

UNCONSCIONABILITY AND THE CROWD—CONSUMERS AND THE COMMON LAW TRADITION

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Professor Murray¹ and I² agree on so many things. We are both dreadfully disappointed by what the Code's unconscionability clause³ has spawned in the way of case law.⁴ Neither of us has much good to say about the learned writing about the section.⁵ A strong lack of enthusiasm informs both our discussions of the section's Official Comments.⁶ In fact, there is even a subtle hint that Professor Murray thinks as I do, that the job of drafting § 2-302 itself might have been improved upon.⁷

But more important than all of that is our basic agreement that in the vast majority of instances, examination of the way the consumer "contract" was made is a not very helpful step in attempting to decide whether, under the rubric of unconscionability, to grant or deny it judicial enforcement. In the typical consumer-adhesion-contract case, people sign the proffered forms without reading them or bothering to attempt to understand them—except for the particular dickered terms. As Professor Murray clearly recognizes, what I have called "procedural unconscionability"⁸ is, therefore, typically irrelevant to the merchant's form-pad sale. Either the whole contract is valid, or it is all (except for the dickered terms) *potentially* invalid as unconscionable. Oh, one can imagine instances of some sort of super-disclosure by a seller, coupled with some sort of super-assent by a consumer, which might validate an otherwise "unconscionable"

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1. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969) [hereinafter cited as Murray].

2. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) [hereinafter cited as Leff].

3. UNIFORM COMMERCIAL CODE § 2-302 (1962) [hereinafter cited as UCC].

4. Murray, at 37, 44, 55-66, 69-72; Leff, at 547-58. Of course, Professor Murray has many more cases to deplore than I had in 1967.

5. Leff, at 528, 558; Murray, at 2: "[T]he writers have done little beyond deplore the Delphic nature of the concept or any codification thereof." Here again, of course, Professor Murray had a greater number of efforts by which to be unimpressed than I. See Murray, at 1 n.1 for his list.

6. Leff, at 489-528; Murray, at 39-41.

7. See Murray, at 38 n.110: "What is alarming is his [Leff's] failure to recognize the need for the kind of provision which § 2-302 is, notwithstanding successful criticisms of the language of the section as it exists."

8. See Leff, at 487.

provision, but we both know that now very frequently in the real mercantile world such a rarity show up. Thus Professor Murray devotes most of his essay to discussing which provisions, assuming no such super-assent, ought to be stricken as unconscionable when they are part of a typical form-pad contract. He does that job with thus far unparalleled care and thoroughness.⁹ And since his essay says what it says better than I could resay it (even if I were trying to be fairly fair) I will not try to summarize it. Let it suffice to say here that I find Professor Murray's attempt to explain unconscionability an admirable job, one which carefully considers almost all of the subtle difficulties involved in such a definitional struggle. Or to be brief, I cannot help but prefer Professor Murray's unconscionability clause to the Code's.

In fact, our dispute, such as it is, has little to do with the "meaning" of unconscionability at all. It involves instead a difference of opinion over the importance of the concept to any system for the control of unfair retailing practices.

What is the function of an unconscionability concept or clause? Briefly, it appears to be one technique for controlling the quality of a transaction when free market control is considered ineffective. It is one method for substituting government regulation for regulation by the parties. The theory of classical contract, paralleling classical economics, was that ordinarily the market mechanism should maximize the welfare of the parties.¹⁰ With the coming of the mass distribution of mass-produced goods via equally mass-produced "contracts," many observers of the contract scene became convinced that one could not rely on the bargaining process to protect certain individuals and classes against harsh contracts.¹¹ That does not mean, and did not mean to those commentators, that the end of individual bargaining between roughly equal contending parties (assuming that ever really existed) necessarily meant a net decrease in human welfare, not, at least, if any reasonably materialistic definition of welfare were used. For it is arguable that mass production is the source of a vast total increase in economic welfare, and that successful mass production requires mass distribution by documents also inalterably mass-

9. *But see* Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969), and Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969) for two other very thorough attempts to do the same job within the past year.

10. *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-31 (1943); Murray, at 28. I have also written recently and in some detail about this, in a piece which may or may not be published by the time this is. *See* Leff, *Contract As Thing*, 19 AM. U.L. REV. ____ (1970).

11. *See* Leff, at 505 n. 68 for a list of the fine contract-of-adhesion articles which tried to come to grips with this problem.

produced, or briefly, that one can no more efficiently customize contracts than customize goods for a mass market without losing all of the economic gains of non-customized production.¹²

Even if that is true, however, it is also true that the welfare gain, if any, is in the net only; that is, not all graphs work perfectly in an imperfect market. Now, no market is perfect, but the consumer market may be more imperfect than others. First, there may be monopolistic or oligopolistic powers in that market, either "natural," conspiratorial, or government sanctioned. Second, the information necessary for market choice may not be available at reasonable cost with respect to any particular consumer product, especially when a consumer has to process information about a vast array of goods; consumers notably lack the expertise that comes from buyer specialization. Third, with respect to consumer "contracts," most of the boiler plate is about contingencies, things that will become important only if the product or deal breaks down. It is hard to focus attention on what should not ordinarily happen, or at least to focus as carefully as upon what will happen for sure; *i.e.*, the price and the nature of the goods. In any event, for these and other reasons, it has been persuasively argued that the market bargaining process will not protect consumers from a large variety of injuries in a huge array of transactions. And if not, some other device to supply that protection may have to be designed. The natural step is to look to government intervention; *i.e.*, to invoke the political "market" instead of the economic one to correct the latter's alleged imperfections.¹³

In any event, let us *assume* that the distribution of goods and services to consumers via essentially inalterable forms an area of national economic life requiring governmental intervention for the maximization of social welfare. Even having made that decision, however, one has barely begun the intellectual struggle such an apparent insight should set off. If the government is to intervene, what form should that intervention take? Should it be legislative and administrative, legislative and judicial? Should the directive to the relevant bureaucracy (administrative or litigative) be express and detailed, or open-ended and open-textured? Should the regulatory

12. See Llewellyn, Book Review, 52 HARV. L. REV. 700, 701-02 (1939).

13. Thus even the common-law judges patrolled penalty clauses, most likely because the penalty was a hoped-for non-happening, and the necessitous borrower was therefore not likely to mount his own vigilant pickets on that particular skirmish line. See 5 A. CORBIN, CONTRACTS § 1057 (1964). *But see* Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 61-82 (1969) for a much more sanguine view of the power of the market to discipline and regulate attempts at consumer oppression.

scheme focus on those market breakdowns the source of which is a lack of market-supplied relevant information,¹⁴ or should the approach instead be direct governmental quality control, akin to the government's forays into the milk,¹⁵ auto¹⁶ and, most interestingly, life-insurance-policy¹⁷ fields.

As for this last choice, between government regulation of information, and regulation of deal-quality regardless of information, Professor Murray and I are, as previously noted, more or less in accord. I may have a little more faith in the regulatory powers of government-mandated disclosure than he, but I think we agree that to attempt to regulate the consumer contracting process is frequently to attempt to regulate a process that not only does not take place, but perhaps one which, as a matter of economic efficiency, ought not to take place.¹⁸ As I said, it is here that Professor Murray makes his most

14. See, e.g., the Prospectus-mandating technique of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, or the various Federal labelling statutes, e.g., 15 U.S.C. §§ 68-68j; 69-69j; 70-70k (1963) (wool, fur and textiles).

15. See State of New York, Official Compilation of Codes, Rules and Regulations, tit. 10, ch. I, part 3 (N.Y.S. Dep't. of Health, Sanitary Code, Milk and Milk Products).

16. See 15 U.S.C. §§ 1381-1425 (1966) (automobile and tire safety standards).

17. See N.Y. Ins. L., esp. §§ 140-74. See also Kessler, *supra* note 10. The reason I find this foray interesting, of course, is that it amounts to direct state control of the content of a species of contract.

18. See Leff, *supra* note 10, for a more detailed discussion of this particular trade-off. My own starting place there is to argue that we should all stop thinking about these consumer adhesion "contracts" as contracts altogether, and think about them as products, just like the products sold pursuant to them. Once having established that outlook, one is better able to discuss *what* governmental regulatory decisions ought to be made about the quality of these "products." For when one says that a particular contract or portion of it is "unconscionable," what one is really deciding is that the contract ought not be allowed to fall below a certain minimum quality. The chief advantage of this particular mind-set is that it makes unavoidable the consideration of factors which Professor Murray found perhaps too easy to avoid, the various costs of direct bureaucratic quality control, be it of goods or "contracts." When you focus on something as a "contract," it is too easy to assume that what doesn't fall on one party will fall on the other, thus, if the shift of a risk is held by the court bureaucracy to be "unconscionable," it will somehow come to rest on the party whose attempted shift was frustrated. When, however, one thinks of the situation as involving a directive to a manufacturer not to sell risky or defective "goods" to the public, one is more likely to recognize that the risk has not been bounced back permanently to the maker-seller, but has been lobbed back temporarily, so that he can slip it into his price base and allocate it ratably to the whole class of buyers. Thus, the net effect of a series of decisions following *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which both Professor Murray and I admire (I because it did not facily rely on the unconscionability clause of the Code, see Leff, at 558 n.300, and he as if it did, see Murray, at 50-54), would be that all buyers of automobiles would eventually automatically "buy" from the manufacturers an insurance policy covering any personal injuries which might arise from manufacturing defects in the cars they bought. I suppose it is possible to believe that one can buy insurance policies without having to pay premiums; it's just that I can't.

That does not mean that such spreading of risk is an evil. In the *Henningsen* situation, for

significant contribution to unconscionability commentary. *If* one assumes that the minimum quality of consumer contracts ought to be regulated by the government via the judicial bureaucracy, on an *ad hoc* case-by-case basis essentially unrestrained by legislative or administrative guidance, then the heart of Professor Murray's essay carefully, at great length, and with considerable intellectual acuity, sets out the relevant criteria and their application.¹⁹

But what if one does not so assume? That, I think, is where Professor Murray and I really part company. He seems to feel that

instance, I would guess that having an obligopolistic industry sell insurance against its own defective equipment to its customers might actually minimize the premium paid. In other words, I am not balking at the charge but only trying to scotch any odd idea that such protection might be cost-free.

19. In fact, some of Professor Murray's suggestions in this area are so vital and stimulating that one finds himself drawn to building on them (as one hopes the courts also will be). Consider, for instance, his discussion of the importance of the subject matter of the agreement to any "unconscionability" determination. Murray, at 29-32. Now "importance" is certainly some function of the buyer's risk. When the government regulates *goods'* quality directly, it generally limits its involvement to important characteristics of the product. It is more active in situations where the failure of self-protection through market mechanisms might have serious and irreversible consequences for the buyer. For instance, where the failure to shop carefully and intelligently might lead to death, sickness or serious bodily injury, the government is more likely to intervene to stipulate at least minimum standards for the goods. *See, e.g.*, the auto-safety standards, note 16, *supra*. Only rarely does the government intervene, except through information-generating devices like expanded notions of fraud, or through devices like the Prospectus requirement of the Securities Act of 1933 (*see* note 14, *supra*) when the danger is merely that the buyer will get less than he might otherwise have received. In other words, government is most likely to intervene directly when the risk to the buyer goes beyond the value of the thing bargained for. When one looks at the cases "under" § 2-302 collected and so thoroughly discussed by Professor Murray, it appears, though dimly, that the courts "using" the section may already have started, though not very consciously, implementing some such criterion as "risk beyond the value of the bargain" as an unacknowledged touchstone for those contract clauses needing for their validation (if ever validatable) some form of super-assent. The clearest instance is with respect to warranty disclaimers, where elimination by "contract" of recourse against the seller or manufacturer means not only that one may get defective or worthless goods, but that one may also sustain uncompensated personal injuries. Another such situation, at which Professor Murray hints, *see* Murray, at 31-32, involves certain contractual collection devices which may also serve to cost the debtor substantially more than the debt. Admittedly the danger here is not of uncompensated personal injuries, but that there may be economic losses beyond the total value of the goods (or debt) involved. In fact, even the excessive-price cases in which the lower New York courts seem to be specializing are more comprehensible if one assumes that the judges are responding to some feeling that the buyers in those cases were risking only a freezer's worth, *see Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct. 1966), *rev'd on measure of damages*, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (Sup. Ct. 1967), or a broiler's worth, *see In re State of New York. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303 (Sup. Ct. 1966), of money, not the vast sum for which they unaccountably signed up. Thus, it might indeed be wise to set as a conscious criterion for the "importance" of a clause, that it involves danger to the buyer beyond the value of the deal. Such a finding would be neither necessary nor sufficient for a finding of unconscionability, but it would certainly be relevant, just as it is in any bureaucratic quality-control decision. *See also* note 32, *infra*.

with something like fatality: "The obligation to develop a viable concept of unconscionability falls upon the judicial process in our legal system."²⁰ If all he means by that is that since § 2-302 is in the Code, the courts will have to do something about it, then of course one can't disagree. The damn thing *is* there; one can't just ignore it. Indeed, as I said several years ago, it is likely that the courts will eventually get to some not-too-grotesque end-position.²¹ But I can't believe that that's all Professor Murray means. Rather, it seems to me he thinks that the nation *needs* something like the unconscionability clause of the Code in order to achieve substantial consumer justice. Or, to put it another way, he appears to believe that regulation of the quality of mass-distribution contracts requires some open-textured directive to courts to strike naughty provisions, and that the proper governmental quality-control agency is an unguided court. I don't.

Professor Murray's model is a litigation model. In order to establish the unenforceability of any particular provision, in any particular jurisdiction, there will have to be at least one lawsuit, with the relatively high transaction costs (especially relative to the amount at issue) of that law-reform technique. Now, what happens after that first lawsuit? Take a case like *Williams*.²² In that case the court remanded for a finding whether a cross-collateral clause, allowing the seller to repossess all items ever bought from it by the buyer, upon default in payment for the most recently purchased item, was "unconscionable." Let us assume that on remand that it is decided that, at least where the buyer is a lady on relief with seven children, such a clause is unenforceable.²³ What's the seller's next move? Why to "distinguish the case," of course. Perhaps the next thing to do is make the clause clearer, maybe to make it read: "Caution: if you don't pay for what you just bought we may be able to take back whatever we ever sold you." Well, now we've got a new case for case-by-case

20. See Murray, at 79. Actually, Professor Murray and I also still disagree over a lesser included question, the effect of the interaction of §§ 2-302 and 2-316 on warranty-disclaimer law. He comes out one way on the basis of the "purposes" of the Code, and I come out another on the basis of its text, comments and political history. See Murray, at 45-49; Leff, at 520-24. I think, frankly, that the courts will eventually make warranties effectively non-disclaimable, at least with respect to personal injuries, though more likely via the strict-tort-liability route than through enthusiastic use of UCC § 2-302.

21. See Leff, at 558-59.

22. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); see Leff, at 551-56; see Murray, at 54-59.

23. Note that the *additional* risk of such a clause to a buyer is *not* that he may have taken from him more than the last item he bought; that could happen without such a clause, when the seller took execution on his deficiency judgment. The *extra* exposure is only of those items covered by the applicable exemption statute.

development. O.K., let's assume that the seller loses that one too, perhaps because the apparent assent was not "verified" (in Professor Murray's terms) because the buyer did not have, in the "relevant geographic market,"²⁴ any alternative to such a clause when buying what he bought, or any functional equivalent of it (to make which finding the court must also decide, under Professor Murray's approach, what the "relevant product market" is).²⁵ Fine. We've just had too little internal antitrust suits, (under § 2-302(2), I assume),²⁶ one on relevant geographical markets and one on functional equivalence, and the seller has lost again. But, of course, the next seller who wants to use a clause like the first seller ought not be daunted. After all, if his neighborhood or product is different, it's a whole new ball game—or so it seems under Professor Murray's honest and careful approach.

But let us say that over the course of many such cases it is pretty well settled by the court in that jurisdiction that with respect to almost any kind of goods sold in any one of the poor neighborhoods in town, the clause which figured in *Williams* is unconscionable. Now, that does not mean that sellers would necessarily stop using it. After all, under the common-law tradition they lose only if the other party chooses to litigate, and most consumers don't. But let us say that the sellers' lawyers (assuming they have lawyers, and the kind who go over their forms too, not just the kind who procure default judgments) insist as a matter of ethics that the clause not appear as a trap for the unwary consumer. Does that mean it's gone? Not necessarily. How about a change that reads: "Caution: if you do not pay for what we just sold you, we may be able to take back everything we ever sold you which is not protected from execution under state law." Is that unconscionable? It gets the seller priority over other creditors, which is one of its major purposes. But it also saves the seller the transaction costs of post-judgment execution, thereby increasing the chance that the buyer will *indeed* lose some of the things he previously bought. And that loss, because of the difference between "value" to the possessor and "value" when sold as used goods, might still be scarifying.²⁷ Is that risk still "material"? Is the assent not "validated" because every other seller has such a clause or worse, even though it would make no *formal* difference (except between creditors) if there were no clause at

24. See Murray, at 32-33.

25. See Murray, at 33.

26. See Leff, at 541-46.

27. See Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969).

all? Well, all we know now is that now we've got ourselves another lawsuit.

Let us say that the seller loses this one too, perhaps on the ground that the actual risk from self-help repossession is much greater than the actual risk from judgment execution, and the buyer could not have recognized that. Is the seller class finally finished with respect to cross-collateral clauses? Most likely not, if it wants to fight. For there is still another not unethical method of operations. Change the clause again (" . . . and the chance we will perhaps take them back is better than if we had to sue and ask the sheriff to take them back for us") and maybe put in a spot for initialling in the margin. Would that do it? Back to the old courtroom.

And, winning there, let's all start up again with new parties in a new jurisdiction.

To cut this short, the problem is not with Professor Murray's criteria, but with the common-law tradition itself when sought to be used to regulate the quality of transactions on a case-by-case basis, each one of which is economically trivial (so that you need free legal help for the consumer, and the seller can almost always avoid nasty precedent by an early surrender or settlement), and each one of which depends upon several doses of "the total context of the fact situation"²⁸ and "copious examination of the manifestations of the parties and the surrounding circumstances followed by a balancing effort."²⁹ It is as if there were some breakdown in the competitive structure which permitted, even fostered, the production of shoddy goods—not dangerous, just crummy—and one sought to have an impact upon that disutility by encouraging individual suits by individual buyers for individual product insufficiencies on (often) very individual factual patterns. One cannot think of a more expensive and frustrating course than to seek to regulate goods or "contract" quality through repeated lawsuits against inventive "wrongdoers."³⁰ Wouldn't it be easier and far more effective, *if* one finds these cross-collateral clauses, or some

28. Murray, at 33.

29. Murray, at 26-27.

30. See the amusing and illuminating piece on this technique and its limitations, Schrag, *Bleak House 1968: A Report On Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969). See also Shuchman, *supra* note 27, at 53: "If the consumer is given rights and remedies that must be asserted in a court—any court within the framework of the present legal system—we may just as well do nothing." I think it fair to state that, unlike me, neither of these authors is a secret agent for the forces of legal reaction. Professor Posner, on the other hand, who is not a "legal reactionary" either, but a more committed believer than I in the power of the market generally to correct its own abuses, seems to have more faith in the courts as an aid to that process than I have. See Posner, *op. cit. supra* note 13, at 65-68.

others, offensive in consumer transactions, just to face one's conclusion and regulate them out of existence, in a manner no lawyer could conscientiously avoid?³¹ Wouldn't it be better, finally, to face the political problems and pass a statute that deals with cross-collateral clauses, negotiable-note and waiver-of defense financing, abusive collection devices, a wide panoply of quasi-crooked marketing devices, and so on, and maybe even gross overpricing (on analogy to the civil-law *laesio enormis* progeny) and tuck in, along with private causes of action for the victims, an administrative enforcement arm to police these repetitive nasty practices (and perhaps get compensation for the whole class of bilked consumers theretofore identifiably bilked)?³² Isn't there some economy of scale in that approach? Remember, the idea is to change as many nasty forms and practices as possible, not merely to add to the glorious common law tradition of eventually coping. Wouldn't more be changed by explicit positive law, administratively interpreted and enforced, than by the feed-back from easily distinguishable, easily storable, exceedingly expensive *cases*?³³

Well, I really don't know. It kind of depends on whether facile devices like § 2-302 will stall the hard thinking and lobbying that has to be done. If not, I suppose there is some marginal need for some provision to deal with particularly egregious consumer-contract horrors not yet reached by any statute.³⁴ The key factor I suppose, is that in dealing with mass vices in mass contracts, administration by way of

31. See, e.g., UNIFORM CONSUMER CREDIT CODE §§ 2.408, 2.409 (Official Text 1969). Neither this Code, nor even the two particular provisions, are gems of consumer-protection activism, but God knows they ought to get this job done.

32. See, e.g., the recently passed N.Y.C. Consumer Protection Law of 1969, N.Y.C. ADMIN. CODE, ch. 64, §§ 2203d-1.0-8.0 (1969). This Act is very much worth looking at to see how much can be accomplished in the way of radical consumer protection without limiting one's reliance to repeated private lawsuits over a meaningless statutory text.

It is interesting too, to note that § 2203d-2.0 thereof provides: ". . . In promulgating such rules and regulations [defining unconscionable trade practices] the commissioner shall consider among other factors: . . . (5) the degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction; . . ." That is, the groping "risk-beyond-value-of-the-deal" criterion, see note 19, *supra*, is also touched upon in this Act.

33. Of course, I may seem to be missing the point that one may not be able openly to convince the legislatures to do that which ought to be done, and thus the proper course is to slip by them an open-textured provision, and then have the courts exploit its ambiguities. Well, maybe. But, goddammit, maybe not. See Leff, *passim*. Professor Murray, to my fair surprise and substantial spiritual oppression, refers to that theme in my article as "legislative history." See Murray, at 35.

34. It would be most useful if one could conjoin unconscionability with effective class-action statutes, to cut down the per-plaintiff transaction cost. The present leading contender for authorizing federal consumer class actions, however, (S.3201, 91st Cong., 1st Sess.) does not provide for such a cost-effective marriage.

the litigation bureaucracy is likely to have only trivial impact, for good or evil. One does not cure any serious breakdown in a theoretically competitive market system by case-to-case sniping,³⁵ but one doesn't do much harm either. As I have said before, the courts *will* adjust;³⁶ the trouble is that the economic system most certainly will not have to, and will not, I think, until more than this cute litigation game is played.

So now our dispute is at least open. Professor Murray wonders, I assume rhetorically, what I would have done with "a statute providing that one should not be unjustly enriched at the expense of another," or with "Section 5 of the Federal Trade Commission Act which merely proscribes unfair methods of competition."³⁷ Well, if you must know, pretty much what I would do with § 2-302 of the Uniform Commercial Code, with considerable enthusiasm and some historical justification too.³⁸ Or, once more to quote myself (to whom, I am sure, the last word will not belong): "Subsuming problems is not as good as solving them, and may in fact retard solutions instead. Or, once more to quote Karl Llewellyn (to whom, after all, the last word justly belongs), 'Covert tools are never reliable tools.'"³⁹

35. See Gellhorn, Book Review, 68 MICH. L. REV. 151, 152-53 (1969).

36. See Leff, at 558.

37. Murray, at 36.

38. See, e.g., the report by "Nader's Raiders" on the FTC, E. COX, L. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969), reprinted in 115 CONG. REC. E 370-99 (daily ed. January 22, 1969); Posner, *supra* note 13.

39. Leff, at 559, quoting LLEWELLYN.]THE COMMON LAW TRADITION 365 (1960), quoting Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).