<sup>2</sup> is held not to mean what it says and indeed what its plain purpose was and that upsets everything for everybody in all future litigation.

N. Y. LAW REVISION REPORT, *supra* note 205, at 178. Llewellyn hoped that the Code, particularly Article 2, would bring to an end the need for courts to resort to covert tools.

207. The drafters of the Revised Uniform Sales Act (which over time evolved into Article 2) were keenly aware that codification was not without its risks. In a 1941 report to the Conference on Uniform States Laws they put it this way:

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

1 E. KELLY, *UNIFORM COMMERCIAL CODE: DRAFTS* 308 (1984).

paradoxically, as a first step towards a more workable rule. Perhaps if the section was supported by a wealth of decisions that clearly and consistently articulated a well-reasoned body of displacement policy, it would gain a meaning and coherence which it now lacks.<sup>208</sup> Furthermore, one can only hope that present and future Code drafting committees do not continue to be insensitive to the practical consequences of ignoring a section which is presently inadequate to accommodate informed decision-making. It cannot be assumed that courts will or will not import into a Code case a particular non-Code rule. The challenge for the framers of the Code of the future is to ease the inevitable tension caused by coexisting sources of law. They can do this by trying to make clear in each section—more so than the original framers did—which common law doctrines continue to survive in which contexts. Also, more use can be made of the official comments as a forum for the discussion of the viability of related non-Code law. The simple truth is that the Code needs section 1-103, and section 1-103 needs attention.

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208. Llewellyn had in mind the same sort of judicial fleshing-out process for § 2-302. See N.Y. LAW REVISION REPORT, *supra* note 205, at 178. ("Anything that is done under this section is going to make precedent, and the precedents can be recorded and the precedents can accumulate and guide.").

