Law Inventory 1971

Ronald A. Anderson

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol47/iss4/5

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
The middle third of the twentieth century has witnessed many changes in the law. Over and beyond the problem of giving an answer to a particular question, change of law generally presents a social problem. Some applaud the changes or a particular change as being a step toward attaining justice. Others deplore the particular change or the fact that the law can be changed so readily, contending that the instability and uncertainty are undesirable and reduce the law to the status of a railroad time schedule, "subject to change without notice." As we are almost at the mathematical two-thirds point of the twentieth century, it is believed that some inventory should be taken. Our interest is twofold: as lawyers we are interested in the rules of law; as citizens we are concerned with the running of a free society. This article has been written with such objectives in mind and thus may serve as an epilogue to the first two-thirds of this century and a prologue to the final third.

Some of the topics discussed may seem unrelated to others but we must rise above the compartmentalization inspired by convenience of classification and seek to find the pattern of "today's law." Just as the sharp edges of the pieces of a mosaic disappear when we stand back, leaving only the pattern visible, we can see a pattern and a direction in the changes that have been made in the middle third of this century. One perceives an increasing protection afforded the person, accompanied by a furtherance of good faith and protection from oppression, hardship, and exploitation. In terms of structure of society one sees a constantly increasing segment of life leave the area of free enterprise and become subject to government regulation, with the government being the federal government, and the control being exercised by an administrative agency rather than a traditional branch of government—executive, judicial, or legislative.

II. The Fall and Rise of Legal Concepts

During the third of the twentieth century under consideration, many "traditional" legal concepts were abandoned by the courts. Many courts currently feel that the old legal concepts do not adequately safeguard or promote the objectives of society. Many courts have been influenced by the general thought of Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Courts have repeatedly been stating that it is the duty of judges to re-
evaluate rather than to follow old concepts. For example, in a case involving the fitness of a house, the court rejected the concept of caveat emptor when the buyer purchased from the builder-vendor while the house was in the course of construction, and implied a warranty against structural defects; the court stating in so doing: "The doctrine of caveat emptor is one of judicial origin and, since our statutes are silent on the subject, no restriction rests on our courts for delimiting the application of the rule . . . the law should be based upon current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common-law principles abreast with the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . ." The following are some of the significant changes that have occurred.

A. Product Liability

The nearly total disappearance of the limitation of lack of privity and the rise of the concept of strict tort liability have revolutionized the law of product liability. It is likely that further change will take place because there will be a backwash of the strict tort liability concept upon the warranty concept and there will be a general overflow of product liability concepts into non-sales areas.

With respect to the interaction of the several theories of product liability, strict tort liability may be explained as an effort to permit recovery where none was permitted by the warranty law. Specifically, it was designed to avoid limitations found in warranty which were stated in terms of lack of privity, lack of notice, and disclaimer. The existence of the strict tort rule permitting recovery has had a great influence in persuading courts to liberalize the warranty rules with the net result that warranty recovery tends to become identical with strict tort. In one instance, the court expressly declared that it was expanding the

3 Rothberg v. Olenik, 262 A.2d 461, 462, 467 (Vt. 1970). This pattern of re-evaluation is seen in many areas: "Troubled by a growing disparity between the Chessman reading of section 209 and a current of common sense in the construction and application of statutes defining the crime of kidnapping. . . ." California v. Mutch, 4 Cal. 3d 389, 93 Cal. Rptr. 721, 482 P.2d 633 (1971) (emphasis added).

Note also the explanation of the genesis of the concept of promissory estoppel: "The development of the law of promissory estoppel is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings. . . ." Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

4 Of necessity, I have ignored many changes, such as the growing abolition of immunity from tort suits in the case of charitable institutions, spouses, parents, and political subdivisions. I shall be happy to reply to letters sent to me at Drexel University, 32nd and Market Streets, Room 505B Matheson Hall, Philadelphia, Pa. 19104, if anyone desires further information on any matter related to this article.

5 Notice that the plural form of "products liability" is commonly used. This would appear to be a misuse of the plural and was probably initially a carry-over of the terminal "s" in premises liability. Note that one does not say "malpractices" liability. In view of the fact that a product liability suit involves only one product—the one which was defective and caused harm, it appears that the singular form is to be preferred. If we were a question of liability of a manufacturer for noncompliance with a government standard relating to his "products" generally, there would be greater reason to use a plural form.


7 There of course remains the significant distinction that a warranty of fitness applies to any defect which is inconsistent with fitness, whereas strict tort liability is not applied unless
warranty concept as it was absurd that warranty recovery should be less broad than that permitted under strict tort liability.8

Concepts of product liability have been extended to transactions which were not the sale of goods. Thus, product liability concepts have been applied to permit recovery where the transaction was not a sale of goods but a true lease of goods,9 a free sample distribution of goods,10 and to goods consumed in the course of the rendition of services.11 Contrary to the traditional analysis made in the blood transfusion cases, several courts have imposed product liability where a blood transfusion caused serum hepatitis.12

When a service is rendered merely as an incident to a pattern of selling, strict tort liability can be applied. Thus it has been held that a distributor of new automobile tires and a tire manufacturer could be liable in strict tort although the sale was made by the manufacturer to the automobile owner and the distributor merely provided the service of installing the tires.13

the defect is such as to make the use of the product dangerous to a greater degree than a user would reasonably contemplate.

Other significant differences are the effect of a disclaimer of liability and the operation of statutes of limitations.


See also Baker v. Seattle, 484 P.2d 405 (Wash. 1971), holding that a disclaimer of liability clause in a true lease of a chattel was subject to the same limitations as would be applicable in the case of a sale of goods on the theory that “The legislature of this state has enunciated a public policy with regard to disclaimers of liability in commercial transactions by enacting the Uniform Commercial Code.”

Sales concepts of the Uniform Commercial Code have been extended to “lease” transactions since “it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical result.”


13 Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (this decision is particularly significant as the appellate court expressly reversed the trial court for holding that the distributor could not be liable in strict tort in the absence of a sale).

A contractor remodeling a home may be held liable on breach of warranty and strict tort liability for fire damage to the house caused by a fire resulting from a leaky fitting connecting a hot water heater installed but not supplied by him. Worrell v. Barnes, 484 P.2d 373 (Nev. 1971) (sustaining liability as against contention that transaction was not a sale of goods and sustaining strict tort liability as against the contention that the manufacturer had not manufactured a product) (appellate court reversed lower court for limiting plaintiff to negligence theory of product liability).

In Carpel v. Saget Studios, 9 UCC REP. SERV. 82 (E.D. Pa. 1971), a contract to take photographs was held to be a contract for the sale of goods.
It is likely that in time the social force in favor of protecting the person which underlies the present wave of consumer protectionism will develop rules of law which will entitle a good faith "customer" to a protection comparable to that which the "buyer" of "goods" now enjoys. The emphasis given in product liability cases to the necessity of rehabilitating the plaintiff, as opposed to finding fault on the part of the defendant, will undoubtedly lead the courts to question why all persons should not have the same rehabilitative protection as the buyer of goods. When this question is asked, it is likely that the answer will be in favor of the plaintiff without regard to whether the transaction which led to his harm which necessitates such rehabilitation was a sale of goods or any other kind of transaction.

With the extension of the warranty and strict tort concepts into the area of real estate law, the array of plaintiffs protected by a product liability theory increases, and, by the same token, it will become increasingly difficult for a court to refuse to find liability in favor of a plaintiff because he did not buy goods.

One can anticipate that ultimately the courts will abandon the concept of a "defect" in the goods and will impose liability when the use of the goods, at least in a manner which was reasonably contemplated by the defendant, exposed the plaintiff or members of the class to which the plaintiff belonged to an unreasonable degree of risk. This would permit liability to be imposed, as has been done where the design of the automobile was such that upon collision at low impact the gas tank sheared off and threw flaming gasoline into the automobile.

B. Property Ownership

The limitations upon ownership of real estate have expanded. Contrary to the common-law rule that no implied warranty of fitness arises in the sale of real estate, one-fifth of the states now imply such a warranty. A number of states imply a similar warranty in the case of the leasing of

---

14 Note the language employed to sustain the implication of a warranty of fitness of leased real estate in *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). "Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that the goods and services are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability. . . ." Note the conjunctive use of "goods and services." In the field of strict tort liability, see *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).


It is to be noted that the so-called defect in the *Badorek* case was not the cause of the harm but was merely a matter affecting the extent to which harm would be sustained. This is significant because of the variation that it makes in the concept of proximate cause. Instead of the defect's being the proximate cause of the harm, it is possible as in the case cited, for the negligence of the other driver to be the "cause" with the character of the defendant's product merely being a matter affecting the extent of the injuries sustained because of the fault of the other driver.

real estate.\textsuperscript{18} Strict tort liability has been applied to the vendor of real estate.\textsuperscript{19}

When the owner of real estate sells or rents, he is prohibited in a number of ways from discriminating against others, and a state constitution may not authorize him to discriminate.\textsuperscript{20}

In using his land, the owner must not offend pollution controls, which have been added to the restrictions already imposed by zoning laws and restrictive covenants, and the general limiting concepts of the law of nuisance and of property.

Under a new doctrine which might be called "pseudo-dedication," an owner who opens his real estate or place of business to the public cannot prevent his employees or members of the public from exercising first amendment rights on his property.\textsuperscript{21} This right has been extended so as to give the right to non-employees and non-customers to enter the area of the owner's place of business otherwise open to the public such as parking lots, pavements, and waiting rooms and solicit funds and signatures supporting the adoption of anti-pollution laws or protesting the involvement of the United States in foreign wars.\textsuperscript{22}

May a landowner leave his land undeveloped and make no use of it? Contrary to common law, there is authority that society can tell the owner that he must put his land to use. In the early days of redevelopment, the land taken was a slum area which was obviously deteriorated. From this beginning, redevelopment expanded to permit the taking of areas that were likely to become slums. Recent authority holds that redevelopment is not necessarily linked to elimination or prevention of slums but permits the taking by eminent domain of vacant, unimproved land which was standing idle because the title to the land was held by numerous owners, the theory being that communities should eliminate "stagnant and unproductive" conditions of land and for that purpose may use the power of eminent domain in order to "serve the health, welfare, social and economic interests, and sound growth of the community."\textsuperscript{23}

Decisions such as that just noted are significant not only in themselves but in terms of the potential threat that they hold for the traditional concepts of free enterprise and private ownership. By traditional views, the owner of land in the Levin case could have let it stand undeveloped as long as he chose. By the


\textsuperscript{19} Schipiper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).

\textsuperscript{20} Reitman v. Mulkey, 387 U.S. 369 (1967).

\textsuperscript{21} Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

\textsuperscript{22} Sutherland v. Southcenter Shopping Center, 3 Wash. App. 2d 833, 478 P.2d 792 (1970); Diamond v. Bland, 3 Cal. 3d 658, 91 Cal. Rptr. 501, 477 P.2d 733 (1970), cert. den. sub nom., Homart Development Co. v. Diamond, 402 U.S. 988 (1971); Tanner v. Lloyd Corp., 446 F.2d 545 (9th Cir. 1971). A traditional approach would have reached the contrary conclusion on the ground that the property was private property and that the owner by permitting the public to enter thereon did not extend an unqualified license but only made a limited invitation for a particular purpose.

\textsuperscript{23} Levin v. Bridgewater Township Committee, 57 N.J. 506, 274 A. 2d 1 (1971). Note also that community redevelopment is in a sense the reverse side of the coin of which the other side is zoning. In zoning, the community speaks in negative terms of what shall not be done with land; in redevelopment, the community speaks in affirmative terms of what shall be done with land. Both concepts would make Adam Smith most uncomfortable.
Levin case, society determines when the land is to be used. If society may do this, will it not be able to tell the landowner whether he should or should not farm his land, and what crops he should or should not plant; whether he should mine minerals from his land? And from thence, is it not an easy progression to telling him what use he should make of the farm products or the minerals? To whom he should sell? And in short make all the management decisions for him that under the free enterprise concept are made by management? How does the law erect a boundary line between cases where the will of society dictates the use of property and the area in which the landowner retains his common-law managerial prerogative?24

The problem here considered has another dimension. If society can tell the landowner how he should utilize his land for the good of the community, can it not tell the individual how he should use his talents and ability to work? It will be very difficult to maintain a dividing line between property and person.25

The questions here raised cannot be ignored with the patriot's fervent belief that it cannot happen here. As far back as 1803, Madison deplored the fact that in the natural course of events the power of government grows and the liberty of the individual declines. As we examine the living constitution of today we must recognize that Madison had a deep understanding tantamount to clairvoyance.

C. Premises Liability

The liability of the occupier of premises has been traditionally stated in terms of the status of the plaintiff as a trespasser, a licensee, or an invitee. There is authority which will probably initiate a trend which by the end of this century will wipe out that distinction and treat premises liability merely as a question of ordinary negligence law; and whether the plaintiff is a trespasser, a licensee, or an invitee will be merely one of the circumstances which the reasonable man should consider.26 If that result is reached, the legal historian will undoubtedly

---

24 Note that in a broad sense, the problem here is not new because the twentieth century had already turned its back on the common law which would permit a landowner to leave his land in its natural state. For decades, the landowner has been told that he must drain swamps and cut weeds to prevent the growth of mosquitoes and farm parasites and to prevent the spread of fire. What is now taking place is the transition from (a) regulating to prevent physical harm to the surrounding area to (b) regulating to prevent socio-economic harm.

At various times, the law has sought to make a distinction between physical harm and economic harm. Thus it countenanced the regulation of conditions of employment to prevent industrial accidents long before it approved the regulation of the economic conditions of employment to assure the worker a minimum wage.

While we can note that protection from personal injury is often the opening wedge in the development of a new legal theory, it is merely a matter of time before the law moves on to seek to protect economic interests. Consider how the strict tort liability concept which initially was concerned with injury to the person has now in most jurisdictions spread to protect property and economic loss as well.

25 The point that the thirteenth amendment to the United States Constitution would prevent the transition indicated in the text can be met by the same technique that permits equity to issue a negative injunction against working for other persons with the result that economic pressure compels the contract-breaking employee to work for the employer with whom he had contracted to work.

look back and contend that this approach began a long time ago and that what
up to now have been called “exceptions” to the common-law rule are merely
early unrecognized applications of the “negligence” concept.

The common-law trespasser's rule is generally subject to exceptions in
favor of (1) trespassing children; (2) minimal trespassers, as persons standing on
your doorstep to find shelter from the rain while waiting for the bus; and
(3) recurrent tolerated trespassers, as people cutting across the railroad track
to get to the station. In these three situations, the common law has reached a
result which would fit in with a negligence analysis of liability: there is a fore-
seeable or probable pattern of conduct with foreseeable harm if certain precau-
tions be not taken by the occupier, and, therefore, he is liable if he fails to take
those precautions.

Recurring licensees have been held to be entitled to the protection ordinarily
afforded invitees. By this view, where a mailman regularly uses the premises,
the occupier may have a duty, because of his expectable presence, to warn him of
a defective condition of a porch step, even though the mailman is merely a
licensee. Again the exception can be rationalized more readily in terms of a
negligence standard of care.

The definition of invitee has been almost universally broadened to include a
person who is invited on the premises, expressly or by implication, under such
circumstances that he has reason to believe that the premises are safe—as con-
trasted with presence for the economic benefit of the occupier of the land. Note
the similarity in the shift of viewpoint from (a) what the invitor will obtain to
(b) what the invitee expects, and the shift in the field of product liability from
(a) fault or act of the defendant to (b) protection from dangers which the user
is not likely to anticipate.

As another facet of the problem, the premises liability plaintiff will un-
doubtedly be able to go beyond negligence and obtain recovery on strict tort
liability and reach beyond the occupier to a former owner or builder.

D. Good Faith

Good faith is acquiring a particular significance in the law as well as a new
content.

The Uniform Commercial Code declares that “every contract or duty within

28 This has already been permitted in the Schipper case. See Note 19 supra.
29 Illustrative of this new content, I have for some time inquired of graduate students
in business administration how they would answer the question whether the ultimate buyer
could sue the remote manufacturer when the product purchased from the middleman caused
the purchaser harm. To the lawyer, this of course called for an answer in terms of whether
lack of privity was a defense.

The general reaction in the last ten years has been that the subpurchaser should of course
recover, but the surprising thing is that some explain or rationalize this result on the ground
that “good faith” requires the manufacturer to be liable if his product causes harm.

I know that my random sampling cannot be accepted as conclusively proving anything
but I strongly suspect that the non-law-trained man of the 20th Century is giving to good faith
a much different meaning than did the 19th Century law court. If this be so, it is significant
because sooner or later the beliefs or mores of society at large find their way into the rules of
law. The “good faith” decisions cited hereafter reflect that shifting point of view.
this Act imposes an obligation of good faith in its performance or enforcement.\textsuperscript{30}

The Official Code Comment supports the view that this is not a requirement that is peculiar to the Code but that, to the contrary, the Code is merely restating a general requirement applicable to all transactions. The decisions both under the Code and as to non-Code matters confirm the far reach of the concept of good faith.\textsuperscript{31}

In the field of contract law, good faith is not only a positive element or duty but is gradually permitting “indefinite” agreements to be deemed binding. The output and requirement contract is now binding as against the argument that it is invalid because illusory and indefinite since there is no fixed obligation to have an output or to have requirements.\textsuperscript{32}

Good faith of the parties has also been relied upon to overcome the “illusory promise-no consideration” argument in the case of contracts which by their letter permitted a party to render such services as he deemed necessary.\textsuperscript{33}

The complexities and unpredictability of modern business life have made courts willing to trust to the good faith of the parties and to sustain the validity of their working arrangements although a few decades ago such arrangements would have been condemned as mere agreements to agree and therefore not binding contracts. As an illustration, it has been held that a sales representative could recover reasonable compensation on orders over $250,000.00, although his contract merely specified that a subsequent agreement would be made as to compensation for orders of that size.\textsuperscript{34}

Flexible working arrangements that permit one of the parties a large degree of choice or freedom of decision are common. For example, consider an arrangement between a bank and an automobile dealer by which the bank agrees to purchase from the dealer contracts for the sale of cars to its customers,
the bank agreeing to purchase "such conditional sales contracts . . . as are acceptable to the bank at agreed rates of discount." 35

When parties to a contract in a good-faith effort to meet the business realities of the situation agree to a reduction of contract terms, there is authority that the promise of one party to accept a lesser performance by the other is binding even though technically the promise to render the lesser performance is not consideration because the obligor was already obligated to render the greater performance. Thus it has been held that a landlord's promise to reduce the rent was binding where the tenant could not pay the original rent and the landlord preferred to have the building occupied even though receiving a smaller rental. 36 Not only is good faith being relied upon to give validity to an agreement which would otherwise not be deemed a binding contract but good faith is being invoked to prevent one party from exercising a right expressly given him by the contract. 37

The increased emphasis on good faith is part of the same stream of social responsibility that is apparently expanding "concealment" liability by holding that it is "fraud" for a seller to fail to disclose a material fact which the buyer would not be likely to know or to think of inquiring about, 38 even though such matters were of public record. 39

As part of this trend of protecting one who relies, there is a tendency developing in the law to regard statements as an abbreviated or summary statement of subsidiary facts rather than as an opinion or sales talk. Thus it has been held that the statement that a house was of "sound construction" was a sum-

35 Biggins v. Southwest Bank, 322 F. Supp. 62, 63 (S.D. Calif. 1971). This policy is also manifest in the recognition of a floating lien on shifting inventory, Uniform Commercial Code § 9-204; a perfected security interest in unidentified proceeds, Uniform Commercial Code § 9-306(4)(b); and "open" terms in contracts for the sale of goods, Uniform Commercial Code §§ 2-201(3), 2-305, and 2-306 to 2-311.


37 Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 38 (8th Cir. 1968) (restricting a franchiser's power to exercise an express right of termination). Likewise it has been held that a supplier (California Canners and Growers) could not terminate its exclusive distribution contract without notice to the distributor (Melchiorre) even though no duration was stated in the contract which could be cancelled by either party, the court stating "he would need time to negotiate another source of supply. It would, indeed, be a weaselly phrase if despite Cal Can's avouchment of the exclusiveness of Melchiorre's right or privilege, it could with impunity dissolve and reassign the distributorship the moment after it had been consummated. Cal Can's abrogation ought not to be dismissed through so sterile a reading of its assurance." Melchiorre v. California Canners and Growers, 394 F.2d 413 (4th Cir. 1968).

Note the somewhat comparable utilization of the concept of good faith by U.C.C. § 1-108 in restricting the power of a creditor to accelerate a debt.


mation as to existing facts relating to its construction and not sales talk or a matter of opinion.\(^4^0\)

Additionally, the concept of good faith is bringing new limitations upon management and corporation law.\(^4^2\)

### E. Consumer Protection from Unconscionable Terms

One of the most significant developments in the era under consideration is the rise of the concept of "unconscionability" and its use as a weapon in the war for consumer protection. If a contract for the sale of goods or any clause thereof is "unconscionable," a court may refuse to enforce the clause or the contract or may so limit the application of any unconscionable clause as to avoid an unconscionable result.\(^4^2\)

The courts have seldom explicitly defined the term "unconscionability" or "unconscionable contract." The definition most commonly used is the vague one found in an early English case that an unconscionable bargain is one "such as no man in his senses and not under delusion would make on the one hand,\(^4^0\)


**41** Diamond v. Oreamuno, 29 App. Div. 2d 285, 287 N.Y.S.2d 300 (1968) (sustaining right of corporation to recover profit obtained by corporate officers selling their shares to a non-complaining outsider when officers did not disclose that earnings information not publicly known was unfavorable). In some instances, it is unlawful for a shareholder to act without disclosing to the other contracting party information he possesses by virtue of his position within the corporation. For example, it is unlawful for a majority shareholder to purchase the stock of a minority shareholder without disclosing material facts affecting the value of the stock known to the majority shareholder by virtue of his position of power within the corporation and not known to the selling minority shareholder.

Some degree of restriction is placed on a parent corporation in requiring "fairness" in its dealings with its subsidiary. Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883 (Del. 1970).

**42** \textit{Uniform Commercial Code} § 2-302. The \textit{Uniform Consumer Credit Code} extends this provision to credit and loan transactions with consumers. \textit{Uniform Consumer Credit Code} § 5.108.

As to the interpretation and application of the provision of the U.C.C., see 1 \textit{Anderson on the Uniform Commercial Code} 390-409 (1970).

When a sales transaction was disguised as a lease from a third person, in consequence of which the buyer did not have the benefit of a consumer protection statute applicable to "sales," the clause of the lease obligating the buyer to pay the "rent" without regard to any breach of warranty was not enforceable because unconscionable, on the theory that the consumer protection statute set a standard to measure unconscionability. United States Leasing Corp. v. Franklin Plaza Apartments, 319 N.Y.S.2d 531 (N.Y. Cir. 1971). In holding that the unconscionability section of the Code applied in this situation, the court declared, "It is no longer a novelty to refer to the 'unconscionable contract or clause' section of the Uniform Commercial Code (Sec. 2-302), as a proviso that is substantially broader in application than its appearance in the article on Sales would seem to indicate. It is considered to be 'a barometer not only in the area of sales, but as to other types of contracts, as well as new conceptual approaches to our entire body of law.'" 319 N.Y.S.2d at 535. In \textit{Educational Beneficial, Inc. v. Reynolds}, 324 N.Y.S.2d 813 (N.Y. Civ. Ct. 1971), a contract for computer training tuition was held void as unconscionable, citing U.C.C. § 2-302.

In \textit{Dean v. Universal C.I.T.}, 114 N.J. Super. 152, 275 A.2d 154 (1971), the court held void as unconscionable a clause in a credit sale contract for an automobile which barred the buyer from claiming that there were any items therein, as in the glove compartment, unless he gave registered mail notice within five days after repossession of the automobile. It is significant that the court did not sustain the clause as a reasonable protection from fraudulent claims designed to give the creditor reasonable opportunity to protect the alleged property of the debtor and to protect himself from liability. Significant is the fact that the court used "unconscionability" as the basis for invalidating the clause and made no reference at this point of the opinion to the fine print of the contract as furnishing a basis for holding that the "property claim" clause was a "surprise" clause, so that the buyer's signing the contract could not be regarded as an assent thereto.
and as no honest and fair man would accept on the other." One may well question the utility of this definition when one recalls that the steamboat was described by society as Fulton’s Folly and the purchase of Alaska by the United States was long condemned as Seward’s Folly. Seeking to give meaning to what society is striving to say, one can sense that unconscionability is an expansion of the concepts of illegality and “contrary to public policy.” That is, at first a contract was enforceable unless it was outright illegal. In time, judges were reluctant to enforce some contracts which seemed very wrong to them and they did not feel that the chance circumstance that the lawmaker had not yet declared such contracts illegal should require the courts to enforce them. Thus, the judges developed the concept of invalidity because contrary to public policy, even though not legislatively declared “illegal.” Today we have a widening of this concept of the extent to which society will condemn a contract: today the contract (1) must not be illegal, (2) must not offend public policy, even though it is not illegal, and (3) must not be unconscionable, even though it is not illegal and does not offend public policy as formerly defined. If we go behind terminology, we find two basic questions: (1) Who establishes the criterion or standard by which a contract is condemned? (2) What is the consequence of condemnation?

If the contract is “illegal,” it is the lawmaker who has declared the public policy that such a contract is not to be allowed. Likewise, the consequence of such condemnation is that either or both of the contracting parties may be subject to criminal prosecution and punishment, and the contract may not be binding. In the case of a contract which is contrary to public policy, the declarant of the standard is the court, and the consequence of violating the standard is merely that the contract may not be enforceable as between the parties; neither party, however, is subject to criminal prosecution. In the case of the statutory unconscionability standard, the lawmaker has declared the standard although it is apparent that judicial interpretation as to what that standard means will have the net result that the court is a co-declarant of the standard. With respect to consequences, the consequence of “unconscionability” is limited to the civil side of the law. In the absence of a statute, such as a consumer protection statute, expressly imposing a criminal penalty upon the making of an “unconscionable contract,” it is not a crime to make an unconscionable contract. 44

44 This adjective is included to distinguish the statutory unconscionability concept from the traditional equity chancellor concept. This distinction is not always maintained and some courts, encouraged by the existence of the statutory standard, have been willing to find that there always was a common-law principle equivalent to the statutory standard. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).
45 Note that it may also be observed that the civil consequence of unconscionability may follow a more flexible pattern than when the contract is condemned as contrary to public policy. Generally in the latter situation, the court views the contract on an “all or none” basis. The statutory unconscionability provisions permit a court to edit a contract to eliminate the unconscionable aspect when this may be done, with the result that there is still remaining a binding, although modified, contract between the parties.
The courts have been quick to pick up the authority given by the statutory concept of unconscionability. As stated by one court:

[T]he law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference. . . . We have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of law recognizes the importance of a free enterprise system but at the same time will provide the legal armor to protect and safeguard the prospective victim from the harshness of an unconscionable contract. Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions.\(^4\)

American courts have traditionally taken the view that competent adults may make contracts on their own terms, provided they are neither illegal nor contrary to public policy; and that in the absence of fraud, mistake, or duress, a party who has voluntarily entered into a contract is bound thereby, notwithstanding it was unwise, improvident, or disadvantageous for him to do so. Traditionally the courts have declared that a contract cannot be challenged because of inadequacy of consideration. The unconscionability concept is in conflict with these traditional rules of contract law, particularly when applied to condemn excessively high prices.\(^4\) One case has recently been decided which purports to continue the concept of the earlier consumer protection unconscionability decisions but which may well mark a turning point and retreat by the courts.

In *Morris v. Capitol Furniture & Appliance Co.*,\(^4\) the sales price was held not unconscionable because the buyer could have gone elsewhere, and therefore had a meaningful choice in the transaction. Specifically, household goods costing a seller $234.50, exclusive of freight, delivery, commissions and overhead were sold to a consumer under a contract giving her the choice of paying cash or paying in weekly installments for 2 years. The cash price was $594.85, plus a sales tax of $17.85. If payment was made in weekly installments of $12.00, a "credit charge" of $219.30 was added, making a total credit sales price of $832.00. The buyer claimed that the credit price was unconscionable because there was more than a 100% markup. The lower court rejected this conclusion on the ground that "since this contract was a new and independent one, defendant was free to indulge in comparative shopping. Consequently, an essential element of unconscionability, that is, '[t]he absence of meaningful choice' was not present in the instant case. . . ."\(^4\)

The appellate court quoted the lower court, apparently with approval, commented on the fact that the buyer had not

\(^{46}\) Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969). Note that in some instances the unconscionability provisions permit a court to avoid contracts or contract terms in "near fraud" cases without the necessity of determining whether fraud is actually present—something which might be virtually impossible or very expensive to prove in today's world. By finding that there is "unconscionability" when the facts are "near fraud," the court in effect liberates a consumer plaintiff from the burden of proving fraud by a preponderance of the evidence.


\(^{48}\) 280 A.2d 775 (D.C. App. 1971).

\(^{49}\) Id. at 776.
presented "evidence of the commercial setting, purpose and effect of this contract which would lead the court to a finding of unconscionability,"[50] and affirmed the action of the lower court.

What does the comparative shopping concept mean? Is it not equally true that in the other "unconscionable price" cases the buyer could have engaged in comparative shopping? What does the term "meaningful choice" mean? When is it absent? If the buyer would be faced with similar price patterns in all other stores in the same geographic area would the buyer still have had a meaningful choice? If the buyer does not have the money to buy for cash from either the seller or from someone else, is there a "meaningful choice"?

Note the similarity between the problem here involved and that in Henning-sen v. Bloomfield Motors,[51] in which the court was greatly influenced by the fact that even if the buyer had gone elsewhere he would have been met by the same warranty exclusion regardless of where he purchased his automobile. Note likewise the similarity between the problem involved and the concept of "adhesion contracts." Does the law say that an insurance policy is not a contract of adhesion merely because the insured was not compelled to procure the particular policy or because he could have gone elsewhere?

What does "meaningful choice" mean? If we adhere to the traditional common-law concepts and the policy of free enterprise, "meaningful choice" exists as long as there has not been any deception or coercion. If we are solicitous as to the buyer's interests, it could be said that "meaningful choice" does not exist unless the buyer has the economic power to give effect to his volitional choice. It is most unlikely, however, that American society is willing to condemn a transaction as involuntary merely because the buyer could not afford to do what he wanted to do, that is, to buy elsewhere or for cash. With respect to the future development of the concept of unconscionability, it should be recognized that the contracts condemned in the decisions preceding the Morris case, because the price charged was unconscionable, could for the most part have been sustained on the terminology of the Morris case. Ignoring those unconscionability cases which contained an element of fraud or near fraud, the remaining cases which condemned excessive prices because they were unconscionable presented just as much freedom to engage in comparative shopping and the buyer's choice was just as meaningful as in the Morris case. Yet a high-price markup was deemed not controlling in the Morris case because of the comparative shopping and meaningful choice elements.

Whether viewed from a legalistic or a socio-economic point of view, there is much cause to lament the rise of a pattern by which courts under U.C.C. § 2-302 determine whether a price is proper.

Without regard to the ultimate decision made by a court, I would be much more impressed by a decision as to whether a price is "excessive," if I could perceive on what basis or ground the conclusion was reached that the price was excessive. Is the mathematical difference between the cash price and the time price the sole criterion? It would seem that someone should consider the degree

[50] Id.
of risk attendant upon credit selling. The greater the number of transactions in which the seller sustains a loss, the greater is the "overhead" of selling, and prices must be increased by the seller either as to all buyers or as to the credit buyers. What is the administrative overhead cost of credit sales? If the buyer pays weekly installments over two years, there are 104 entries to be made on the seller's records. How much does this cost the seller? For many years it has often been said and accepted without challenge that a large enterprise cannot afford to send a bill or a letter with respect to a matter under $5.00 because of the high clerical and overhead costs involved. It would be worthwhile to know just how much of the credit charge imposed by a credit seller can be justified on the basis of administrative expense incurred because of the installment payment pattern. It may very well be that once we eliminate all fraud and deceptive selling practices found in some of the unconscionability cases, we come down to the conclusion that the problem basically is "the heavy cost of credit to consumers." It is very easy to become emotionally aroused over the plight of the poor consumer being exploited by the avaricious and greedy time seller. We can readily agree that such practices are not to be permitted. But how do we make the determination that a price is too much? And, how do we know what the price should be? How much of the credit price is consumed by overhead and bad risks? After the net profit is determined, how do we know when it is too much? How can we evaluate it as excessive or not excessive without establishing criteria applicable to cash sales as well as credit sales and without regard to the economic position of the buyer? Or do we contemplate a society in which one rate of profit is deemed proper in selling to those in higher income brackets but not when the buyer is in a lower income bracket? Are we willing to impose upon the merchant seller a legal obligation to do that which professional men have for many years done voluntarily: charge the poor clients smaller fees or never bothering to collect their bill?

Extensive research to obtain basic data must be made. Then policy decisions of far-reaching societal consequence must be made. One may well question whether a court of law armed with U.C.C. § 2-302 or a similar statutory provision is the proper body to make that determination and to make it in a private suit between two private litigants. Private litigation does not ordinarily produce the impartial data which is needed by society in order to make sound planning determinations. Likewise, private litigation is complete with the entry of the final judgment and the expiration of the time for appeal: it is not concerned with the societal consequence of the decision. A citizen, as distinguished from a litigant, may well ask the question whether judicial monitoring of prices by way of the unconscionability clause protects consumers generally or whether it is merely a windfall for a few isolated consumers. If one seller has his economic knuckles rapped by a court, does he change his price structure? Does he raise all his prices generally to offset the reduction required by the court's decision? Does he sell at a nominally lower price but then evade the court's decision by requiring the credit buyer to make a secret or disguised payment of the amount of the reduction in price? Does the "industry" reduce its prices or does the

court's opinion compelling a defendant seller to reduce his price merely force
that one seller to price himself out of the competitive market? Does the seller
make it impossible for certain classes of buyers to obtain goods on credit by
raising his standards for acceptable credit risks in order to offset the “hazards”
of selling at a lower price? If the credit seller is thus stricter, and refuses to sell
to the given consumer, does the consumer go away happy or does he pick up
a stone and throw it through the store window and off we go to another civil
disorder?23

Before I could say that a decision under U.C.C. § 2-302 is “right” or
“wrong,” I would like to have impartial data relating to these questions. Our
economic welfare is too important to be tossed lightly around in a game of “stick
the label ‘excessive’ on the price tag.” What are the realities of our world today?
Let us set aside the game of blindman’s buff when we are making determina-
tions of social significance. Let us find out what we are really doing. Research
must take the place of semantics and emotions, yes, and even of traditional ap-
proaches and procedures.

F. Protection of the Indigent

The current growth of consumer protection cannot be fully understood
without recognizing a companion element of protection of the indigent—both
of these elements, protection of the consumer, and protection of the indigent,
stemming from the social force of protection of the person. Protection of the
indigent long existed in the form of the criminal court judge’s discretionary
authority to appoint counsel to represent an indigent defendant who did not
have an attorney. In 1963, this right of the trial judge was elevated to a duty
so that it became a constitutionally-protected right of the accused to have an
attorney appointed for him at public expense when he was charged with a
serious offense and was unable to pay for a private attorney.54

53 Note that consumer dissatisfaction is generally regarded as one of the major causes
of the civil disorders that have devastated many of our major cities in the last several years.


This had been foreshadowed by Johnson v. Zerbst, 304 U.S. 458 (1938), which had
held that federal courts were required to appoint counsel to represent indigent defendants,
Gideon thereafter extending this obligation of the federal courts to state courts.

There is some authority that a court should appoint an attorney to represent an indi-
(App. Div. N.Y. 1971). The translation or carrying over of criminal concepts to the civil
side has been made in Blair v. Pitchess, discussed in note 68 infra. The citation of civil and
criminal case authority by the U.S. Supreme Court in Boddie v. Connecticut, see note 58
infra, is a further indication of the applicability of the application of criminal law concepts
to civil litigation.

In the Application of Wright, 189 N.W.2d 447 (S.D. 1971), the court adhered to the
rule that a court is not required to appoint counsel for an indigent defendant charged with a
petty offense because extending the right to counsel in such cases "seems to us to bear little
relation to the realities of our society," for "If such offenders are given the right to appointed
counsel, to whom can it be reasonably denied?" The concern of the court is well-taken but
it reveals clearly that the limitation of the Gideon rule to serious offenses is dictated by
practical expediency. In effect it is an application of the old maxim de minimis non curat lex
to the field of personal rights. As a matter of abstract analysis, it is difficult to exclude the
protection of some rights because of the “realities” of modern society. It may well be that
society will recognize that abstractly every defendant in both civil and criminal litigation
should be represented by counsel but then, having in mind the expense of and the problem of
the availability of counsel, may refuse to adhere literally to the theoretical premise and
The concept of protection of the indigent was then expanded so that now the recipient of welfare payments is entitled to a hearing before such payments may be terminated on the ground of the recipient's disqualification. Likewise, a state welfare law may not impose residence qualifications or exclude from benefits aliens generally or aliens who have not resided within the state for a long period of time, such as 15 years. A judge cannot impose a sentence of "$30.00 or 30 days," on the theory that such sentence discriminates against the defendant who does not have $30.00. A plaintiff seeking a divorce cannot be required to pay court costs in advance where the effect of such requirement, because of the indigence of the plaintiff, is to deny the plaintiff the right to sue for a divorce. When a debtor has been discharged in bankruptcy, his state license to operate an automobile cannot be revoked under a state financial responsibility act when such revocation is based upon the non-satisfaction of a judgment which was discharged in bankruptcy.

The concept of protecting the indigent shades off into procedural protection of the debtor and gives such modern decisions as those holding that due process of law prohibits a prejudgment attachment of wages, a prejudgment attachment of the debtor's property generally, a seizure by a hotel of property for a debt owed by a guest—the historical landlord's lien, the seizure by a landlord of property of the tenant because of overdue rent—the landlord's distraint.

Appeals are now pending in the United States Supreme Court to determine whether a contract authorizing a creditor to confess judgment against a debtor upon his default is valid; whether a secured creditor can repossess collateral upon the default of the debtor without prior notice and hearing as to his right to repossess; and whether a state can require an indigent person for whom the court has appointed an attorney to indemnify the state for such expense.

accept as a compromise the obligation to appoint counsel only for persons accused of the more serious criminal offenses.

57 Short v. Tate, 401 U.S. 395 (1971).
58 Boddie v. Connecticut, 401 U.S. 371 (1971). The opinion of the Court purports to limit its applicability to divorce actions on the theory that a state after requiring the use of its courts to obtain a divorce cannot shut the doors of the court to a person merely because of indigence. This is an unsound restriction as equal protection requires that no barrier exclude the indigent from any court in any action. This view is recognized by a concurring opinion and is implicit in the Court's citation of a criminal law case as support for its decision in a divorce case, such citing recognizing that there is no valid distinction between one type of judicial proceeding and another for the purpose of determining the effect of indigence.
64 D.H. Overmyer Co. v. Frick, No. 69-5; Swarb v. Lennox, No. 70-6.
65 Fuentes v. Faircloth, No. 70-5039.
apparently no one has yet raised the question of whether a clause giving the creditor power to accelerate the debt upon default is valid, as against the contention that there must be a notice and hearing as to the existence of a default before there can be an acceleration on the basis that there was a default. Should such a limitation be recognized, its application will be most interesting when the acceleration clause gives the creditor the right to accelerate when he deems himself insecure or to accelerate “at will.”

Returning to the adjudicated cases, it has also been held that a replevin plaintiff in a state court action cannot obtain possession of the claimed property without first showing the existence of probable cause comparable to that required for the issuance of a search warrant. Courts adopting this conclusion take the position that a provision in a security agreement expressly authorizing the creditor to repossess the property does not alter the conclusion, relying on the theory that such a provision is in the nature of an adhesion clause which should not be held binding and in any event which is to be construed as authorizing repossession only by the seller, and not authorizing the entry of an officer or public employee acting under a court writ. It would appear that ultimately the requirement of notice and hearing will be extended to invalidate all summary remedies of a creditor, whether by entering a judgment by confession, taking possession of property, or enforcing a lien on property in the creditor’s possession. The fact that a procedure has been long-rooted in the past is no assurance of its future validity.

III. The Process of Governing

A. Jurisdiction

The concept of physical presence as an essential element for jurisdiction in personam has been supplemented to permit the exercise of such jurisdiction over a nonresident when he makes a contract or commits a tortious act within the state, even though it is a single act or contract, or when he engages in business within that state. Under some statutes it is sufficient that he derive economic benefit from commercial activities within the state although the nonresident did not actually participate in such transactions, as when the nonresident defendant sold goods to a middleman who sold the goods in the forum state. This is a

67 U.C.C. § 1-208 recognizes the validity of such clauses, imposing only the requirement that such a power be exercised in good faith and placing upon the debtor the burden of proving the nonexistence of good faith.

68 Blair v. Pitchess, 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971) ("... in order to create a constitutional prejudgment replevin remedy, there must be a provision for a determination of probable cause by a magistrate and for a hearing prior to any seizure, except in those few instances where important state or creditor interests justify summary process...". Obviously, the affidavits customarily required of those initiating [such actions] do not satisfy the probable cause standard. Such affidavits need allege only that the plaintiff owns property which the defendant is wrongfully detaining. The affiants are not obliged to set forth facts showing probable cause to believe such allegations to be true, nor must they show probable cause to believe that the property is at the location specified in the process. Finally, such affidavits fail to comply with the probable cause standard because they are not passed upon by a magistrate. ..."; Laprease Raymours Furniture Co., 315 F. Supp. 716 (E.D.N.Y. 1970). Contra, Brunswick Corp. v. J. & P., Inc. 424 F.2d 100 (10th Cir. 1970); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

very practical and logical extension of the concept of the nonresident motorist service statutes first sustained in 1927.\textsuperscript{70} It is, however, a far cry from the basic concept of jurisdiction as the exercise of power by the sovereign over the person of the defendant.\textsuperscript{71} Still further removed is the extension of the long-arm concept to permit service in New York, the forum state, upon a West German corporation with respect to a cause of action arising in West Germany.\textsuperscript{72}

The net result of the long-arm concept is to permit the process of a court to run anywhere in the world, granted the existence of sufficient contacts of the defendant with the forum state to satisfy the concept of due process. Such "contacts" are being increasingly found in the obtaining of economic benefit from the forum state, as distinguished from physical presence or the doing of an act therein.

B. The Federal Welfare Power

One of the most incredible changes that has taken place in the third of the twentieth century under consideration has been the rise of the federal general welfare power. Admittedly the written Constitution does not grant any general welfare power and the legal historian will recall that the early New Deal reform laws of President Roosevelt were held unconstitutional because the Court then deemed them not sustainable as an exercise of the granted federal powers. Beginning with the decision of \textit{N.L.R.B. v. Jones & Laughlin Steel Corp.},\textsuperscript{73} sustaining the validity of the Wagner Labor Relations Act of 1935, the Court began an expansion of the commerce power which by 1946 permitted the Court to say that by virtue of the commerce power "Congress can effectively deal with problems concerning the welfare of the national economy. . . . We reaffirm once more the constitutional authority resident in Congress by virtue of the commerce power to undertake to solve national problems directly and realistically . . . that follows from the fact that the federal commerce power is as broad as the economic needs of the nation. . . ."\textsuperscript{74}

As indicating that Congress is in fact regulating the general welfare, by whatever legal theory it may be constitutionality sustained, consider the follow-

\begin{itemize}
\item Hess v. Pawloski, 274 U.S. 352 (1927).
\item \textit{Compare} Pennoyer v. Neff, 95 U.S. 714 (1877).
\item 301 U.S. 1 (1937).
\item American Power & Light Co. v. Securities and Exchange Comm'n, 329 U.S. 90 (1946). It is worth noting that in that case the Court sustained the federal death sentence for improper utility holding companies, concluding that such holding companies came within the reach of the federal commerce power because the holding company systems used interstate channels of communication to promote investment. Does this mean that all phases of economic activity can be regulated by the federal government as long as they use interstate communication?

This is fairly the tail wagging the dog. If use of interstate means of communication for promotion of enterprise activities is a sufficient basis on which to rest an exercise of the federal interstate commerce power, it would necessarily follow that every business that utilizes mail, telephone, radio, or television for either advertising or the actual conduct of the enterprise becomes "interstate commerce." It would appear that there would not be much remaining outside of the sphere of federal power.
ing statutes adopted by Congress in 1970. It is very important to bear in mind that most of the statutes are the result of popular demand and thus were either authorized or ratified by the sovereign people. The general welfare nature and objective of the following statutes is emphasized by the committee reports presented to Congress in support of the various statutes, the intent of Congress being clearly to regulate the general welfare, without any great concern over the legal theory or "constitutionality" of such federal action. The statutes include:

School Lunch Program,
Public Health Training Act,
Medical Library Assistance Extension Act of 1970,
Commission on Population Growth and the American Future,
Saline Water Conversion Program,
Public Health Cigarette Smoking Act of 1969,
Elementary, Secondary and Other Educational Amendments of 1969,

---

75 These statutes are listed merely in the sequence of adoption. This serves to give a better appreciation of the bewildering "all over the lot" aspect of running a modern society.
76 It is curious that what public protest one hears, such as that against involvement in foreign wars, is directed at federal action within areas in which the federal government has undoubted power to act. I was about to write that one does not hear of voters dissenting from federal crime control or consumer protection on the ground of lack of power of the federal government nor manifest disapproval as by dumping tea in the Boston Harbor. How times have changed! Today the Boston Tea Party would be held a violation of the Federal Refuse Matter Act of 1899 as a pollution of the ocean.
78 Pub. L. No. 91-208, 84 Stat. 52. "Advancing urbanization and acceptance of public responsibility for new health services to the population have expanded the need for personnel trained in protecting the public health. For many years agencies concerned with community health programs have been faced by shortages of professional personnel with public health training...including physicians, nurses, and sanitarians. To meet the need for training more public health personnel, many educational institutions—such as schools of public health, engineering and nursing; departments of preventive medicine and dentistry; and other institutions which provide special public health training—must continue to expand their enrollment capacity. Such expansion will require additional highly specialized faculty and supportive staff..." S. Rep. No. 91-586, 2 U.S. Code Cong. & Ad. News 2491 (1970).
Expansion of the School Lunch Program, Child Nutrition—Special Milk Program,
Medical Facilities Construction and Modernization Amendments of 1970,
Public Works and Economic Development,
National Commission on Libraries and Information Science Act,
National Foundation on the Arts and the Humanities Amendments of 1970,
Sea Grant Colleges Appropriations Extension,
Emergency Home Finance Act of 1970,
Newspaper Preservation Act (granting anti-trust exemption to operating agreements entered into to prevent financial collapse),

87 Pub. L. No. 91-304, 84 Stat. 375. To extend earlier laws to "provide Federal help, in cooperation with the States, to assist communities, areas, and regions in the United States which are suffering from excessive unemployment or underemployment by providing financial and technical assistance needed for the creating of new jobs. Its emphasis is on long-range planning and programming for economic development with the objective of enhancing the domestic prosperity by the establishment of stable and diversified local economies. This is accomplished by expanding new and existing public works, providing loans for businesses, and technical assistance necessary to create directly or indirectly new opportunities for long-term employment and economic growth." S. Rep. No. 91-284, 2 U.S. Code Cong. & Ad. News 3393 (1970).
88 Pub. L. No. 91-345, 84 Stat. 440. "... to establish a national commission on libraries and information sciences ... to make a comprehensive study and appraisal of the role of libraries as resources for scholarly pursuits, and centers for the dissemination of knowledge, and as components of the evolving national information systems ... to develop recommendations for action by Government or private institutions and organizations designed to ensure an effective and efficient system for the Nation." S. Rep. No. 91-196, 2 U.S. Code Cong. & Ad. News 3452 (1970).
89 Pub. L. No. 91-346, 84 Stat. 443. "The Committee [on Labor and Public Welfare] recognizes the growing appreciation of the arts and the humanities by citizens across the Nation and urges the Endowments to continue their efforts to decentralize American art and culture and emphasize those programs that will stimulate the creation of new cultural institutions and strengthen established ones in local communities, States and regions. By further integrating the arts and humanities into the mainstream of American life, increased opportunities for broader appreciation of them will be created. ..." S. Rep. No. 91-879, 2 U.S. Code Cong. & Ad. News 3473 (1970).
91 Pub. L. No. 91-351, 84 Stat. 450. Based on the premise "that economic conditions in this Nation are approaching a critical level, and that immediate action is necessary if we are to avoid a further drop in the economy and possibly a serious recession by the end of the year." S. Rep. No. 91-761, 2 U.S. Code Cong. & Ad. News 3489 (1970).
92 Pub. L. No. 91-353, 84 Stat. 466. Section 2 of the Act declares that "in the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan
area where a joint operating arrangement has been hitherto entered into because of economic
distress or is hereafter effected in accordance with the provisions of this Act.”
93 Pub. L. No. 91-356, 84 Stat. 471. This Act “provides basic support for development of
fundamental knowledge in all scientific fields and disciplines. This knowledge and basic capa-
bility are needed to meet the challenge of maintaining a viable and growing and technologically
based physical and social environment.” S. REP. No. 91-983, 2 U.S. CODE CONG. & AD.
94 Pub. L. No. 91-373, 84 Stat. 695, extending the unemployment compensation program
which “has provided a continuing income to millions of men and women in periods of unem-
ployment. The program has also added a stability to the national economy that has moderated,
and on occasion perhaps even averted, economic recession.” S. REP. No. 91-752, 2 U.S.
95 Pub. L. No. 91-378, 84 Stat. 794. “Designed to provide summer employment oppor-
tunities for youth, primarily those from urban areas, who have varying economic, social and
racial backgrounds . . . More than a year ago, the President's National Advisory Commis-
sion on Civil Disorders reported that the lack of substantial employment opportunities for the
youth trapped in urban ghettos was one of the principal causes of riots. The youth of these
areas were characterized as encountering a life of despair and hopelessness. . . . The Youth
Conservation Corps would reach many of these young men and women and demonstrate to
them that they can play a significant role in the functioning of our society . . .” S. REP. No.
97 Pub. L. No. 91-387, 84 Stat. 829. “. . . to extend an existing program to provide financial
assistance to commercial fishermen.” H.R. REP. No. 91-1273, 2 U.S. CODE CONG. &
98 Pub. L. No. 91-410, 84 Stat. 862, extending “the reporting date for the institutional
investors' study presently being prepared by the Securities and Exchange Commission.” H.R.
99 Pub. L. No. 91-427, 84 Stat. 884, authorizing expenditures for research to protect coral
reefs from destruction by the Starfish Crown of Thorns. “. . . in addition to providing a habitat
and food source for fish, the living coral reefs offer protection . . . during tropical storms.
If the coral dies, and begins to erode the islands become susceptible to erosion and other dam-
age caused by typhoons.” H.R. REP. No. 91-1406, 2 U.S. CODE CONG. & AD. NEWS 3933
100 Pub. L. No. 91-430, 84 Stat. 85. “. . . to carry out a program of research and promo-
tion designed to expand the domestic and foreign markets and increase utilization for U.S.
101 Pub. L. No. 91-431, 84 Stat. 886. To “(1) state congressional findings that many of
the Nation's communities are unable to finance the construction of urgently needed public
facilities and that there is an immediate need for such facilities to provide basic safeguards for
the health and well-being of our citizens, to check widespread water pollution, and to provide
an effective and practical method of combating rising unemployment; (2) to re-enact the bal-
ance of the authorization for basic water and sewer facilities provided for in Title VII of
the Housing and Urban Development Act of 1965 and provide for an additional authorization
of $1,000,000,000.00; and (3) extend for 1 year . . . the time within which a community
may qualify for a basic water and sewer facilities grant . . .” H.R. REP. No. 91-1263, 2 U.S.
103 Pub. L. No. 91-453, 84 Stat. 962. “. . . to provide long-term financing for expanded
urban mass transportation programs . . .” H.R. REP. No. 91-1264, U.S. CODE CONG. & AD.
Communicable Disease Control Amendments of 1970,\(^{104}\)  
Credit Union Insurance Act,\(^{105}\)  
Federal Aid in Wildlife and Fish Restoration,\(^{106}\)  
Resource Recovery Act of 1970,\(^{107}\)  
Comprehensive Drug Abuse Prevention and Control Act of 1970,\(^{108}\)  
Public Health Service Act Amendments,\(^{109}\)  
Environmental Education Act,\(^{110}\)  
Developmental Disability Services and Facilities Construction Amendments of 1970,\(^{111}\)  
Health Training Improvement Act of 1970,\(^{112}\)  
Almonds Marketing Orders Act,\(^{113}\)


\(^{106}\) Pub. L. No. 91-503, 84 Stat. 1097. "... to encourage comprehensive planning by State Fish and Game Departments, to increase the revenues available to the States for wildlife restoration projects, and to provide funds to be used by the States to carry out programs supporting hunter safety." S. REP. No. 91-1289, 2 U.S. Code Cong. & Ad. News 4353 (1970).

\(^{107}\) Pub. L. No. 91-512, 84 Stat. 1227, amending "the Solid Waste Disposal Act in order to provide financial assistance for the construction of solid waste disposal facilities, to improve research programs pursuant to such Act, ... (1) to expand and intensify the development of new technologies for solid waste disposal; (2) to promote greater initiative on the part of the States in assuming increasing responsibilities for solid waste disposal programs, ..." H.R. REP. No. 91-1153, 3 U.S. Code Cong. & Ad. News 4553 (1970).

\(^{108}\) Pub. L. No. 91-513, 84 Stat. 1236. "... to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse. ..." H.R. REP. No. 91-1444, 3 U.S. Code Cong. & Ad. News 4566 (1970).

\(^{109}\) Pub. L. No. 91-515, 84 Stat. 1297 extending "the existing program known as Regional Medical Programs, under which grants are made for local based programs designed to improve the diagnosis, care, and treatment of heart disease, cancer, and stroke" and expanding the programs "to cover kidney disease." H.R. REP. No. 91-1297, 3 U.S. Code Cong. & Ad. News 4676 (1970).

\(^{110}\) Pub. L. No. 91-516, 84 Stat. 1312. "[R]ecently it has become apparent to many ... that the ever-increasing rate of using resources, and the pollution which results from this use, might result in the destruction rather than the enhancement of the quality of the Nation's environment. If the people of the United States are to develop these resources in a creative and nondestructive manner, they must have the knowledge and insight that will enable them to take into account the environmental consequences of the decisions that they make. The Environmental Quality Education Act ... is designed to assist in providing the public with this knowledge and insight. ... Every phase of education, from preschool through adult and continuing education, must be re-ordered to permit the introduction of ecological understanding." S. REP. No. 91-1164, 3 U.S. Code Cong. & Ad. News 4704 (1970).

\(^{111}\) Pub. L. No. 91-517, 84 Stat. 1316. "... to assist the States in developing a plan for the provision of comprehensive services to persons affected by mental retardation and other developmental disabilities originating in childhood, to assist the States in the provision of such services ... to assist in the construction of such facilities to provide the services needed to carry out such plan. ..." H.R. REP. No. 91-1277, 3 U.S. Code Cong. & Ad. News 4714 (1970).

\(^{112}\) Pub. L. No. 91-519, 84 Stat. 1342. "... to amend Title VII of the Public Health Service Act to establish eligibility of new schools of medicine, dentistry, osteopathy, pharmacy, optometry, veterinary medicine, and podiatry for institutional grants under Section 771 thereof, to extend and improve the program relating to training of personnel in the allied health professions. ..." S. REP. No. 91-1002, 3 U.S. Code Cong. & Ad. News 4755 (1970).

\(^{113}\) Pub. L. No. 91-522, 84 Stat. 1357, to authorize marketing research and promotion projects including paid advertising for almonds.
Agricultural Act of 1970,\textsuperscript{114} Drug Abuse Education Act of 1970,\textsuperscript{115} Horse Protection Act of 1970,\textsuperscript{116} Investment Company Amendments Act of 1970,\textsuperscript{117} Small Business Act Amendments,\textsuperscript{118} Water Bank Act,\textsuperscript{119} Atomic Energy Utilization for Industrial or Commercial Purposes,\textsuperscript{120} Investor Protection,\textsuperscript{121} Peanut Marketing Quotas,\textsuperscript{122} Family Planning Services and Population Research Act of 1970,\textsuperscript{123}

\textsuperscript{114} Pub. L. No. 91-524, 84 Stat. 1358. "... to establish improved programs for the benefit of producers and consumers of dairy products, wool, wheat, feed grains, cotton and other commodities ... to assure consumers of abundant supplies of food and fiber at fair and reasonable prices. It would protect farm prices and income, provide for expanding markets at home and abroad, minimize Government costs, and provide administrative flexibility to assure workability of programs." S. REP. No. 91-1154, 3 U.S. CODE CONG. & AD. NEWS 4788 (1970),

\textsuperscript{115} Pub. L. No. 91-527, 84 Stat. 1385. "... to make grants to conduct special educational programs and activities concerning the use of drugs and for other related educational purposes ..." S. REP. No. 91-1244, 3 U.S. CODE CONG. & AD. NEWS 4843 (1970).

\textsuperscript{116} Pub. L. No. 91-540, 84 Stat. 1404. "... to end the inhumane practice of deliberately making sore the feet of Tennessee walking horses in order to alter their natural gait ... Prohibiting the shipment of any horse in commerce, for showing or exhibition, which a person has reason to believe is sored; ... making unlawful the exhibiting of a sored horse in any horse show or exhibition in which that horse or any other horse was moved in commerce; ... prohibiting the holding of any horse show in which a sored horse is exhibited if any of the horses in that show were moved in commerce." H.R. REP. No. 91-1597, 3 U.S. CODE CONG. & AD. NEWS 4870 (1970).

\textsuperscript{117} Pub. L. No. 91-547, 84 Stat. 1413. "... to define the equitable standards governing relationships between investment companies and their investment advisors and principal underwriters. ..." S. REP. No. 91-184, 3 U.S. CODE CONG. & AD. NEWS 4897 (1970).

\textsuperscript{118} Pub. L. No. 91-556, 84 Stat. 1468. "... to increase ... the amount of loans, guarantees, and commitments which can be outstanding at any time from the business loan and investment fund of the Small Business Administration." S. REP. No. 91-1366, 2 U.S. CODE CONG. & AD. NEWS 2970 (1970).

\textsuperscript{119} Pub. L. No. 91-559, 84 Stat. 1468. To authorize "the Secretary of Agriculture to enter in 10-year renewable contracts with landowners and operators in important migratory water fowl nesting and breeding areas for the conservation of water on specified wetlands." S. REP. No. 91-1393, 3 U.S. CODE CONG. & AD. NEWS 4974 (1970).

\textsuperscript{120} Pub. L. No. 91-560, 84 Stat. 1472:


\textsuperscript{122} Pub. L. No. 91-568, 84 Stat. 1499. "... to amend the Peanut Marketing Quota provisions. ... There are many peanut acreage allotments too small to constitute an economic unit in view of rising costs of producing and harvesting peanuts. ... Much greater mechanization in the production of peanuts involves the use of very expensive equipment, herbicides, and improved methods of cultivation. This simply means that the cost per acre of producing peanuts is going up. Therefore, in many cases, farmers need to increase their peanut acreage allotment in order to realize a reasonable return on their tremendous investment." H.R. REP. No. 91-164, 3 U.S. CODE CONG. & AD. NEWS 5034-35 (1970).

\textsuperscript{123} Pub. L. No. 91-572, 84 Stat. 1504. "... to improve and expand the availability of family planning services and information to all persons desiring such; to assure the coordination, supervision, administration, and evaluation of domestic family planning services and population research activities with regard to present and future programs; to enable public and nonprofit private entities to plan and develop comprehensive service programs; to provide for the development and to make readily available information concerning family planning and the dynamics of population growth; to assist in expanding the availability of trained manpower needed to carry out these objectives; and to establish an Office of Population Affairs in the Department of Health, Education and Welfare as a primary focus within the Federal Government on matters pertaining to population research and family planning." H.R. REP. No. 91-1472, 3 U.S. CODE CONG. & AD. NEWS 5068 (1970).

\textsuperscript{124} Pub. L. No. 91-577, 84 Stat. 1542. 
\textsuperscript{125} Pub. L. No. 91-579, 84 Stat. 1560. 
\textsuperscript{126} Pub. L. No. 91-610, 84 Stat. 1817. 
\textsuperscript{127} Pub. L. No. 91-623, 84 Stat. 1850. 
\textsuperscript{128} Pub. L. No. 91-631, 84 Stat. 1876. 
\textsuperscript{129} Pub. L. No. 91-644, 84 Stat. 1880. 
\textsuperscript{130} Pub. L. No. 91-646, 84 Stat. 1894. 
\textsuperscript{132} Pub. L. No. 91-670, 84 Stat. 2040. 
\textsuperscript{133} Pub. L. No. 91-682, 84 Stat. 2087. 

\textsuperscript{124} Pub. L. No. 91-577, 84 Stat. 1542. "... to encourage the development of novel varieties of... plants and to make them available to the public, providing protection available to those who breed, develop, or discover them, and thereby promoting progress in agriculture in the public interest..." H.R. Rep. No. 91-1605, 3 U.S. CODE CONG. & AD. NEWS 5082 (1970).

\textsuperscript{125} Pub. L. No. 91-579, 84 Stat. 1560. "... to amend the Act of August 24, 1966, relating to the care of certain animals used for purposes of research, experimentation, and exhibition, or held for sale as pets."

\textsuperscript{126} Pub. L. No. 91-596, 84 Stat. 1590. "... to authorize the Secretary of Labor to set standards to assure safe and healthful working conditions for working men and women, to assist and encourage States to participate in efforts to assure such working conditions, to provide for research, information, education, and training in the field of occupational safety and health..." S. Rep. No. 91-1282, 3 U.S. CODE CONG. & AD. NEWS 5177 (1970).

\textsuperscript{127} Pub. L. No. 91-610, 84 Stat. 1817. "... to extend for one year the authorization for programs under the Vocational Rehabilitation Act."


\textsuperscript{129} Pub. L. No. 91-623, 84 Stat. 1868. "... to authorize the assignment of commissioned officers of the Public Health Service to areas with critical manpower shortages, to encourage health personnel to practice in areas where shortages of such personnel exist..." H.R. Rep. No. 91-1662, 3 U.S. CODE CONG. & AD. NEWS 5775 (1970).

\textsuperscript{130} Pub. L. No. 91-631, 84 Stat. 1876, declaring "that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods of the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities."


\textsuperscript{132} Pub. L. No. 91-646, 84 Stat. 1894. "... establishing a uniform policy for the fair and equitable treatment of persons who are displaced, or have their real property taken for Federal and federally assisted programs. The need for such legislation arises from the increasing impact of Federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasingly urban population..." H.R. Rep. No. 91-1656, 3 U.S. CODE CONG. & AD. NEWS 5914 (1970).

\textsuperscript{133} Pub. L. No. 91-648, 84 Stat. 1909. "... to provide grants for the improvement of States and local personnel administration, to authorize Federal assistance in training State and local employees to provide grants to State and local governments for training of their employees..."

\textsuperscript{134} Pub. L. No. 91-670, 84 Stat. 2040, regulating the advertising of projects as to milk and tomatoes and potatoes and enabling "potato growers to finance promotion programs to improve..."
Food Stamp Act Amendments,\(^{135}\) Medicare Hospital Standards,\(^{136}\) and Lead-Based Poisoning Prevention Act.\(^{137}\)

It is true that many of the statutes above noted are appropriation laws, and one can say that the federal government can spend money for a general welfare program even though it does not have any power to directly regulate the general welfare. One would have technical support for this position in \textit{United States v. Butler}\(^{138}\) and \textit{Helvering v. Davis}.\(^{139}\) Perhaps we should test the practical validity of this distinction. Assume that you invested a substantial sum of money in a corporation formed to make television sets and then the board of directors proceeds to spend large sums for the general welfare. Would you as a shareholder have a legal and moral ground to complain? If you would, why should there be a different answer because the money you give to the enterprise is involuntarily taken as taxes rather than voluntarily given as an investment? Many, such as Madison, claimed that the federal government could only spend money with regard to matters which the federal government could regulate, and therefore could not spend money for the general welfare. Perhaps in 1970, we can view this matter in the perspective of history. Almost two centuries ago, a new nation was formed to exercise the powers delegated to the Congress of the United States by article I, section 8, of the Constitution. General welfare as we think of it today was either unknown or was a matter to be left to the states, the local communities, or the family groups. By the end of the first third of the present century, our constitutional law was taking the compromise position of permitting the federal government to spend—but not to legislate—for the general welfare. As we go into the final third of this century, the constitutional law is apparently moving the rest of the way to accept by acquiescence, if not direct holding, that the Congress can regulate the general welfare.

\(^{135}\) Pub. L. No. 91-671, 84 Stat. 2048 “recognizing that limited purchasing power is related to hunger and malnutrition, [and designed] to assist low-income households to increase their expenditures for food and to upgrade the quality of their diets. Under it, the eligible households exchange the amount of money they have in spending for food for an allotment of coupons of higher monetary value. The difference between the amount the household pays for the coupons and the value of the coupon allotment—the free coupons—represents the Federal contribution to the household’s increased food purchasing power.” H.R. Rep. No. 91-1402, 3 U.S. Code Cong. & Ad. News 6027 (1970).

\(^{136}\) Pub. L. No. 91-690, 84 Stat. 2074. Amending the Social Security Act “to modify the nursing service requirement and certain other requirements which an institution must meet in order to qualify as a hospital thereunder so as to make such requirements more realistic insofar as they apply to small institutions.” H.R. Rep. No. 91-1676, 3 U.S. Code Cong. & Ad. News 6117 (1970).

\(^{137}\) Pub. L. No. 91-695, 84 Stat. 2078. “... to provide Federal financial assistance to help cities and communities to develop and carry out intensive local programs to eliminate the causes of lead-based paint poisoning, and local programs to detect and treat incidents of such poisoning, to establish a Federal demonstration and research program to study the extent of the lead-based paint poisoning problem and the methods available for lead-based paint removal, and to prohibit future use of lead-based paint in Federal or federally assisted construction or rehabilitation. ...” S. Rep. No. 91-1432, 3 U. S. Code Cong. & Ad. News 6130 (1970).

\(^{138}\) 297 U.S. 1 (1936).

\(^{139}\) 301 U.S. 619 (1937).
Many statutes are still carefully drawn to speak in terms of "affecting [interstate] commerce." This has the magical effect of transforming what to the ordinary observer would appear to be local activity into conduct within the reach of the federal interstate commerce power as interpreted in the *Jones & Laughlin Steel Company* case. By applying this concept, one bypasses the earlier concept of interstate commerce as the translation of goods, persons, or intelligence across a state line.\(^{140}\)

The diminished or non-existent utility of the concept of "in or affecting interstate commerce" may also be seen in the Occupational Safety and Health Act of 1970.\(^{141}\) While the definitions section begins by rendering lip service to the concept, by defining "employer" as "a person engaged in a business affecting [interstate] commerce who has employees . . ."\(^{142}\) and "employee" as "an employee of an employer who is employed in the business of his employer which affects [interstate] commerce,"\(^ {143}\) the Act then proceeds to get down to its declared purpose and broadly defines "occupational safety and health standards" in terms of being "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."\(^ {144}\) The Secretary of Labor is then authorized to promulgate occupational safety and health standards.\(^ {145}\) Neither the definition of such standards nor the grant of authority to the Secretary of Labor bothers to refer to the limiting concept of "in or affecting interstate commerce." By standard principles of statutory construction, the Act could be interpreted as though the sections defining "occupational health standards" and granting the power to the Secretary of Labor expressly confined such definition and grant of power to places of employment in industries "affecting interstate commerce." I doubt whether this question will ever be raised because I cannot conjure up a hypothetical situation in which there will be a health hazard sufficient to come to the attention of the Secretary of Labor or sufficient to attract the attention of those charged with the enforcement of his regulations which would not satisfy the concept of "affecting" interstate commerce under the concept that began with the *Jones & Laughlin Steel Company* case.\(^ {146}\) Conceivably, if you hire a man to cut down the tree in your back yard,\(^ {147}\) and you employ him to convert the tree into clothespins which you sell to your neighbors, we might have a situation of employment which does not "affect interstate commerce." What percentage of American industry can withdraw itself from

---


141 It is interesting to note the way in which the United States Supreme Court in *United States v. Darby*, 312 U.S. 100 (1941), in reversing *Hammer v. Dagenhart*, in effect indicated that anyone who had relied on that case was somewhat stupid because anyone should have recognized that the majority of the Court was wrong and that the "classic dissent" of Justice Holmes was correct. Anyone reading the earlier *Hammer* decision would have formed the impression that the earlier Court was there saying that anyone who did not believe in the *Hammer* majority opinion was obviously stupid.


144 *Occupational Safety and Health Act of 1970, supra* note 141, at § 3(5).

145 *Id. at §§ 3(6).*

146 *Id. at § 3(a).*

147 *Id. at § 6.*

148 *See note 73 supra.*
federal control under the authority of the clothespin case? It is apparent that very little of American industry is that provincial. Conversely stated, virtually all American industry is today conducted in such a way or under such circumstances that it comes within the reach of the federal commerce power. 148

The net result is that as far as employment and industry are generally concerned, the commerce power has the same reach as though article I, section 8, clause 3 of the Constitution gave Congress the power to regulate the general welfare. 149 This is a long step away from the turn of the century when the first Federal Employers’ Liability Act was held invalid because it extended to all employees of carriers as distinguished from those who were engaged in interstate commerce. 150 The Act of 1970 is likewise a long step away from the decision of the Court in 1936 in Carter v. Carter Coal Co., 151 in which the Court held that it was beyond the power of Congress to establish a code of fair competition for the soft coal industry, stating:

But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employees is a local relation. . . . Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the Act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its characteristics. . . .

One can anticipate that the trend evidenced by the Act of 1970 will lead in the future to the adoption of a national workmen’s compensation law. In support of such a statute will be the argument of uniformity in payments and procedure and the elimination of questions of competing jurisdiction, such as to whether the federal law or a state statute applies, as in the case of workers in a dockyard, or as to whether the law of state A or of state B applies, in situations in which the contract of employment is made in one state but actual work, such as selling or construction, is to be done in another state. 152

---

148 Even my hypothetical clothespin case gives little comfort to states-righters for if you would sell your homemade clothespins to a neighbor they would probably be competing with interstate-made clothespins on sale at the supermarket and therefore you would be “affecting interstate commerce” within the scope of United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); and Wickard v. Filburn, 317 U.S. 111 (1942).

149 Once it is conceded that an activity is within the reach of the commerce power, its regulation cannot be challenged because of its general welfare objective. United States v. Darby, 312 U.S. 100 (1941).

150 The Employers’ Liability Cases, 207 U.S. 463 (1908). The statute was then amended to restrict it to employees of interstate carriers who were working in interstate commerce. The statute was held valid. Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1 (1917).

151 298 U.S. 238 (1936).

Current support for the view that the Supreme Court should not function as a “continuing constitutional convention” and should interpret the Constitution as written is found in the dissenting opinion of Chief Justice Burger in Coleman v. Alabama, 399 U.S. 1 (1970).

152 Notice that the waters of this problem of interstate conflict are destined to be muddied
C. Administrative Ascendancy

A large percentage of determinations, that is, decision-making in the management sense, is today made by the administrative agency. As of 1933, courts were taking a much greater part in such determinations. At that time, the United States Supreme Court was equating due process to laissez-faire and invalidating both state and federal legislation which, in seeking to improve the general welfare, interfered with freedom of contract. The scope of the federal commerce power was determined by the later-to-be-condemned distinction between manufacturing as a change of form and commerce as a change of place, with only the latter coming within the reach of the federal commerce power. The modern administrative agency had already appeared by 1933 but functioned in a relatively small area of the total economy such as the regulation of public utilities, transportation, insurance, and banking; and workmen’s compensation.

Today, a large percentage of determinations that affect society are made by administrative agencies. Decreasingly are these matters left to management to decide. As matters of an increasingly technical nature are entrusted to administrative agencies, the courts are exercising less and less control over the agencies. Increasingly, the courts have refused to interfere in areas of administrative agencies. Theoretically, the courts still maintain the right to interfere when there is arbitrary and capricious administrative action. But what is arbitrary and capricious? Is it enough that the court disagrees with the action of the administrator? No. Is it enough that the court would not have made the same decision if it had been the administrator? No. Is administrative action arbitrary and capricious when it causes people to lose money? No. Is it enough that the administrative action is unwise? No. Thus, for all practical purposes, the right to appeal from administrative agency action is virtually useless in the great majority of cases because the court will not upset what the administrator has done. Courts are showing a greater tendency to keep out of the picture and let the administrator handle the matter. This is seen particularly in cases involving pollution. The courts express the view that the matter in controversy involves many more persons and interests than the one plaintiff and the one defendant before the court, and, therefore, it is not proper to decide far-reaching community problems in ordinary private litigation, but that, to the contrary, the administrative agency will be better able to take all matters into consideration. The Supreme Court has refused to take a case brought by the state of Ohio to enjoin chemical corporations in other states and in Canada from dumping mercury into water which ran into Lake Erie from which some Ohio cities obtained their water supply. Although the United States Constitution expressly authorizes a suit brought by the state against nonresidents, the Supreme Court

by substituting the concept of the state with the most significant contacts for the state where the contract was made or the injury was sustained.

153 The courts are avoiding the inconsistency which appears in the law of jury determinations, where expert testimony is admissible to interpret X-ray photographs, on the theory that the jury lacks the ability to understand the X-rays, but it is then held that when the experts disagree as to the meaning of the X-rays, the jury is to determine which expert is correct. United States v. Dudley, 64 F.2d 743 (9th Cir. 1933).

Court refused to exercise this power on the ground that the lawsuit represented merely a segment of the overall problem of the pollution of Lake Erie, and that this problem was being considered and had been considered for some years by both state and international agencies and commissions and that the Court should therefore not interfere with the actions of the experts in the absence of a peculiarly "federal" question.

In simple terms, this means that the problems and technological complexities of the twentieth century are pushing the courts out of the picture and placing the administrative agency in full control. Many persons were shocked by the recent proposal to have wage and price control boards from which no appeal could be taken. It is conceded that this is novel but it is honest—it recognizes that for all practical purposes an appeal from an administrative agency has no value in cases which require the making of a judgment upon the basis of factual data. This recognition has a most salutary effect for it makes it clear that it is the responsibility of every citizen to have well-trained administrative officials. This applies not only to the top-ranking members of the national commission, but to all staff members, field examiners, and the myriad of personnel who come into direct contact with the business which they regulate. The importance of their training is obvious. An airline gives a pilot's job only to an applicant passing rigorous tests and intensive training. Can we be any less careful in the training and selecting of the men who will pilot and control the work of the administrative agencies? The premise that administrative agency members and employees must have high qualifications must be accepted by American society as the starting point.

D. Rights and the Environment

I regret to see so much time and intellectual brilliance misapplied in seeking to find past authority for a right to control the environment. I do not see the value of past legal precedent, if there be any, in our search for a solution to the socio-physical problems posed today by man and the environment. In the effort to find precedent for a "right to a decent environment" one writer looks to the Preamble of the United States Constitution and finds a condemnation of noise pollution in the statement relating to insuring "domestic tranquillity." Unless I misread the pages of history, this phrase meant to the Framers of the Constitution much the same as what "law and order" means to us today. I find it difficult to believe that the Framers of the Constitution could have contemplated modern noise pollution in view of the fact that the first factory was constructed in the United States after the Constitution was adopted. Sam Slater, who had worked in Awkright's Factory in England, built a factory in New England from memory, since the English mercantilist policy prohibited the exportation of blueprints or working models of her then-rising factory system. I doubt if the Framers living in an eighteenth-century rural America could have foreseen the noise of twentieth-century highway transportation and the noise of the supersonic jet planes of the 1960's.

It has also been contended that regulation of environment can be sustained
under the ninth amendment to the Constitution. This amendment declares “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Does this amendment declare any constitutional “environmental right”? Not in direct terms. Is there any authority for the proposition that in 1790 there was an “environmental right” of the people to which the ninth amendment can apply? The answer is simply “no.” Society was concentrating on obtaining political freedom, as declared in the Declaration of Independence, and economic freedom, as declared in Adam Smith’s *Wealth of Nations*. There was neither the time nor the occasion to speculate as to whether there would be an environmental right two centuries later when technical devices yet unheard of should arise and thirteen agrarian states clinging to the Atlantic seaboard would expand westward to become a vast industrialized nation. When the Philadelphia Convention which drafted the present Constitution completed its labors, Patrick Henry and two other members refused to sign the draft of the new constitution because they feared it would create a new tyranny in substitution for that which the American Revolution had been waged to overthrow. The bargaining and the strategy employed to secure the ratification of the new Constitution by the necessary number of states make it clear that the man of 1790 did not have the least idea that there was a right to a desirable environment. If he gave the matter any thought, he had a remedy readily available: move westward, and thus we find Daniel Boone in 1807 writing that he was going to move westward because the valley where he lived was becoming overcrowded because someone was clearing land for a cabin five miles from Boone’s cabin.

Should we today assume that the man of 1790 possessed a right to a decent environment but just did not know about it? If so, what was the origin of that right? If it antedates 1790 was it possessed by the Colonials as successors to the displaced Indian tribes, or was it part of the Mayflower compact of 1620? If we want to push the absurdity further, assuming that the Colonials brought a right to environment to the new American colonies, where did it originate so that the Colonials could bring it from England? Did it come into England with the Norman Conquest of 1066? Had the invading Romans, Angles, or Saxons, brought the right to England? We will find it easier to obtain solutions for modern problems relating to the environment if we turn the page of legal history and start a new chapter with a new right that society now wants. The lawyer finds it intellectually difficult to recognize a new right when none existed before. What we are witnessing is more acceptable to the political scientist, for we are witnessing the “spontaneous” generation of a right because society wishes it to exist. Is not this merely a manifestation of what we call the democratic process at work?

If one questions that there is a phenomenon by which rights spring up where they did not exist before and become clothed with legal protection, consider the right of privacy. Today, the “right of privacy” is recognized as an essential element of American law and everyone concedes that there is such a right. A century ago, this right of privacy did not exist in American law. Is it not strange that with all the generations of liberty-loving Americans the right
of privacy did not obtain recognition until the period following 1890?\textsuperscript{155} Certainly, the men who wrote the Declaration of Independence were conscious of “rights.”

Surely the men who insisted that the Bill of Rights Amendment be added to the new Constitution in 1790 were conscious of rights. How can we explain that those men and the law did not come around to recognizing a right of privacy until a full century later?

The answer in very simple terms is that people worry about the problems which face them. Back in the days of the Declaration of Independence and the framing of the Constitution, no one was concerned about the right of privacy. Notice the extent of the fears and concerns of the framers of the Bill of Rights Amendment to the Constitution. The Fourth Amendment to the Constitution, added in 1790, states, “The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the person or thing to be seized.” The man of 1790 was afraid of a recurrence of the days of George III. In a voice reminiscent of James Otis decrying against the writs of assistance, the framers of the Fourth Amendment declared what we today would have regarded as a segment of privacy—protection from police invasion of privacy. The man of 1790 was just not concerned with invasion of privacy by a private person. While a snooping person could be prosecuted to some extent under a peeping-tom statute, this was limited to some area or conduct relating to peeping into a house or similar place and was only a criminal liability. The victim could not sue for damages for the invasion of privacy.

What should we say of the right of privacy? If we are honest with history, all that we can say is that modern man thinks highly of his privacy and wants it to be protected. Knowing that the law is responsive to the wishes of society we can go one step further and say that the right is protected. But note that we should go no further than to say that it is a right which society wishes to protect at the present time. . . .

I believe most wholeheartedly in the American way of life and the concepts on which our society and government are based but that does not obscure the fact that once upon a time there was no American way of life and that the concept of man possessing rights recognized by government was the fruit of more than a mere revolution. It was a product of création. While many religious leaders, philosophers, and poets spoke of the rights of man and of the dignity of man, governments laughed at such pretensions and held man tight in a society based on status. A man had rights, not as a man but because he held a given status. If he were a nobleman, he had the rights of a nobleman of his degree. If he were a warrior, he had the rights of a warrior. If a slave, he had very little rights at all. In each case, the law saw only status; it was not the man who had rights but the status of nobleman, the status of warrior, the status of slave.

In the course of time, serfdom displaced slavery in much of the western world. Eventually feudalism disappeared and with the Treaty of Westphalia of 1644, putting an end to the Thirty Years’ War, the modern society of nations was deemed to appear. Surely, one might say that in such a “new world order” man had rights. No, not as a man but only as a subject. Even when the English colonists settled in America, they brought with them not

the rights of men but the rights of British subjects. Even when the colonies were within one year of war, their Second Continental Congress presented to King George III the Olive Branch Petition in which they beseeched him to recognize their rights as Englishmen. For almost a year the destiny of the colonies hung in the balance as to whether they should stay within the empire seeking to obtain recognition of their rights as Englishmen, a "status" recognition, or whether they should do something more.

Finally, the ill-advised policies of George III and the eloquence of Thomas Paine's Common Sense tipped the scales and the colonies spoke on July 4, 1776, not in the terms of the rights of English subjects, but in terms of the rights of man existing independently of any government. Had the American Revolution been lost, the Declaration of Independence would have gone rattling down the corridors of time with many another failure. More fortunately for us, the American Revolution was won, and the new government that was established was based upon "man" as the building block rather than upon "subjects." Rights of man replaced the concept of rights of subjects. With this transition, society comes from status to freedom. The obligations of a king to his faithful subjects were replaced by the rights of man existing without regard to the will or authority of any king. America is now going through the growing stages of determining what is embraced by the concept of "rights of man." To cite one growing problem, note the right of privacy. Other rights will be observed growing up and are still growing.

Some may criticize the above analysis on the theory that rights existed before they were recognized. This raises the obvious question of when did they begin to exist. Let us take the rights of free speech, freedom of the press, and free assembly. If these rights existed in law before our Constitution declared them to exist, when did they come into existence? Did they exist in ancient Egypt under the Pharaohs, in ancient Rome under the Caesars, in the Holy Roman Empire under Charlemagne, in feudal England under the Edwards? Did freedom of the press exist before there was printing? Before there was writing? The concept of legal rights floating in the air, unrecognized by any government, is absurd enough but to have them floating in the air only over that portion of the British Empire which becomes the United States, is doubly absurd.\[156\]

I am aware that there are a number of schools of political science which are in conflict with the views expressed above. I note, however, that the writings on which those schools of thought are based antedate the era of democracy and the era of industrialization. What was written in ancient Greece or in France before the French Revolution or in England before the 1867 abolition of property ownership as a qualification on the right to vote does not necessarily have validity today. Just as I know that I cannot write a book on the law of Zanzibar because I do not have the least idea of its existing law, culture, and economy, I question how even the wisest man living in the earlier agrarian, non-democratic societies could speak of law with such universal validity as to be true centuries later in an industrialized democracy.

The view has also been expressed that the environment is held in trust for the benefit of all. Who declared the trust in what? When factory X purchased a tract of land in what was then wilderness, no one included in the deed any

provision that the air space would be held by the factory in trust for the benefit of the community. If we believe in stare decisis, we must recognize that the factory holds the air space just as free from control as it does the surface of the land or the subsurface. To say that after many years, the air space is held in trust is merely misbranding.\textsuperscript{157} When we tell the factory that it holds its air space in trust for the community, we are really seeking to sugarcoat the fact that society is commandeering the property of the factory, and in a non-"free enterprise" way is telling the factory owner how he should use his property.

The "trust" concept is dangerous because it "proves" too much. If air space is held in trust for society, why not subsurface rights? Why not say to the owner of land that he holds the minerals beneath the surface in trust for the benefit of the community? And how do we limit the trust concept to property? Why not say that every individual holds his personal skills and ability to work in trust for the community and therefore society can require him to work the way society planners direct? This you will say cannot be done in a free society. But if that which is privately owned (the air space) must be held in trust for the community, how can you validly draw the line between air space and other assets privately owned? The inability to draw any boundary line makes it apparent that the trust theory contains the seeds of tyranny—in the name of the common good everyone can be told what to do with what. Is this any more palatable to American concepts because it is our own government and not an individual—an irresponsible tyrant—who is establishing the rule? Should we not bear in mind that the rules as to what the community requires will undoubtedly be made by an administrative agency consisting of men who are not popularly elected and who are subject to such minimal judicial review that for all practical purposes their decision will be final?

I object to finding any protection of the environment on the basis of a constitutional or legal right because to so describe the desired objective of society is to mislead and distract attention from the real problems involved. Let us assume as a starting premise that there is a constitutional right to a good environment. Now consider the facts of \textit{Boomer v. Atlantic Cement Co.}\textsuperscript{158} In that case, the court found that a cement manufacturer was causing damage to the surrounding area by polluting the air with particulate matter. The court awarded money damages for the harm done to the plaintiff's property but refused to stop the running of the plant because everything scientifically possible to eliminate the evil had been done, no one in the industry knew of any way to eliminate the evil, the cement plant represented an investment of 45 million dollars, and employed more than 300 people. If we say that Boomer had a constitutionally-protected right to enjoy an unpolluted environment, we would be tempted to conclude that the cement factory must be shut down. Unless, of course, we say that even constitutional rights are not absolute and that all constitutional freedoms have some limitation. Will our decision be influenced by the consideration

\textsuperscript{157} Analogy to wild game which is deemed owned by the sovereign "in trust" for the people, is misleading. The wild game was not owned by a private person. The factory did own the air space above its factory.

that if the New York plant of the Atlantic Cement Company is shut down in order to obtain a decent environment, every other cement factory in the country must also be shut down? Will society show such a firm belief in clean air that it will willingly return to dirt roads and mud adobe huts?

We cannot avoid this dilemma on the ground that only one cement factory was involved in the Boomer case. A court must bear in mind that the decision it makes as to cement company A will be invoked against company B, company C, company D, and so on. If one properly-run cement plant is to be shut down, does not the concept of equality require that all must be shut down?

Significant in any determination of the problem from a societal, if not a legalistic, standpoint will be the consideration of the availability and comparative cost of substitute materials that could replace the cement.

Assuming that there is a constitutional or legal right to a decent environment, will the environment-polluting industries be permitted to continue to pollute the environment by analogy to the “unavoidably unsafe” exception in strict tort liability?

Perhaps the answer will be to project zoning from a local to a national level. That is, zone the country in terms of areas where industry may locate. For example, cement factories would be allowed to locate in zone X where the wind patterns are such that the cement dust will fall within a naturally-blighted area. Is the determination of what should be done advanced in any way by speaking of constitutional and legal rights or of a trust duty with respect to the environment? We must face the problem that we have conflicting interests involved and we must make policy decisions as to what will be best for society. It is a problem in public management rather than “law.”

IV. Reform in Haste

Society, generally, and democracies in particular, seem prone to make reforms in haste. Sometimes this results in the reform objective being defeated or handicapped. In other instances, the result is that the reform goes too far and makes changes that are undesirable and unnecessary. Illustrative of the first category is the current agitation to give protection to the consumer from waivers of warranties. The Uniform Commercial Code approves the waiver of warranty as long as warranties of fitness are waived in a manner which if in writing is conspicuous. But the Code also permits a limitation of remedies, as by making repair or refund the extent of liability, where there is a breach of warranty and the plaintiff has sustained property or economic loss. Such a limitation is “prima facie unconscionable” as to “consequential damages for injury to the person in the case of consumer goods, but limitation of damages where the loss is commercial is not.”

Interestingly, the solicitude felt by the drafters of the Code in preventing surprise exclusions or disclaimers of warranties in U.C.C. § 2-316 was forgotten

159 Uniform Commercial Code § 2-316.
160 Id. § 2-719.
161 Id. § 2-719(3).
by the time U.C.C. § 2-719 was reached, for the latter section does not include any limitation in terms of conspicuousness. A strict construction of the Code would justify the conclusion that only the total exclusion of a warranty must be conspicuous and a refund-replacement-repair limitation need not be conspicuous. One may suspect that when the question arises as to the effect of an inconspicuous limitation, the courts may seize upon the concept of unconscionability and regard it as protecting from surprise, from which it could be concluded that a limitation of remedies clause which was not conspicuous was unconscionable. Applying the Code to a practical situation, we can envisage a buyer purchasing an electric fan for his home. The warranty of fitness for normal use cannot be excluded by a writing which does not satisfy the standards of U.C.C. § 2-316. If the seller does not go to the extreme of seeking to say “no warranties” but is willing to meet the buyer part way to the extent of accepting warranty liability but then declaring “when there is a breach of warranty I will refund your money,” the seller thereby avoids the limitations of U.C.C. § 2-316 and the only limitation is that found in the concept of “unconscionability” in U.C.C. § 2-719(2). Assume that when the buyer uses the fan in his home it short circuits and starts a fire which destroys the buyer’s house. The buyer’s fire loss is excluded by the Code unless the court will conclude that the limitation limiting the buyer to a refund is unconscionable.

There are various proposals now current to adopt statutes or administrative regulations limiting or preventing the seller or manufacturer from excluding warranties. From the illustration above given, it is apparent that a hasty regulation of warranty waiver will not give the consumer the protection which the reformer has in mind. It is apparent that there must be a broad overall approach to all types of clauses which may affect or bar a recovery, whether stated in terms of an exclusion of warranty, a limitation of remedy, a requirement of notice in order to “register” a warranty, a notice of claim to be given of harm sustained, or any other type of restrictive provision that may be devised.

Likewise, consideration should be given to the scope of the class intended to be benefited by the reform. The “consumer” is the natural point of focus of attention, but is he the only one intended to be benefited? Consider the case of a manufacturer selling a twenty-ton metal press to a factory making kitchen utensils. An employee is injured in using the press because it does not function properly. When he seeks to hold the manufacturer liable, the latter points to a clause in the contract by which his obligation is limited to making repairs without cost. Is this limitation binding upon the employee? Is the press “consumer goods” within the scope of U.C.C. § 2-719? It is apparent that there will be a strong temptation to hold that it is “equipment.” One may well expect that eventually the concept of “consumer” will be broadened to extend to any person using the goods, whether he purchased them or not, or any person exposed to danger by the use of the goods, without regard to the identity of the actual user.

162 This is an element of the warranty of merchantability under U.C.C. § 2-314.
163 In view of the fact that the Code concept of unconscionability is to be determined as of the time of the making of the contract, it would seem that a court would be reluctant to apply the unconscionability concept in the hypothetical situation here considered.
In some situations, the problems above noted have been bypassed by courts in the last few decades by applying the strict tort liability concept. This does not mean that society should not make an intelligent re-assessment of the problem, as opposed to reforming in haste, for the reason that the scope of recovery under strict tort and warranty sometimes differ—in some states, property loss is not covered.

I do not think that it is a satisfactory solution to the warranty problem to state that strict tort liability may be imposed, for the reason that I can remember how our law school class in common-law procedure pointed the finger of scorn at the common-law courts with their many procedural distinctions, such as those between trespass and trespass on the case, and thought how absurd it was that a plaintiff should lose because he happened to enter the hall of justice by the wrong door. I have the feeling that society is doing the same thing as did the common-law judges when current society plays this game of warranty versus strict tort liability. It may well be that we will eventually have a fusion of the theories of product liability. In making a reform of the warranty-waiver problem in order to protect the consumer, we should not in haste merely put a patch on the law in much the same manner as a small boy might put a rubber patch on a bicycle tire, but we must give careful thought to how what is proposed fits into the overall pattern of product liability. Above all, we must recognize that this is not exclusively a "legal" question. Our reform must begin with research to educate ourselves as to the socio-economic needs and problems of today's society and the effect of our proposed reforms.

Another consequence of reforming in haste is that the reformer does not build upon the experience of the past. This may be illustrated by the granting of the class action right to consumers as part of the current consumer protection reform movement. First, why is it necessary to give consumers the right to bring a class action? Since the 1938 Federal Rules of Civil Procedure, consumers could bring a class action when the rights involved were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." This was the so-called "spurious class action" and was in substance a form of permissive joinder of plaintiffs. Spurious class actions were at one time in legal history held improper on the ground that there was not a class merely because there was a similarity of experiences of the various members of the alleged class. Under the modern spurious class action, purchasers of stock have been allowed to bring a class action in order to recover their individual losses resulting from false promotional statements, and employees have been allowed to bring such an action against their employer to recover overtime.

164 For a discussion of the various product liability theories, see 1 ANDERSON ON THE UNIFORM COMMERCIAL CODE (1970).
165 FED. R. CIV. P. 23(a)(3).
166 4 ANDERSON PENNSYLVANIA CIVIL PRACTICE 586-88 (1962).
167 See, e.g., PENN. R. CIV. P. 2030 (1940).
wages. The right of consumers to bring a class action on behalf of themselves and other consumers similarly situated has been judicially recognized.\footnote{168 Vasquez v. The Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971) (permitting a group of buyers under a frozen food and freezer plan to bring a class action on behalf of themselves and other buyers to cancel their contracts because of fraudulent misrepresentations by the seller's agents).}

In light of the foregoing, one can well ask what has been achieved by statutes expressly giving consumers the right to bring a class action? In many states it is provided that the consumer's class action may be brought by the attorney general or some other official. Here, the reform has the advantage of shifting the expense of litigation onto the attorney general and the government. In view of the rising demands upon public treasuries, society should consider whether a class action by the attorney general at the public expense is the best way of meeting the problem.

I am not suggesting that we turn our back on the consumer and return him to his status as of 1900. To the contrary, I contend that we should carefully examine the years since 1900 to see if we cannot develop some procedure better than the class action. Those familiar with the problems of stockholder litigation and the history of class actions under the modern rules of civil procedure are not entirely in accord that the right to bring a class action has made any significant improvement in the position of the consumer beyond putting the expense of litigation on someone else's shoulders. Consider the situation in which you order a $25.00 consumer item from a mail-order house in a distant state. Will the right to bring a class action be of any value to you? How will you know who are in the class? You will probably retain an attorney to obtain discovery of other customers of the seller who have made complaints and your attorney will then communicate with them to see if they are interested in joining in a class action. I suspect that for a $25.00 item you will probably say this is not worth the trouble. Is there some new form of proceeding that modern society can devise? I suggest that a careful exploration of the history of indemnity funds under the Torrens Land Registration System, state unindemnified motorist funds, oil spill indemnity funds, and foreign insurer's deposit funds might reveal that a new procedure could be devised for making the consumer complaint to an administrative agency in charge of a consumer indemnity fund. The agency, if satisfied of the merits of the consumer's case, could pay the consumer the amount of his claim and then take an assignment from him of the claim. Careful study is required to work out the details so as to be both practical and fair not only to the parties involved but also to the taxpayers and consumers generally who are paying for the administration of the system in one way or another.

The fact that so many of us believe in our present judicial system should not blind us to the fact that our present system exists in a sense by default—the jury outlived its rivals of trial by battle, trial by ordeal, and compurgation. Is it beyond the realm of possibility that modern man who has found better ways of transportation, better ways of communication, better ways of building and heating houses, better ways of refrigeration may not be able to devise a better way of administering justice? Perhaps if he researched as carefully with respect to
the societal matters as he has done in the quest for material things, there would be a better judicial system for all and not merely just for consumers.

A very grave danger in reforming in haste is that apart from failing to help those intended to be helped, a hasty reform can very well harm others. The field of consumer protection again furnishes a good illustration of this. Starting with the premise that a consumer should be able to assert the defense of failure of consideration and fraud in the inducement even as against a holder in due course of commercial paper given by him to his seller, many jurisdictions have gone beyond saying just that and have declared the commercial paper not negotiable. This protects the consumer but it introduces unnecessary confusion and uncertainty into credit transactions. Assume that the buyer and a comaker sign the buyer's note. What is the liability of the comaker? If the instrument is negotiable, Article 3 of the Uniform Commercial Code supplies the easy answer. If the paper is not negotiable, we must turn to the non-Code law and find ourselves in the nineteenth century. Assume that the buyer's note is indorsed by the seller-payee to a finance company or bank. What is the liability of the seller-indorser? Within what time must the holder give the indorser notice of the maker's default? If this is consumer paper which has been made "nonnegotiable" we must turn back again to the nineteenth century for the answer to these questions, rather than to the easy answers in the Code. What is the effect of a forgery or an alteration on such paper? What is the effect of an impairment of collateral? Is the holder of the paper subject to an adverse claim to the paper? For answers to these and many other questions we must turn our backs on the clear-cut answers given by Article 3 of the Uniform Commercial Code and go back into an obscure earlier century. This would not only be a most difficult research task in many instances, but consider the practical absurdity of so doing—the Negotiable Instrument Law was drafted at the end of the last century because a "modern" law was needed by the new business world. The U.C.C. was drafted in the middle of this century because the N.I.L. had by then become outdated and no longer fitted the needs of what was the then "modern" world. Now comes the over-eager consumer protectionist and tells us that the solution for the consumer protection problem is to make consumer protection paper nonnegotiable and shove it back into a society before the Uniform Commercial Code, before the Negotiable Instruments Law. When one realizes that a large part of commercial paper circulating in our economy and supporting federal reserve notes arose from consumer transactions, one may very well question if the world of credit and finance does not need protection from the consumer protectionist. The simple answer is that everyone needs protection from hasty reforms that fall short of or overshoot their objectives.

As another aspect of the injunction against making reforms in haste, we should not evaluate the status quo nor proposed reforms without making an intelligent analysis of all data. I read with much interest that no-fault insurance has reduced the volume of collision litigation in Massachusetts. On the basis of this fact, the Massachusetts Plan has been hailed as a great success. Is reduction of litigation the sole objective of no-fault insurance? If the object of society is to reduce litigation, I suggest that you stand on the courthouse steps with a shot-
gun and threaten to blow off anyone’s head who makes a move to start a lawsuit. This would certainly reduce the litigation rate and your reform plan might be hailed as a great success. But I doubt whether you would wish to adopt the shotgun plan, for the reason that litigation reduction is not the prime objective. Society wants the fair, prompt settlement of legitimate claims. If that be so, should we not inquire further into the Massachusetts statistics to see whether the litigation which is not brought because of the no-fault plan represents “bad” claims that should not be asserted? If research does not support the conclusion that “bad” claims have been squeezed out and that “good” claims still prevail, how should we evaluate the no-fault plan? I would like to know much more than the available statistics indicate in order to appraise whether the reduction of the Massachusetts litigation rate is evidence that the Massachusetts no-fault insurance plan is good or that it is bad.

If we go back to the beginning of the century, one of the big arguments in favor of adopting workmen’s compensation was the fact that the great difficulty of recovering in a negligence-based lawsuit against an employer resulted in a very large percentage of worthwhile claims being scared away from the courtroom. If keeping out of court a worthy claim for an employee’s injury was an evil at the turn of the century, by what magic can we say that keeping worthwhile claims out of a courtroom today is good? I am not speaking in opposition to no-fault insurance; I am merely asking how it really works. As a citizen, I have the right to know. As a citizen, I have the duty to inquire. If no-fault insurance is not working properly, we should hasten to repeal laws adopting it. If it is working well, we should consider whether its underlying concept should be extended to other areas of liability-determination. From the standpoint of the injured person, should there be a difference when he falls in a hole in the floor in the grocery store and when he is run over by the delivery truck of the grocery store? Careful research and thought may indicate that modern society, in the interest of equality and rehabilitation, should impose liability on the basis of causation. This admittedly would turn our legal backs on the concept of fault but we must carefully examine and determine whether liability based on fault is appropriate to our industrialized age and large population; careful consideration should be given to workmen’s compensation, liability for damage from use of dynamite, liability for failure to install safety devices, and liability for ocean spills and pollution.169

V. Lawyers as Leaders

Lawyers, because they have direct knowledge of how government and law work, can be the leaders in educating society to the new needs of society. Lawyers have a potential for leadership in the newly-emerging society because of their experience in dealing with strange situations and their experience in seeking to reconcile conflicting views. The spectrum of modern human experience is too broad for any man to be an expert in more than his own sector

of study or research. Somehow, society must put together all the pieces and perhaps by so doing can put them together closer to the heart's desire. The lawyer's training in handling conflicting concepts, his experience in dealing with clients whose businesses are strange to him—all have given the lawyer a skill in information collating and determination making.\textsuperscript{170}

As a word of caution, the training of a lawyer tends to cast him in the pattern of an advocate. If the lawyer is to perform the function for modern society of which he is capable, he must approach the problems of society with an open mind, he must obtain valid data, and he must appraise it honestly and impartially, unbiased by a blind devotion to past concepts. In effect, he must be a strict judge and require that every contending thought or social policy carry the burden of proof as to its validity. This is the leadership which America needs and will need increasingly in the future as our socio-industrial problems become increasingly complex. Once again, the lawyers have the great opportunity that they had in the early days of our republic—the opportunity of being truly the nation's leaders. I hope that nothing that I have said is misconstrued as having any political implications. My client is these United States of America which countless courageous men before me have granted to me for the term of my natural life, to hold in trust for my fellow man and for future generations. I rest my case, but I hope that the lawyers of America will not rest but will strive ever forward to achieve the Great American Dream.

\textsuperscript{170} The phrase "determination making" is used to avoid the connotations and associations of a court which are attached to the term "decision making." From the standpoint of the dictionary and of society, anyone faced with the necessity of acting or of choosing between alternatives, makes a decision. A judicial decision differs from the decision of management, the decision of an airplane pilot, the decision of a student, the decision of your cook, only in terms of who makes the determination and the sphere of application of the determination. All have the common denominator of analyzing the facts, applying some standard or rule to the facts, and making a determination—a decision—by virtue of such application.