Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4

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Because legal storytelling is now very much in vogue, it occurred to me, in the midst of writing a different type of article for this Symposium, that I too had a story to tell. My story does not concern my personal feelings of oppression or marginalization, as is the current fashion.1 Rather, it involves my role as a minor participant in a legal event—the drafting and adoption of revised Articles 3 and 4 of the Uniform Commercial Code. It thus connects with an older, somewhat milder tradition of legal narrative,2 and with the social science technique of participant observation.3

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2. See, e.g., Curtis J. Berger, Away from the Court House and into the Field: The Odyssey of a Special Master, 78 COLUM. L. REV. 707 (1978); Philip G. Schrag, On Her Majesty's Secret Service: Protecting the Consumer in New York City, 80 Yale L.J. 1529 (1971). With respect to the topic of this Article, see Fairfax Leary, Reflections of a Drafter, 43 OHIO ST. L.J. 557 (1982); and Fairfax Leary, Jr. & Michael A. Schmitt, Some Bad News and Some Good News from Articles Three and Four, 43 Ohio St. L.J. 611 (1982).

3. See generally George J. McCall & J. L. Simmons, Issues in Participant Observation (George J. McCall & J. L. Simmons, eds., 1969) (viewing participant observation as style of research employed to seek analytic descriptions of complex social organizations and delineating methodological and ethical issues that pertain to participant observation); Robert W. Janes, A Note on Phases of the Community Role of the Participant Observer, 26 AM. SOC. REV. 446 (1961) (describing use of participant-observation to research whether community role of investigator affects statements made by local respondents); Morris S. Schwartz & Charlotte G. Schwartz, Problems in Participant Observation, 60 AM. J. SOC. 343 (1955) (analyzing process of participant-observation as experienced in sociological study of mental hospital ward
All stories should have an identified purpose, as several observers of this style have noted; my story has two such purposes. First, it provides a modest amount of legislative history for a statute that state legislatures throughout the nation are considering, and that we will probably be living with, in some form, for a considerable period of time. Information about the way this statute was drafted may be of use to legislators deciding whether to adopt it, to legislators deciding whether to amend it, now or later, and to judges deciding how to interpret it. Second, the story provides some insight into the general process of legislative design, particularly by expert committees. With the use of such committees on the rise and with a new federal statute authorizing agencies to draft regulations through negotiation among private parties, the entire question of legislative drafting by nongovernmental bodies merits serious attention.

I. THE ABA COMMITTEE

My involvement with the process of drafting the revisions to Articles 3 and 4 began in the spring of 1986, when I was asked to serve as Chair of an American Bar Association subcommittee devoted to this issue. The general committee was the Ad Hoc Committee on Payment Systems, and consisted in its entirety of two subcommittees: mine, devoted to reviewing the Articles 3 and 4 revisions, and the subcommittee on wire transfers, which was devoted to reviewing a proposed new article of the UCC, designated Article 4A. The two subcommittees had an overlapping membership and always met in tandem; the principal distinction between them was the identity of the chair.
I had not been involved with the drafting process in any way before being asked to serve on the subcommittee. My participation was limited to a role typical of legal academics: writing a long, rather complicated article about the subject matter under consideration. This article, coauthored with my colleague, Robert Cooter, applied economic analysis to the problem of loss allocation in payment law, and concluded that this law, particularly the UCC, should be more protective of consumers. It helped me get tenure, but I have no vivid recollection of its having persuaded anyone. Consequently, I was flattered to be asked to serve as an ABA chair—even the chair of a subsection of an ad hoc committee—and it is with a twinge of regret that I now realize, for reasons to be described below, that the ABA will never ask me to chair anything again.

When I accepted the position, I knew very little about the history of the UCC revision project. I was aware that there had been something called the 3-4-8 Committee, which had produced a proposed statute known as the New Payments Code (NPC). I also was aware that both the NPC and the committee had met an unfortunate end, and that the current revision effort represented a second attempt to update the same UCC provisions. Upon reviewing the 3-4-8 Committee's ultimate draft, however, I experienced a certain sense of unease. The draft, authored largely by the committee's reporter, Hal Scott of Harvard Law School, was a major intellectual achievement. It proposed uniform collection and loss allocation rules for all the major modes of payment other than currency—checks, credit cards and electronic fund transfers—and developed a uniform terminology to express these rules. There were some problems with the draft, of course, but overall it seemed to me that Scott had succeeded in achieving what Gilmore and Dunham had achieved for security interests in the original UCC; he had penetrated through a welter of specific and contradictory statutes to perceive the

11. See Peter F. Coogan, Article 9—An Agenda for the Next Decade, 87 Yale L.J. 1012, 1014-17 (1978).
regularities of the underlying transactions, and the legal rules that were necessary to facilitate them. It was unclear to me why the NPC had failed, and what the conceptual and policy basis of the new effort would be.

These questions were quickly answered during the course of the first meeting of the ABA committee, held in Chicago on June 17, 1986. The NPC, I learned, had attracted intense and widespread opposition from the banking industry. In unifying payment law, the NPC had greatly reduced the favorable treatment banks received under the rules in Articles 3 and 4 governing the checking system, and the industry reacted with predictable and implacable fury. Consumer groups, which might have been expected to oppose the banks, had apparently joined them in opposition because the NPC proposed a reduction in the favorable treatment consumers received under the federal statutes governing credit cards and wire transfers. The result was an apparently grisly 1983 meeting in Williamsburg, Virginia, at which speaker after speaker rose to excoriate the reporter, the existing draft and the whole concept of unifying payment law. Two years later the sponsors of the UCC, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), terminated the entire project.

I also learned a bit, during the course of this first meeting, about the new revision effort that had replaced the abortive NPC. The ALI, which had taken the leading role in sponsoring the revision process, was now feeling rather gun-shy and had yielded this role to the NCCUSL. That august organization had reached an understanding with the banking industry after a series of meetings. A new revision process would be initiated to modernize Articles 3 and 4 in light of changes in technology that had occurred since the original UCC was promulgated in 1951. The revision would not attempt to unify payment law; it would simply update the existing Articles 3 and 4, and add one new article—designated 4A—to govern wholesale wire transfers. It was further agreed that the new revision would not alter the balance between banks and consumers that existed in the original Articles 3 and 4, nor would it add any new provisions dealing with consumer protection. Article 4A would scrupulously avoid consumer transactions, which were governed by relatively pro-consumer federal statutes, and focus exclusively on electronic fund transfers.

13. See Miller, supra note 9, at 1220-23.
between business entities. To lead the drafting effort for this reconstituted project, two new reporters had been appointed—Robert Jordan and William Warren of UCLA Law School.

The ABA Committee had been restructured to reflect the scope of the new revision project, with one subcommittee (the one I chaired) devoted to Articles 3 and 4, and a second subcommittee (chaired by William Davenport, of First National Bank of Chicago) devoted to the new Article 4A. The committee was asked, at its first meeting, to approve a proposed name change from the Ad Hoc Committee on the New Payment Code to the Ad Hoc Committee on Payment Systems. Its task was to provide advice to the reporters and to the ALI-NCCUSL Drafting Committee in general. Once the revision was complete, the committee would also advise the ABA itself whether to endorse the final product.

We met three or four times a year, from June of 1986 through August of 1990, after which I resigned my position as chair for reasons to be described below. Invariably, one meeting was held at the ABA's annual convention, which takes place in early August, and another was held at the annual meeting of the ABA’s Business Law Section, in March or April. One or two other meetings unconnected with general ABA events were also held at various locations around the country. These later meetings typically lasted two full days, with one day devoted to my subcommittee, and the second devoted to the subcommittee for Article 4A.

In theory, the meetings were open only to members of the Ad Hoc Committee on Payment Systems, but any member of the ABA who was interested in the subject matter could join the committee. The membership list varied from about 60 to 110 people—with one sudden surge to 133, as will be explained below—but attendance at each meeting usually ranged from 20 to 40. Most of these were “regulars,” although there were always a few people who emerged off the membership list for a single meeting before vanishing from sight once more. Both the members of the overall committee and the regular attendees at the two subcommittee meetings were predominantly bank attorneys, corporate attorneys who dealt with their firm’s cash management operations, attorneys in private firms who represented banks or large corporations, and


15. See Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee on Payment Systems, in Chicago, Ill. 2 (June 17, 1986) [hereinafter Minutes, June 17, 1986] (on file with Loyola of Los Angeles Law Review).

16. See infra notes 67-68 and accompanying text.
law professors. In addition, there usually were representatives from the Federal Reserve System, the New York Clearinghouse and the American Bankers Association.

The committee fulfilled its task of providing advice for the drafting process by maintaining ongoing contacts with the ALI-NCCUSL Drafting Committee. The reporters attended many, but not all of our sessions, and seemed to pay serious attention to the views of the group when they were present. Two members of the ABA committee who regularly attended its meetings, Frederick Miller, a professor at the University of Oklahoma, and Donald Rapson, Assistant General Counsel of the CIT Group, Inc., were also members of the drafting committee; the two co-chairs of the drafting committee, Robert Haydock and Carlyle Ring, occasionally came to the ABA committee meetings. In addition, several other members of our committee were apparently in regular contact with the drafters. In the fall of 1990, our subcommittee produced its final report, recommending ABA endorsement of the Article 3 and 4 revisions, and the ABA House of Delegates approved the Article 3 and 4 revisions on February 12, 1991.

II. REPRESENTING THE CLIENT

Articles 3 and 4 codify bank practices regarding check collection, as well as existing understandings about promissory notes, but their crucial provisions—the ones that produce almost all the controversy—involves the allocation of losses between banks and their customers. For a long time, commentators on the UCC drafting process have expressed doubts about the ALI and NCCUSL practice of relying on bank lawyers to draft such provisions. The bank lawyers on the ABA committee had heard

17. On September 20, 1988, prior to the surge in membership, the Committee consisted of the following:

| Attorneys Employed by Banks and Other Financial Institutions | 25 |
| Attorneys Employed by Corporate Users | 35 |
| Attorneys in Law Firms | 14 |
| Law Professors | 17 |
| Consumer Representatives | 1 |
| Others | 16 |


18. See, e.g., Frederick K. Beutel, The Proposed Uniform Commercial Code Should Not Be Adopted, 61 YALE L.J. 334, 362 (1952) (stating that Article 4 "is a deliberate sell-out of the American Law Institute and the Commission of Uniform Laws to the bank lobby"); Grant Gilmore, The Uniform Commercial Code: A Reply to Professor Beutel, 61 YALE L.J. 364, 374, 377 (1952) ("As Beutel says . . . Article 4 . . . was proposed by a group of bank counsel . . . . [A]s it now reads [it] should not be enacted, as part of the Code or in any other guise.").
this criticism of course; when asked about it, they typically declared: "When I participate in an advisory committee, I check my clients at the door." This was true; with the exception of Thomas Baxter, who explicitly and effectively represented the concerns of the Federal Reserve System, none of the attorneys on the committee defended the particular interests of the bank for which they worked, or which retained them. What these attorneys did not check at the door, however, was their conceptual framework. Contemporary philosophers and anthropologists assure us that doing so would be impossible, and even efforts to imagine doing so, like Rawls' *A Theory of Justice*, have been subjected to intense criticism. In any event, the bank attorneys who participated in the ABA committees certainly had their conceptual frameworks in the room with them. Part of this conceptual framework was the product of being white, male and upper-middle class, as virtually all these attorneys were. Indeed, the very image of checking one's clients at the door would occur most readily to someone who frequents restaurants with coat check facilities; I generally wind up at McDonalds, where I try to keep my possessions really close to me. Beyond their lack of diversity, the bank attorneys on the committee tended to see the world from the perspective of their clients. To them, banks are reputable, well-run institutions, struggling to make a decent profit in an economy buffeted by recession, a political environment that imposes unnecessarily stringent and detailed regulations and a world of intense, ever-increasing competition. Consumers who make claims against banks, on the other hand, tend to be careless, mistaken or dishonest. They are not bad people, but when they

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19. Because it is essentially the regulator of the check collection system, the Fed has a direct institutional interest in the rules governing that system. Moreover, as will be described below, it has the power to preempt any rules that it deems undesirable. In addition to Baxter, Fed officials who attended some of the committee meetings included David Felsenthal, Oliver Ireland and Ernest Patrikis.


Lose money, their natural tendency is to blame the bank, or if they know they were at fault, distort the facts so that the bank will take the loss.

One example of this perspective involved the committee's treatment of stop payment orders. The original Article 4 declared that the customer has the "right" to stop payment on a check—one of the very few affirmative rights that this statute extends to customers. But it went on to provide that "[t]he burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer." As I and several other members of the committee pointed out rather early in our meetings, and as the reporters were well aware, this burden-of-proof requirement is problematic. First, it grants a procedural advantage to the party that clearly made the mistake. Second, and more basically, the entire point of the stop payment mechanism is to shift the "burden of establishing the fact and amount" of a commercial loss from the customer to the merchant; it provides the ordinary buyer with a self-help remedy and requires the merchant to proceed with litigation. If the bank makes an error, however, the customer loses this advantage because the bank is entitled to debit the account until the customer demonstrates, to the bank or a court, the fact and the amount of the loss.

In response to these perceived difficulties, the reporters drafted a new stop payment provision. It read as follows:

(3) If a bank pays an item contrary to a binding stop payment order, it shall promptly recredit the customer's account for the amount of the item unless the customer refuses to sign upon request by the bank (i) an affidavit setting out facts sufficient to establish a prima facie defense on the item, and (ii) an agreement in writing to cooperate with the bank in its action against the person who received payment to establish the bank's subrogation rights under Section 4-407.

23. U.C.C. § 4-403. Articles 3 and 4 will be cited as either "Original" or "Revised." "Original" refers to the 1951 version of the Code; "Revised" refers to the 1990 version. In this case, the relevant language is identical in the two versions.

24. U.C.C. § 4-403(3) (Original).


26. U.C.C. § 4-403(3) (Tent. Draft July 31-Aug. 7, 1987). All drafts cited in this Article are typewritten documents prepared by the NCCUSL, and are on file with the Loyola of Los Angeles Law Review. The date given is the one that appears on the title page and generally refers to the NCCUSL meeting at which the particular draft was presented.
The provision, Warren and Jordan felt, preserved the benefit of the stop payment order for the customer, yet provided the bank with sufficient information so that, having paid the check from its own funds, it could proceed against the merchant.

At the first meeting where this new provision was discussed, a consumer representative—Gail Hillebrand of Consumers Union—was present. She found the provision an improvement, but observed that many consumers would be intimidated by being required to sign a legal document. They would assume that they were admitting liability rather than giving the bank legal rights against the merchant, or they would experience a vague, less-defined discomfort about potential involvement in legal proceedings. The bank attorneys at the meeting were quiescent, perhaps because they were seeing the provision for the first time. I assumed that we had taken a small step toward more balanced legislation.

By the next meeting, however, these attorneys had an answer. First, they argued, many people who stop checks do so dishonestly or as a result of a mistaken belief about their legal rights; banks should not be held liable for paying checks that should have been paid anyway. More importantly, the bank attorneys said there was no need for a legal rule requiring banks to recredit the customer's account because that was standard practice anyway. When the customer complained that the bank had paid the check over a valid stop order, the bank would ask the customer about the circumstances of the stop. In cases in which the bank perceived that the customer had a valid reason to stop the check, it would voluntarily recredit the account and either accept the loss or proceed against the merchant. To codify this practice would only deny banks the flexibility they needed in these situations.

As these arguments were advanced, most of the people in the room nodded in agreement. Gail Hillebrand was unable to attend. Sensing that a blazing condemnation of the ways banks treated ordinary consumers would not be well received, I tried a different argument: If banks were already acting so responsibly, they could have no objection to the


28. For the circumstances of Hillebrand’s participation, see infra notes 57-58 and accompanying text.

codification of their already excellent practices in law. This law would
discipline the outliers, those irresponsible institutions that diverged from
standard practice when subject to financial stress. Surely, there were
some such institutions; because we all knew that certain savings and
loans (one can always dump on S&Ls when talking to attorneys for com-
mercial banks) were willing to commit outright crimes, they would cer-
tainly be prepared to treat consumers as harshly as the law allowed. I
even received support from one of the bank attorneys, David Goldstein
of Seattle, who urged his colleagues to be “statesmanlike” on this issue.
But most of the committee members did not perceive erroneous payment
of stop orders as a particularly serious problem, and felt that a complex
legal rule would interfere with the flexibility required by our well-
managed, consumer-oriented banking system. William Warren, one of
the reporters, was present, and I am sure the same views were expressed
in the drafting committee. The result, as Warren announced at a later
ABA committee meeting, was that the proposed change was withdrawn,
and Article 4’s stop payment provision was restored to its original
form.30

Had consumer representatives been in the room, I am certain they
would have found the bank attorneys’ picture of banks and consumers
somewhat fanciful. Consumers, they would have said, are generally hon-
est; fraud losses on checking accounts, for example, are extremely low
and virtually all of these losses are attributable to real criminals, not er-
rant consumers. Banks, on the other hand, are rarely solicitous of indi-
vidual consumers, and they are reluctant to absorb losses or forgo profits
when the hapless consumer can be made to pay. In addition, they are
inefficient, regularly committing errors whose consequences they are un-
willing to accept.

There is very little empirical evidence available about these matters,
certainly not enough to support or refute either set of images. The bank
attorneys’ reflexive belief in the trustworthiness of banks and the irre-
 sponsibility of customers springs from a characteristic way that lawyers
think. Lawyers cathect with their clients.31 They do not think of them-

30. See Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee
on Payment Systems, in Houston, Tex. 10 (Mar. 4, 1989) [hereinafter Minutes, Mar. 4, 1989]
(on file with Loyola of Los Angeles Law Review).
31. See, e.g., Mark J. Green, The Other Government: The Unseen Power of
Washington Lawyers 271-93 (rev. ed. 1978); Robert L. Nelson, Partners With
Power: The Social Transformation of the Large Law Firm (1988); Erwin Chemer-
insky, Protecting Lawyers from Their Profession: Redefining the Lawyer’s Role, 5 J. Legal
Prof. 31 (1980); Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into
THINKING LIKE A LAWYER

selves as hired guns, mercenaries, trained barracudas or any of the other bellicose figures that their critics depict. Instead, they see themselves as helping people carry out desirable activities or enforce their legal rights. This is true even for general litigators who switch from plaintiff to defendant, buyer to seller, borrower to lender, new entrant to dominant firm with each case, yet always seem to be convinced that the client who walked in the door and retained them should prevail. It is all the more true for corporate attorneys who work within a single industry, or specialized litigators who always represent one side. When that single industry consists of people whose social class and economic status are the same as the attorney’s, bonds of friendship will be added to the process of client identification. Over time, these forces generate a conceptual framework, a general orientation toward the world. It is possible for lawyers to check their clients at the door—attorneys in law firms switch clients fairly regularly, and in-house lawyers can always imagine moving to a different company within the industry. What they cannot leave behind them is a set of identifications, beliefs and personal bonds built up over decades of practice. These identifications, beliefs and bonds constitute their career, their sense of themselves as productive members of society, and form a comprehensive framework through which lawyers perceive the issues in their field.

Of course, this process of identification varies in intensity. It will be attenuated, perhaps to the vanishing point, when there is a large difference in social status between the lawyer and the client. For a public defender, representing a client who is of a different race, uneducated, poor or lower-middle class, and accused of doing something that the lawyer cannot possibly imagine having done, there may be no sense of identification at all. In fact, public defenders often acknowledge that they represent the guilty, a realization that may be responsible for their high rate of job dissatisfaction. But most people integrate their lives, constructing a belief system that provides them with a sense of meaning for the things they do. For an attorney, this process involves identifying with one’s client group and ultimately developing a conceptual framework that incorporates and justifies these clients’ points of view.

The force of this identification process was apparent throughout the ABA committee meetings. While the discussion of stop orders was one

of the most dramatic examples, a much more important instance involved truncation. Under existing check collection systems, the check itself traces a commercial circle from the drawer to the payee, to the depositary bank, the intermediary bank, the drawee or payor bank and, as a canceled check, back to the drawer. With truncation, the physical check is cut off at some point and its journey is completed by electronic transmission of the information it contains. Simple truncation stops the check at the payor bank, so that the customer receives a statement with a list of charges but no canceled checks. Nothing in the current UCC prevents this practice, but it does not reduce collection costs to any significant extent. Radical truncation stops the check at the depositary bank and transmits nothing but electronic information through the collection process. This represents a major cost reduction. It is already the way credit card charges are collected, and it probably represents the future of the checking system. Because of their eighteenth century origins, existing Articles 3 and 4 contemplate paper collection and contain a variety of legal rules that preclude radical truncation. The banks’ desire to remove these legal impediments to truncation was probably their primary motivation for favoring revision of the UCC.

While truncation benefits bank customers by lowering collection costs, it also presents difficulties for them. Instead of receiving their canceled checks each month, customers will receive information. The first problem involves the amount of information they receive. The absolute minimum is the item number and the amount of the check; the maximum that can be transmitted electronically is an image of the check, which is what the American Express Company provides for credit card charges. Mastercard and Visa adopt the intermediate position by providing the item number and amount plus the name of the payee and the date of the transaction. Obviously, the more information one receives, the easier it is

34. Id.
to reconcile one's account, maintain records and detect bank errors or fraudulent items. The second problem with any truncation system is that the actual check is often necessary, and almost always useful, for disputes with payees, the Internal Revenue Service or various other parties. When such disputes arise, the customer will need to retrieve the check, or at least obtain a complete copy of it.

The draft versions of the Articles 3 and 4 revisions responded to the banks' desire to facilitate truncation—by providing that an item, that is, the thing that moves through the collection system, could consist of electronic information as well as a physical check. However, they did not deal with any of the potential problems that truncation might cause the customer. To fulfill their obligation to the customer, banks were only required to transmit the minimum amount of information—item number and amount, plus the date the item was paid by the payee bank. While the drafts did state that the customer was entitled to the original check, or a copy of it, on request, they did not contain any rules governing the amount the bank could charge for retrieval, the length of time permitted for retrieval or the customer's remedy if the bank was unable or unwilling to produce the item.

In the ABA committee, the task of pointing out the potential difficulties that these provisions would create for ordinary consumers fell largely to the law professors; I recall being particularly vociferous about the subject. We suggested that consumers might be bewildered by a list of numbers, and that a fair truncation system should impose some obligation on the banks to supply consumers with the information they would need by requiring that banks report the name of payee, or provide "carbonized" checks, or use some other mechanism. In addition, we thought that banks should be required to provide a copy of the actual item, or the item itself, within a defined period of time and at a reason-

37. U.C.C. § 4-110 (Revised). This provision went through a succession of variations from one draft to the next. The main reason for the changes was the banks' concern that the provision impose as few constraints on them as possible, thereby allowing for maximum flexibility.

38. U.C.C. § 4-406(a) (Revised). The date of payment is, of course, easy for the bank to supply. Unlike the date on the instrument, or the date of deposit, it will rarely be of much use to the customer.


able cost, because a customer's bank had no particular incentive to retrieve the item from some remote location and the consumer would be in a very poor bargaining position at the time of the request.\textsuperscript{41} I also thought that a balanced statute should impose a penalty on banks that failed to produce a requested item and that the formula that has proven to be effective in the Truth in Lending Act, a liquidated sum plus attorney's fees, would be appropriate.\textsuperscript{42}

Each time these points were raised, most of the other committee members reacted as if a faux pas had been committed. There was a slight rustling of people in their seats and a few sidelong glances; then one of the bank attorneys, with the most subtle suggestion of a sigh, would undertake to explain to me why the suggested changes were unnecessary. In the first place, he would say, truncation is a new idea, and we should not encumber it with rules whose effects cannot be anticipated. Requiring banks to provide the name of the payee would involve massive redesign of the banks' automatic processing equipment and thus delay, if not prevent, the advent of truncation. As for rules and sanctions governing check retrieval, these are entirely unnecessary; banks need customers and have no desire to ignore their legitimate requests. Requiring the payor bank to obtain items within a specified period of time, under threat of civil liability, is unreasonable because that bank would not have control of the check. All that such a requirement would achieve would be to create another impediment to truncated check collection. At the conclusion of this statement, usually delivered in parts by several different people, there was a general nodding of heads and an unspoken air of "let's proceed."

At work in these discussions, particularly with respect to the retrieval issue, was the same sense that banks were trustworthy, reliable institutions that would do their best to serve their customers. As previously mentioned, these beliefs derive from the well-recognized tendency of lawyers to identify with their clients, a tendency that becomes greatly amplified when all the lawyers' clients are members of the same industry and the issue involves an identification with that industry. The committee members' treatment of the information issue revealed a deeper, if more diffuse aspect of this identification process. The bank attorneys not only identified with their clients, in the sense of believing, as advocates or representatives, that their clients were right, but they also tended to perceive the underlying structure of the situation in the way their clients did. These attorneys responded genuinely and instinctively to the concern

\textsuperscript{41} Id. at 3.
\textsuperscript{42} See 15 U.S.C. §§ 1692k(a), 1693m(a) (1988).
that providing customers with the name of the payee would involve significant expenses for banks. They could feel the distress their clients would experience if compelled to replace or reconfigure all their automatic processing equipment. In contrast, the plight ordinary consumers confronted with a list of otherwise unidentified numbers simply left them cold.

Most consumer representatives would have reacted exactly the opposite way, of course. Concerned that banks are earning substantial, perhaps excessive profits at their customers' expense, they would have been unmoved by the banks' need to alter the processing equipment in order to reduce collection costs. On the other hand, they would have readily identified with the difficulties that ordinary consumers will face from the severe reduction in the information that is supplied in a truncated system. Their basic allegiance as representatives, like the allegiance of bank attorneys, not only governs their judgments about appropriate solutions but determines their underlying perception of the problem to be solved.

Another discussion in the ABA committee highlights this phenomenon—the discussion about "bounced," or not sufficient funds (NSF) checks. The issue arose in the very first meeting when the chair of the committee, Roland Brandel, pointed out that existing Article 4 does not specify the criteria for wrongful dishonor of a check. Most banks post checks against the customer's account at night. The question was whether a bank officer, when reviewing NSF checks the next morning, must recheck the account to see if additional funds had been received that morning. Brandel's idea was that the officer would not be required

43. At present, all the information that revised Article 4 requires is encoded in Magnetic Ink Character Recognition (MICR) numbers on the bottom of the check (the payor bank, account number and item number are pre-encoded; the amount is encoded by the depository bank). Encoding the payee's name or the date of the check would require more MICR figures, and the machinery is not designed to handle any increase. In addition, the payee's name might be difficult to read and encode.

The answer, of course, is that an innovation is not technologically ready for the market until it can be produced with the necessary safeguards. Airplanes were fairly common in 1910, and were a factor in World War I, but they were not technologically ready for the civilian passenger market until a decade later. In fact, the technological developments necessary to provide customers with a picture of their truncated check are close to completion. See Karen Gullo, Unisys, BancTec Adding Check-Imaging Feature, AM. BANKER, Oct. 25, 1990, at 3; Jeanne Iida, Fed Tests High-Speed Imaging, AM. BANKER, June 14, 1990, at 3; Richard Layne, Bankers Say IBM Ready to Test Imaging System, AM. BANKER, Mar. 9, 1990, at 1. If the banks are required to internalize all the costs of a technological change, they will make efficient judgments about the implementation of that change. Cf. Cooter & Rubin, supra note 7, at 76-77 (discussing application of loss reduction principle to participants in payment system).

to recheck, but if the officer did, the bank would be required to revise the account balance to reflect the newly deposited funds. The committee discussed the idea at several meetings, and a provision to this effect was ultimately added to Article 4, I believe as a result of these discussions.45

There is nothing unreasonable about this provision, although someone more sympathetic to customers' rights might have designed it differently. What is striking, however, is that this is the only provision regarding NSF checks that the committee approved. Bounced checks have been a matter of significant controversy in recent years.46 In response to this controversy, the Federal Reserve Board proposed a regulation that would have given banks an additional day to decide whether to pay or bounce checks under $100.47 The theory of this provision was that many customers bounce checks because they miscalculate their balance at the end of their pay period. The extra day would allow a significant proportion of the bounced checks to be paid, thus saving customers substantial bounced-check fees, and saving money for the payment system generally. The reporters suggested a similar provision in their early drafts, substituting the more flexible term "small" for the fixed dollar amount.48 But the ABA committee reacted negatively to this idea on the grounds that it would create operational difficulties for the bank. Specifically, the concern was that if a small check were reprocessed the second day, there would be no convenient way for the bank's automatic machinery to know that this was a second presentation rather than an initial one, and thus no way to determine that the check should then be

45. Id.; Minutes, Nov. 7, 1986, supra note 39, at 2-3; see Memorandum from Robert Jordan & William Warren, Reporters, to Drafting Committee on Amendments to Uniform Commercial Code—Current Payment Methods (Aug. 6, 1986) (on file with Loyola of Los Angeles Law Review). The memorandum states: "At the June meeting of the ABA Committee, Roland Brandel raised the issue of when a payor bank may determine that a customer's balance is insufficient." Id. at 67. It then reprints language submitted by Brandel, which is in fact the first version of revised U.C.C. § 4-402(c). Id.


bounced if no additional funds had been received. In response to this concern, the provision was ultimately dropped from the revision.

Other ways of reducing the number of bounced checks, such as requiring banks to pay small checks prior to large ones, as well as the central question of the amount of bounced-check charges, were never seriously considered by the committee. These issues are perhaps the greatest concerns about the checking system that consumer representatives express. According to some estimates, the banking industry annually clears between three and four billion dollars from return-check charges. But banks do not regard this as a problem, and the committee members shared their perception.

III. DEALING WITH THE OPPOSITION

Although lawyers tend to identify with their clients, and almost always identify with an industry to which all their clients belong, they often must deal with those who hold opposing views. The more amicable the transaction, after all, the less the parties will need to involve attorneys. As a general matter, the lawyer's role is embedded in the context of the adversary system, in which each side is represented by a lawyer committed to its cause and the resolution emerges from the controlled conflict between the two. Indeed, the prevailing justification for authorizing lawyers to represent any client who cares to retain them, without examining the morality of the client's position, is our faith that this adversarial clash of represented parties will produce just results.

But in the ABA Committee and, as far as I could tell, in the ALI-NCCUSL Drafting Committee, only two of the three principal inter-


51. If the customer's balance is $1000, and four checks in amounts of $200, $200, $300 and $900 are presented, the bank can bounce either one check or three, depending on the order of payment. The original Article 4, in U.C.C. § 4-303(2), states: "[I]tems may be ... paid ... in any order convenient to the bank." U.C.C. § 4-303(2) (Original). In the revision, the provision reads: "[I]tems may be ... paid ... in any order." Id. § 4-303(b) (Revised).


54. The drafting committee, as listed on the various drafts of the revisions, consisted (including reporters and ex officio members) of seven law professors, three corporate attorneys, three attorneys in private practice and one judge. The committee received advice from a larger
ests—financial institutions, corporate users and consumers—were represented. Apart from bank attorneys and corporate attorneys of various sorts, the only significant group consisted of commercial law professors, five or six of whom were regular attendees. They were quite knowledgeable about the law, though no more so than many of the bank and corporate attorneys, but they had very little impact on the overall tone of the meetings. To begin with, they held diverse views, ranging from those who focused on consumer issues, such as Mark Budnitz and myself, to those who strongly supported the revision process, such as Fred Miller. More significantly, however, they seemed to lack authority as far as the other members were concerned because they represented no one other than themselves. The bank attorneys could claim, however subtly, the support of the industry, as well as a superior knowledge of bank operations; the corporate attorneys could speak with the authority of major


nonfinancial enterprises. Because both subcommittees usually operated by consensus, rather than by vote, this rendered the influence of the professors even less than their relatively meager numbers would suggest.

The obvious counterweight to all these bank and corporate attorneys would have been some representatives from the consumer movement. As indicated, these representatives could have been expected to express exactly opposite beliefs about the relative trustworthiness of banks and consumers, beliefs based upon their underlying perception of the world. Like the bank attorneys, they would have expressed their views with a relatively high degree of unanimity, and with the political force of their organizations. Their presence might have generated an adversary dynamic leading to a balanced statute, just as the clash between two represented parties in a court of law is expected to produce a just result.

No consumer representatives were part of the Ad Hoc Committee when it was established; however, none were invited, as far as I know, and none volunteered. Fairly early in the course of our meetings, the chair of the committee, Roland Brandel, noted this deficiency and invited Gail Hillebrand of Consumers Union to join.57 Hillebrand attended several meetings; she spoke out on the stop payment issue58 and ultimately wrote a strong statement opposing the revisions, which is described below. But Hillebrand’s participation was constrained by a lack of funding and a lack of time. The bank and corporate attorneys generally had their travel and daily living expenses paid by their bank or firm; the law professors were sometimes reimbursed by their institution or in my case, because I was the chair, by the ABA itself. Hillebrand had no funding, and thus was able to attend only those meetings held near her home in the San Francisco area. In addition, Consumers Union is understaffed, with only four attorneys in the San Francisco office and only eleven nation-wide. In addition to payment law, Hillebrand had to cover all other UCC topics, the Community Reinvestment Act,59 home mortgages, unfair debt collection practices, consumer credit, Truth in Lending60 and abuses involving raw milk. This would have created difficulties if dealing with an ordinary statute; it presented particular difficulties with respect to Articles 3 and 4, which are arcane and technical, and which

57. Later on, another member of the committee, David Goldstein, urged the ABA to secure consumer representation on relevant committees. Letter from David B. Goldstein, Member, ABA Ad Hoc Committee on Payment Systems, to Robert D. Raven, President, American Bar Association 2-3 (Feb. 6, 1989) (on file with Loyola of Los Angeles Law Review).
demand, as commercial law professors and their students know, long periods of unrewarding study.

In order to secure adequate representation of consumer interests on the committee, the ABA would have needed to pay the expenses of several consumer representatives, committing the funds in a sufficiently definitive manner so that the organizations would be willing to assign significant staff time to the project. The ALI and NCCUSL would have needed to do the same thing for their drafting committee. There are several possible reasons why none of these organizations even contemplated doing so. First, they may have believed that knowledgeable attorneys, no matter what their institutional affiliations, were capable of drafting a balanced, public-oriented statute. This was a mistaken notion, and all three organizations should have realized this, given the widely known events surrounding the original Articles 3 and 4, their predecessor statutes, and the abortive New Payments Code. A second possibility is that all three organizations were willing, or even eager, to produce legislation that catered to the interests of banks at the expense of their customers. The final possibility is that none of these organizations had the money to subsidize consumer representatives or, more precisely, that none of them were willing to devote a significant amount of funds to an obscure and sexless topic like payments. My own guess is that all three factors were involved.

The Article 4A subcommittee supplied an illuminating example of the dynamic that might have occurred had consumer representatives been included in the meetings. As a result of the New Payments Code fiasco, the Article 4A project, which dealt with wire transfers, was specifically designed to exclude consumer transactions. But it did cover the transactions of commercial firms, and these firms had the capacity to strike rather hard once they were aroused. What aroused them was the drafting committee's approach to the mysterious interloper problem. The problem, which is extremely simple, but derives drama from the size and speed of wire transfers, is this: At some particular time, there is $100 million in a corporate account; ten nanoseconds later, there is $20 million, and no one knows what happened to the other $80 million.

What distinguishes this problem from many other issues of loss allocation in payment law is that, by hypothesis, there is no way to deter-

61. See supra notes 18-22 and accompanying text.
mine which party was at fault or, indeed, the means by which the loss occurred. Nonetheless, the drafting committee, with the help of its advisors and the ABA committee, was readily able to develop a satisfactory solution. It provided that the bank was required to offer the customer a "commercially reasonable" security procedure for wire transfers. If the customer accepted the procedure, and the bank then failed to follow it, the bank would be responsible for the resulting loss. If the customer refused to accept the bank's security procedure, or if the customer failed to follow that procedure, the customer was liable. If neither party could prove that the other was at fault—the mysterious interloper problem—the customer was liable. This is because customers as a group are likely to be less responsible about payment matters than banks.

Virtually all large corporations have a group of high level employees, including at least one attorney, assigned to managing the corporation's liquid funds. These cash managers, like virtually everyone else in American business, belong to a trade association, known at that time as the National Corporate Cash Managers Association (NCCMA). When the NCCMA found out about the Article 4A drafting project, and specifically about the proposed treatment of fraudulent wire transfers, it sent Arthur Herold, an attorney from Philadelphia, to the March 26, 1988 meeting to express the organization's displeasure. Simultaneously, members of the NCCMA who were attorneys began enlisting in our Ad Hoc Committee on Payment Systems, which quickly increased in size from about 80 to 133 people. These corporate attorneys appeared in force at the next meeting of the two subcommittees. At least fourteen of them were present at the Article 4A subcommittee meeting, representing institutions such as Amoco, Exxon, Atlantic Richfield, Sears Roebuck, Beatrice/Hunt Wesson, Allstate and Dow Chemical.

When the subcommittee reached the problem of the fraudulent wire transfers, and specifically the mysterious interloper problem, a new mood seemed to be present. According to approximately fourteen members of

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65. Other members of the organization include treasury managers, banks, consultants and vendors. The NCCMA has since changed its name to the Treasury Management Association (TMA) in an effort to broaden the association's focus and areas of expertise. NCCMA, CORP. EFT REP., Oct. 23, 1991, available in LEXIS, Nexis Library, Current File.
68. See Minutes, June 17, 1988, supra note 29, at 1; Minutes of Meeting, Subcommittee on Proposed Article 4A, ABA Ad Hoc Committee on Payment Systems, in San Diego, Cal. (June 18, 1988) [hereinafter Minutes, June 18, 1988] (on file with Loyola of Los Angeles Law Review).
the subcommittee, it was the bank's job, not the customer's, to determine whether a security procedure was commercially reasonable. Moreover, if funds mysteriously disappeared from a customer's account, despite the establishment of such a procedure, the fault would obviously be the bank's, and the bank, not the customer, should be liable for the loss. No, said the bank attorneys, banks know how to manage money, and if funds mysteriously disappeared, the customer would almost always be the one at fault. On the contrary, said the cash managers, the bank would be in control of the account, and if funds mysteriously disappeared, they were quite sure that the bank would almost always be the one at fault. In fact, they were so convinced of the accuracy of their analysis that, unless the relevant provisions were changed, they were prepared to oppose adoption of the entire Article 4A in the legislatures of all fifty states.69

This struck the bank attorneys as a persuasive argument. They proceeded, during this session and several succeeding ones, to negotiate with the cash managers over this issue and several other provisions in Article 4A. The result, not surprisingly, was a compromise. On the mysterious interloper issue itself, the customer would be given an opportunity to prove that the loss was not caused by its own employee, or by someone who obtained from the customer the means of effectuating the fraudulent transfer. If the customer could make this demonstration—in other words, if the interloper was truly mysterious—the loss would fall upon the bank.70

With respect to the reasonableness of security devices, the final result ended up closer to the bank's original position. Here is the full text of the relevant provision, section 4A-202(c) of the UCC:

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security proce-

69. See Minutes, June 18, 1988, supra note 68, at 4-8. The minutes state this argument somewhat more delicately: "Mr. Herold stated that the NCCMA could not support the statute as presently drafted." Id. at 6.

70. U.C.C. § 4A-203. Because the burden of proof is on the customer, of course, there could be a situation in which the cause of the loss was truly unknown, but the customer could not persuade the trier of fact that it was blameless. This simply reflects the careful balancing of opposing interests that § 4A-203 represents.
dure was chosen by the customer after the bank offered, and the
customer refused, a security procedure that was commercially
reasonable for that customer, and (ii) the customer expressly
agreed in writing to be bound by any payment order, whether
or not authorized, issued in its name and accepted by the bank
in compliance with the security procedure chosen by the
customer.71

This is classic lawyer's language of course, and would be readily
recognized as such by both lawyers and nonlawyers. What is most nota-
ble is that it is the language of negotiated compromise. The provision is
virtually a transcription of the point and counterpoint, the argument, ob-
jection, response and qualification that occurred during the subcommit-
tee meetings. One can almost hear the bank attorneys and the corporate
cash managers speak as one reads the provision.

Whether transcribing a negotiation of this sort produces optimal so-
cial policy is an open question. I do not think it does. It seems to me
that the interaction among opposing forces works best when it generates
new ideas, rather than qualifying existing ones.72 But at least negotia-
tions produce balance. Provisions such as this, negotiated between par-
ties of roughly equal strength, generally give each side the feeling that
their interests have been adequately protected. That is what the cash
managers felt, as well as the banks. Both sides ended up supporting Arti-
cle 4A in the state legislatures; and with no one opposing it, the statute
was rapidly adopted.

The corporate cash managers were not particularly interested in re-
vised Articles 3 and 4, which is hardly surprising: These statutes create
problems for consumers, in my view, but they work well enough for cor-
porate customers. For example, corporations, with their professional
bookkeeping staffs, will experience no particular difficulty in monitoring
a truncated account statement that contains only numbers, and they
probably would be able to persuade banks to retrieve their items for
them. In fact, the corporate cash managers identified only one significant
concern. The original Article 4 provides that the customer is expected to
review the account statement within "a reasonable period not exceeding
fourteen calendar days."73 If the customer fails to do so, it cannot shift

71. Id. § 4A-202(c).
72. See Edward L. Rubin, Efficiency, Equity and the Proposed Revision of Articles 3 and 4,
73. U.C.C. § 4-406(2)(b) (Original). More specifically, customers generally can obtain a
recredit of any item that a bank has paid and charged to the customers' accounts by proving
that they did not sign or otherwise authorize the item. Section 4-406 provided that customers
were precluded from asserting that they had not signed the item, and thus precluded from
liability to the bank in a case in which two frauds are committed by the same wrongdoer. Both Mark Budnitz and I thought the fourteen-day limit was onerous for consumers, who might be ill, on vacation, tied up with a personal crisis, very busy at work or otherwise distracted. We raised this concern at one subcommittee meeting, with the usual result. At the very end of our subcommittee's deliberations, as the revised Articles 3 and 4 were about to be promulgated, the NCCMA discovered the same concern—not because corporations get sick, but because they might issue a very large volume of checks and then have difficulty reviewing the account within fourteen days. Despite the awkward timing of this discovery, there was no further need for a show of force by the NCCMA. Two attorneys who represent the organization, Anne Pope and Paul Turner, both of whom are effective negotiators, presented the issue to the ABA subcommittee, and the subcommittee dutifully agreed to extend the review period to thirty days.

These interactions illustrate another aspect of the way that lawyers think. Although they identify with their clients and construct reality through their clients' eyes, lawyers regularly deal with opposing lawyers, who identify in turn with their own clients and construct reality through those opposing eyes. As a result, lawyers must know how to negotiate, how to compromise, how to recoup their position and how to lose. In this sense, the adversary process works the way that theory suggests. In other fields, conflicts cannot be resolved without a commonly shared set of criteria that establish the rules of persuasion, or without analysis or empirical evidence that actually persuades. Where such criteria do exist, as in many areas of natural science, the results will be more satisfying than law. Where they do not exist, as in religion, or in areas where the decisive evidence is not available, deadlock often results. Law, or more correctly legal thinking, gives us a mechanism for resolving disagreement in the absence of accepted criteria for truth. It provides, in other words, the verbal medium of compromise.

avoiding the charge to their accounts, if they failed to report an unauthorized signature within 14 days and then a second item, signed by the same wrongdoer, was paid by the bank.

74. See Minutes, Mar. 4, 1989, supra note 30, at 11.

75. See Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee on Payment Systems, in San Diego, Cal. 19-21 (June 8-9, 1990) [hereinafter Minutes, June 8-9, 1990] (on file with Loyola of Los Angeles Law Review). James Kopp, of Shell Oil Company, also spoke on behalf of corporate users. Id. at 17.

76. Id. This change was subsequently touted by the sponsors of the UCC revisions as one of the revisions' benefits for consumers. See Article 3 prefatory note, supra note 54.

77. Cf. Jürgen Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society 243-73 (Thomas McCarthy trans., 1987). Habermas treats law as a paradigm for normative discourse, that is, discourse that can achieve
The bank attorneys on the ABA committee were never persuaded that the corporate cash managers were right about the mysterious interloper problem. On the other hand, when I spoke to them about it after the issue had been resolved, and the cash managers had begun to drift away from the committee, they expressed virtually no resentment at their opponents’ show of force. They would have done the same thing under the circumstances, and it seemed to them not only a legitimate way to proceed, but a substantially valid way to state a position. In an adversary system, after all, there is no basis of decision external to the clash of opposing arguments. To put the matter another way, the justice that adversary systems produce is what Rawls labels “pure procedural justice.”

It emerges from the process itself, whether that process is courtroom trial or committee negotiation.

I felt bad that I could not produce equally beneficial results for consumers as the cash managers had produced for corporations. But this only illustrates another feature of the adversary system: that it only works effectively when the two sides are represented with relative equality. In a courtroom, at least according to theory, equality requires only competent representation, not political or economic power; indeed, that is the normative appeal of the judicial process. This carries over into nonlitigation settings; if parties are negotiating over legally enforceable rights, that is, if they are “bargaining in the shadow of the law,” the same phenomenon will occur. But when the negotiation involves a matter of political policy, when the parties are bargaining in the shadow of the legislature, or in the shadow of an administrative agency, competent representation is not sufficient to secure the equality that is needed for an effective adversary process. There must be an equality of political power. That is what only a consumer representative, and most definitely not a law professor, can provide.

agreement among rational participants without relying on descriptive statements about the world.

78. See Rawls, supra note 21, at 83-90.
79. See, e.g., Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976).
82. This can be called “bargaining without force of law.” See Laura Nader, Disputing Without Force of Law, 88 Yale L.J. 998 (1979). Significantly, Nader notes that consumers with small complaints against merchants, as opposed to the relatively equal divorcing couples whom Mnookin and Kornhauser describe, are in the “bargaining without force of law” situation in legal cases, as well as political controversies. Id. at 109-20. The reason is that the law is available, but it is too expensive and complex to be used for small consumer cases. Id. at 108.
IV. PRESERVING THE INTEGRITY OF THE LAW

The proceedings of the ABA committee revealed another characteristic feature of the lawyer's mode of thought, one that was less obvious, but equally important, as identifying with the client or negotiating with the opposition. This was the continued dominance of the common-law model. A number of leading scholars, including Bruce Ackerman, Philip Selznick and Philippe Nonet, and Richard Posner, have announced the obsolescence of this traditional approach to law. I certainly share this view, but I saw little support for it on the committee. Perhaps this is merely a factor of the committee members' age, although my own experiences with today's law students make me doubt that optimistic theory. Besides, the committee members were not that old, most of them having been in law school during the legal process era. Their attitudes, however, suggested that they had received their training directly from Christopher Columbus Langdell.

Most notably, the committee members were impervious to law and economics. My article with Robert Cooter on loss allocation in the payment system had employed a law and economics analysis, and many of my comments during our committee meetings were based on this perspective. To say that the committee rejected these comments would be an understatement; law and economics analysis was greeted by most of the committee members with complete incomprehension. Some of this may have been the result of the bank attorneys' identification with their clients; Cooter's and my article concluded that consumers should receive more protection than the UCC provides and I reiterated this conclusion in my comments to the committee. But law and economics is not generally regarded as a liberal, pro-consumer approach. Had the attorneys been prepared to think in economic terms, they easily could have contested my statements; in fact, that is exactly what Roland Brandel, the committee chair, and William Warren, the reporter, did. But the blank stares that I received from the other members of the committee indicated a much more profound rejection of the ideas I was proposing.

83. See Bruce A. Ackerman, Reconstructing American Law (1984).
88. Cooter & Rubin, supra note 7.
One example involves the reporters' effort to revise Article 3's complicated provisions on contributory negligence. In their early drafts, Warren and Jordan had proposed that when both the bank and the customer were negligent, any resulting loss should be divided evenly between them. In our subcommittee, Warren recommended this provision because it would encourage settlement and I argued that it was a good idea on economic grounds. Most check fraud cases are relatively small; thus, the cost of making a precise determination of fault, with a comparative negligence standard for example, will generally exceed any benefit to be derived from doing so. In fact, an equal division of liability is often close to optimal because it gives each party sufficient motivation to take precaution against loss. Note that this same approach can be used to solve the mysterious interloper problem; although the amounts are large enough to remove the concern about litigation costs, the concept of equal division makes sense when one wants to motivate both parties to take increased precaution.

But the attorneys in the subcommittee could not imagine dispensing with the principle of fault. In their view, one party was more at fault than the other, and that party should be either entirely liable (the contributory negligence principle) or liable to the extent of its fault (the comparative negligence principle). I tried to explain my view that the assignment of liability was nothing but an instrumentality for allocating loss and inducing precautions to prevent it. I also argued that there was simply no practical way to determine liability for relatively small losses, because litigation costs would rapidly obscure the proportional relationship between the parties' liability and, indeed, could readily exceed the amount at stake in its entirety.

I am not sure I ever received a direct answer to these arguments, but the general tone of the responses suggested an equivalence, in the com-

90. See Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee on Payment Systems, in Toronto, Ont., Can. 3 (Aug. 8, 1988) [hereinafter Minutes, Aug. 8, 1988] (on file with Loyola of Los Angeles Law Review); Minutes, June 17, 1988, supra note 29, at 9-10; Minutes, Sept. 26, 1987, supra note 27, at 7; Minutes, Apr. 10, 1987, supra note 25, at 4; Minutes, Nov. 7, 1986, supra note 39, at 4. As this list suggests, the loss-splitting proposal was one of the subcommittee's most heavily debated topics.
91. See Cooter & Rubin, supra note 7, at 86-92. In fact, my position is that consumers should bear only as much of the loss as is necessary to induce them to take precaution, or more precisely, to take as much precaution as liability rules can induce them to take. This level of loss may be as low as zero, but is certainly no more than $100. Beyond that, all losses should be borne by the financial institution for the simple reason that the institution can spread these losses across the entire customer base. For business customers, however, who are more likely to enter into rational calculations about levels of precaution, an equal division may be close to optimal. See Robert Cooter & Thomas Ulen, Law and Economics 397-403 (1988).
mittee members' minds, between negligent handling of a check and murder. In setting the punishment for murder, we consider not only deterrence, but also the imposition of moral blame. It would be odious to dispense with efforts to determine responsibility in a murder case, and simply punish fifty percent of the accused because of concerns about litigation costs. The committee regarded the even division of liability in check collection cases as equally odious.

Common law is built upon a pervasive principle of fault. Posner argues that this principle yields the efficient outcome, but most people reject this view. In any case, the relationship between fault and efficiency is contingent, not intrinsic; what distinguishes common law is its moralism. A party is liable because its behavior diverged from the accepted standard, because a "reasonable man" would have behaved differently, because the behavior, while not necessarily criminal, was wrong. In addition, the common law is blind to litigation costs. Because liability is regarded as a moral judgment, it occupies a different realm from purely monetary issues like a lawyer's fee. Over the course of the last twenty years, federal legislation in the area of payments has adopted a different perspective, assigning liability on instrumental grounds, awarding attorney's fees, and providing liquidated damages as a substitute for determinations of exact amounts. Every lawyer on the committee was fully conversant with these laws; at some level, however, they felt that these statutes were illegitimate intrusions on the common law, and found the rationale behind them incoherent.

Another indication of the committee's attitude towards law was its lack of interest in empirical research. The reporters took a one-day tour of a bank check processing facility, but they did not have the benefit of any real data. Consequently, the drafting committee and the ABA committee were left to speculate about factual matters such as the level of check fraud losses, the source of these losses, the frequency and reason for stop payment orders, the frequency of bank errors in effectuating such orders, the frequency of NSF checks, the number of NSF checks

that could have been avoided by adopting alternative procedures, existing consumer and corporate practices of reviewing account statements, consumer preferences with respect to truncation, and a variety of other matters that were crucial to their decision-making process.

Much of this information would have been relatively easy and inexpensive to acquire. Indeed, a substantial amount of it already existed in the hands of major commercial banks. They know what their level of fraud losses are, for example, or their frequency of stop payment orders and stop payment errors. Very often, they conduct marketing surveys to obtain information about consumer preferences. While this information is proprietary, and some of it is viewed as sensitive, it could have been readily redacted and combined so that its source was obscured. Banks were certainly eager to participate in the drafting process, and the bankers on the ABA committee were prepared to volunteer informal accounts of information available to the bank when they found it useful to do so. It would have been quite reasonable for the sponsors to request that they provide all the relevant information they already possessed. Other information could have been obtained by fairly simple surveys—a few social science graduate students, working for six months, could have increased the amount of hard data available to the drafting committee and the ABA committee by an order of magnitude.

There was simply no pragmatic reason not to undertake this effort. Articles 3 and 4 were in the process of revision for some fourteen years. To be sure, the sponsors could not have predicted that the effort would drag on that long, but they certainly should have expected it to last more than a year or two. By 1986, when the second drafting effort began, they knew that the first one had taken at least seven years, and could confidently predict that they would have sufficient time to gather the necessary data before the second round had been completed. Some expenses would have been involved, but given the amount of information that banks already possessed and the relative simplicity of gathering some of the remaining data, that expense was not particularly formidable.

It would be overly conspiratorial to assume that the sponsors avoided empirical studies because they feared that the results would disprove their bank-oriented inclinations. In all likelihood the possibility of performing studies did not occur to them, at least not with any force, because they were thinking in common-law terms. Common-law trials are structured by legal doctrine and demand only the facts of the specific
case, according to standards of relevance that the doctrine defines.\footnote{96} Judges do not base their decisions on empirical data, and they possess neither the inclination nor the power to order studies to obtain such data. Instead they engage in speculation, thereby preserving the impression that the common law is a methodologically coherent system.\footnote{97} To take but one example, the original Article 4, as already discussed, provided that the customer must review the account statement within a reasonable time, not exceeding fourteen days, to avoid liability for repeated frauds.\footnote{98} The attorney for a customer who waited until thirteen days had passed might argue that this length of time was reasonable, because ordinary people generally do not expect fraud; the bank would argue that it was not reasonable, in the absence of illness or personal tragedy, because people know that the statement is important. They typically would not conduct an empirical survey to determine the average length of time that individuals wait before reviewing the account, and the judge would virtually never order such a study on his or her own. What they certainly would not do, because it is not within the scope of the case, is perform an empirical study to determine whether liability rules of this sort have any effect upon the level of precaution taken by the average individual.

Whether this is good or bad practice for trying cases is an open question. It seems to me, however, that it is not a particularly good way to draft legislation, or to make public policy in general. I doubt that many people would defend it; in fact, I have often heard various people, including bank attorneys, express scorn for Congress because it legislates on the basis of anecdotes.\footnote{99} But the drafting committee and the ABA

\footnote{96} Originally, the Uniform Rules of Evidence, UNIF. R. EVID. 9-12 (1953) (superseded by UNIF. R. EVID. 201, 13A U.L.A. 60 (1986)), and the ALI (them again!) Code rules, MODEL CODE OF EVIDENCE Rules 801-803 (1942), permitted courts to take judicial notice of facts only when those facts were deemed indisputable. Currently, the rules are limited to adjudicative facts. See FED. R. EVID. 201. There is no rule to govern legislative facts. See 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.1 (2d ed. 1980). In other words, there is no set procedure for judicial factfinding outside the trial setting.

\footnote{97} When judges do rely on nonlegal sources, they often do so in an unsystematic manner that renders these sources unreliable. See Peggy C. Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539 (1987). Casual citation, rather than the skilled usage of social science methodology, does not challenge the common-law approach to decision making. It is consistent with the style of thought that Bruce Ackerman calls "ordinary observing," rather than "scientific policymaking." BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-20 (1977).

\footnote{98} U.C.C. § 4-406(2)(b) (Original); see supra notes 73-76 and accompanying text.

committee did exactly the same thing, and I suspect for the same reason; their thinking was shaped by the traditional patterns of common-law adjudication, and they were unable to make the shift to a more policy-oriented approach. Of course, to think like a lawyer does not necessarily imply that one thinks like a common-law lawyer. But there is a certain appealing coherence or integrity to the common law that induces law-trained people to think that way unless they make a specific effort to approach issues in different terms.

The traditionalism of the lawyers' approach to the law was an additional factor, over and above the committee's lack of balance, that tended to restrict its ability to engage in effective policy making. Even when there was a balance, as in the debate over the mysterious interloper problem, the result tended to be unimpressive—a mere division of the pie, rather than a creative solution to the problem. This may have been due to the absence of a guiding force. With no one who was able to persuade the committee members to think in different terms, they tended to fall back on established thought patterns and to produce only minor variations on preexisting ideas. Thus, they failed to realize the creative possibilities that can result from the clash of effectively presented positions.

All of this serves as but a prelude to the most controversial, and in my view the most remarkable incident during the five years I was involved with the ABA committee. The whole point of the drawn-out, sometimes painful revision process, was to modernize Articles 3 and 4.\textsuperscript{100} In 1987, however, federal legislation preempted a large part of the revised Article 4 rules concerning the collection of checks.\textsuperscript{101} Warren, the reporter with primary responsibility for Articles 3 and 4, readily acknowledged this and concluded that the remaining collection rules be federalized as well. After extensive discussion, including its only formal vote on a specific issue, the subcommittee concluded that the remaining collection rules should remain part of a uniform state law and that—this being the remarkable part—the preempted provisions also should be retained, for enactment as uniform state law. That came to pass, so that today, with the ABA's sage advice, the UCC sponsors have enacted an elaborate, shiny-new statute that is already out of date.

The details, while a bit complex, are illuminating. Article 4 is designed around a rather conceptual distinction between provisional and final payment. When a check is collected, each person who receives the check gives a provisional credit to the person presenting it. Thus, in the

\textsuperscript{100} See Memorandum from William D. Warren & Robert L. Jordan, \textit{supra} note 36.

\textsuperscript{101} See \textit{infra} notes 107-12.
paradigmatic transaction, a provisional credit is given to the payee by the depositary bank, to the depositary bank by the intermediary bank, and to the intermediary bank by the drawee or payor bank. These credits are provisional because they can be reversed. Examples of legitimate grounds for reversal include insufficient funds, a stop order, an intervening legal claim or suspected fraud.

It is crucial to the efficiency of the checking system to assume that checks are properly payable, so that the drawee bank's obligation is to communicate only negative information in the event that it will not pay the check. Consequently, the provisional credit must become a final, or irreversible credit, usable as current funds, by the mere passage of time. This time is set by Article 4, and is known as the drawee bank's midnight deadline—that is, midnight of the business day after the day the bank received the check. At that magic moment, all provisional credits in the intermediary and depositary banks become final. To reject a check, and thus prevent the finalization of these provisional credits, the drawee bank must return the check to the intermediary bank before its midnight deadline. The intermediary bank must then return the check to its transferor, either a prior intermediary bank or the depositary bank, by its midnight deadline. In other words, provisional credits become final credits by the drawee bank's midnight deadline unless the check retraces its path through the collection chain, flipping all the switches that were presumptively thrown when the check made its forward journey.

In 1987, as a result of intense pressure from consumer interests, Congress passed the Expedited Funds Availability Act. The primary purpose of this legislation was to compel banks to make funds available

102. See U.C.C. §§ 4-202, -212 to -213, -301 to -302 (Original).
103. In fact, the payor bank has the power to refuse payment for any reason, see U.C.C. § 3-409 (Original), U.C.C. § 3-408 (Revised), without liability to the presenting bank or the depositary bank. If it does so wrongfully, however, it will be liable to its own customer under U.C.C. § 4-402 (Original & Revised).
104. U.C.C. §§ 4-301 to -302 (Original & Revised).
106. U.C.C. § 4-212(2) (Original) did provide for direct return of a dishonored check to the depositary bank as an alternative, but it placed this section in brackets, and explained in a note: “Direct returns is recognized as an innovation that is not yet established bank practice . . . .” U.C.C. § 4-212(2) (Original).
to bank customers within a specified time after they deposited a check at their bank. In doing so, however, the Act created a problem. The depositary bank might be required to make funds available—that is, allow them to be withdrawn—before it had time to learn that the check had been dishonored. The possibilities for fraud are apparent. To reduce them, the Federal Reserve Board, which was charged with implementing the Act, included rules for expediting the return of checks in its implementing regulation, designated Regulation CC. These rules would enable a dishonored check, it was hoped, to reach the depositary bank before that bank was required to make the funds available to the depositor.

Regulation CC is considerably longer and, if possible, even more complex than Article 4. It contains a number of provisions for expediting the return of checks, but one of the basic provisions is that a check no longer needs to retrace its path through the collection chain. Instead, it can be returned by the most expeditious means available. Two methods that are specifically mentioned are: (1) direct return to the depositary bank; and (2) return via the Federal Reserve System. Rather than reversing its provisional credit to the bank that presented the check, the drawee bank would receive a credit directly from the depositary bank, or from the Fed—which would then return the check to the depositary and receive a credit for itself. The depositary bank, of course, would then make itself whole by reversing its provisional credit to the depositor.

Regulation CC was promulgated on May 27, 1988, with an effective date of September 1, 1988. Apparently Warren and Jordan quickly realized that it preempted a substantial part of Article 4, even in its revised form. Most significantly, Regulation CC displaced the entire conceptual structure of Article 4. If the check no longer needed to retrace its path down the collection chain when it was dishonored, then there was no longer any distinction between provisional and final credits. There was just one type of credit, to be given at each stage of the process,

109. 12 C.F.R. §§ 229.30-.32.
110. Id. §§ 229.30-.31.
111. Id. § 229.32.
and then a separate process, with its own succession of credits, to be
given when the check was returned.\textsuperscript{113}

In response to this development, Warren and Jordan explored vari-
ous ways to adjust their revisions of Articles 3 and 4 to conform with
Regulation CC. After about two years at this task, they concluded, with
characteristic intellectual honesty, that the best solution was to abandon
the attempt and allow federal law to govern the entire check collection
process. This would involve a further expansion of Regulation CC, and
would relegate the Article 4 collection rules to governing the relatively
minor area of noncash items, such as documentary drafts. Warren re-
ported this conclusion to our subcommittee in January 1990.\textsuperscript{114}

The possible federalization of the check collection rules was by far
the most important issue that the subcommittee faced. As will be recal-
led, the ABA committee was assigned the task of commenting on a pro-
ject whose parameters were already set by the ALI and NCCUSL; this
was its only opportunity to review the project’s basic premises. More-
over, federalization was the one issue on which the ABA committee
could have spoken directly to policy makers, rather than simply making
recommendations to the ABA. Oliver Ireland, Associate General Coun-
sel to the Fed’s Board of Governors, indicated to us that the Federal
Reserve System was willing to regulate the entire subject of interbank
collections, but was not necessarily eager to do so, and certainly would
not undertake that role unless there was broad agreement from the bank-
ing community.\textsuperscript{115} That was one community—perhaps the only commu-
nity—whose views our committee was in a good position to report.

When the issue was raised directly with the committee, it produced
a unique dispersion of views among the members, and a consequently
animated discussion. A number of the bank attorneys, including Roland
Brandel, the chair of the committee, and David Goldstein, the Seattle
lawyer who had urged his colleagues to compromise on the stop payment
issue,\textsuperscript{116} spoke strongly in favor of federalization. Other bank attorneys,
including Thomas Montgomery, Assistant General Counsel of the Bank
of America, and Gerard Milano, Executive Director of the California
Bankers Clearing House, expressed reservations. When we took a pre-

\textsuperscript{113} See \textit{Miller & Harrell}, supra note 105, at 8-93 to -95.

\textsuperscript{114} See Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee
(on file with \textit{Loyola of Los Angeles Law Review}). The issue had been discussed by the subcom-
mitee at several previous meetings. Minutes, June 17, 1988, supra note 29, at 2-3; Minutes,

\textsuperscript{115} See Minutes, Jan. 12-13, 1990, supra note 114, at 9.

\textsuperscript{116} See supra note 30 and accompanying text.
liminary vote, twenty-eight members favored federalization of all check collection rules, none were opposed, and four abstained. As to whether Article 4 should be left unchanged as a “safety net” to cover possible revocation of Regulation CC, or substantially rewritten as a statute governing the collection of noncash items, fourteen voted in favor of rewriting Article 4, and five committee members voted against it. Because most of the subcommittee members felt unsure of their positions, I suggested, from the chair, that I write up a brief statement of the reasons for federalization and circulate it to the entire committee, with a ballot for the members to indicate approval or disapproval of the two proposals.\footnote{117. See Minutes, Jan. 12-13, 1990, supra note 114, at 21.}

The statement, drafted with the help of Brandel, Goldstein, Anne Pope and Paul Turner—the latter two being the attorneys who were representing the National Corporate Cash Managers Association—advanced four principal arguments: (1) All the rules for check collection should be in one place and that place could only be Regulation CC; (2) a federal regulation is much easier to change, and thus more flexible, than a uniform state law; (3) a federal regulation could be uniformly and effectively enforced by the Federal Reserve System; and (4) the remainder of Article 4 could be drafted as a coherent statute.\footnote{118. Memorandum from William Davenport et al. to Members of the ABA Ad Hoc Committee on Payment Systems 3 (Feb. 5, 1990) (on file with Loyola of Los Angeles Law Review).} I soon learned that resistance to this idea was developing, particularly among California banks. Of the twenty-one ballots returned, twelve favored the proposals, while nine opposed them.\footnote{119. See Edward L. Rubin et al., Report on the Relationship of UCC Article 4 and Federal Reserve Board Regulation CC 3-7 (1990) (on file with Loyola of Los Angeles Law Review).} Several of the opposing ballots included extensive memoranda, which were ultimately consolidated into a single document authored by Thomas Montgomery, Patricia Fry, a professor at the University of North Dakota, and Robert Ballen, a law partner of Brandel. The major points of this document were: (1) “The state legislative process regarding the check collection system has served the nation well for over two centuries”;\footnote{120. Minutes of Meeting, Subcommittee on Articles 3 and 4, ABA Ad Hoc Committee on Payment Systems, in Boston, Mass. (Apr. 7, 1990) [hereinafter Minutes, Apr. 7, 1990] (on file with Loyola of Los Angeles Law Review).} (2) banks need stability and uniform state laws are less subject to change than a federal regulation;\footnote{121. Memorandum of Robert Ballen et al. 1 (May 10, 1990) (on file with Loyola of Los Angeles Law Review).} (3) federal regulation of the collection process may lead to federal regulation of bank-customer relations, a matter in which local variations are impor-
tant;\textsuperscript{123} (4) the Article 4 revisions are the result of a careful, deliberative process—"by representatives of banks, their customers, the Federal Reserve Board, Federal Reserve Banks, legal experts in the commercial law field, and the Uniform Law Commissioners serving on the Drafting Committee,"\textsuperscript{124} whereas one organization, the Federal Reserve Board, "has unrestricted power with respect to the promulgation of regulations affecting the nation's check collection system";\textsuperscript{125} and (5) federalization "is a manifestation of a broader trend toward 'leaving it to the experts'"\textsuperscript{126} rather than allowing the political process to work.\textsuperscript{127}

Notably, these comments are self-contradictory, favoring both stability and local variation, or favoring drafting committee expertise but opposing Federal Reserve expertise. But a noticeable theme runs through these disparate objections: their attitude of simultaneous reverence for state law and distaste for the federal administrative process. Behind this is the dominance of common law in the mental processes of lawyers. The UCC, being a statute, is not exactly common law—there is very little pure common law these days—but it is very close. Article 3 is a light revision of the Negotiable Instruments Law, which, like the British Bills of Exchange Act that inspired it, codifies the common law as it existed at the time.\textsuperscript{128} Article 4 has no such antecedents, but its conceptual structure is allied to Article 3's, and ultimately to the common-law approach to legal rules. To take just one example, the finalization of provisional credits by passage of the midnight deadline is not described as a finalization at all; rather, Article 4 states that the payor bank becomes "accountable for the amount of"\textsuperscript{129} the item, a rather bizarre assimilation of the standard mechanism for paying checks into common-law rules for allocating losses.\textsuperscript{130} Even more significantly, both articles rely entirely on private litigation to implement their provisions, and thus

\textsuperscript{123} Id.
\textsuperscript{124} Id. at 2-3.
\textsuperscript{125} Id. at 3.
\textsuperscript{126} Id. at 4.
\textsuperscript{127} Id.
\textsuperscript{129} U.C.C. § 4-302(a) (Original & Revised).
\textsuperscript{130} Notably, the revision retained this counter-intuitive usage. Regulation CC has no parallel provision because it does not cover forward collection. A closely allied provision regarding the return of checks begins as follows: "If a paying bank determines not to pay a check, it shall return the check in an expeditious manner . . . ." 12 C.F.R. § 229.30(a) (1992).
employ dispute resolution by a nonspecialist, common-law-oriented judge as their sole enforcement mechanism.

Regulation CC, the alternative means of governing check collection, has an entirely different feel to it. Its rules are stated in technical language, with specific references to current bank operations, not as general principles, and certainly not as allocations of liability. It is designed to be actively enforced by a regulatory agency that has direct supervisory authority over the check collection system, and a formidable operational presence as the largest participant in that system. It can be adapted to rather small scale changes in technology by administrative interpretation or by a fairly simple process of revision. To someone who thinks in common-law terms, Regulation CC looks foreign and unsettling—the product of intrusive, undemocratic experts rather than wise, legally-trained nonexperts; it is simultaneously a source of ever varying administrative policy and a suppression of healthy local variation.

The common-law model encourages us to think of the law as possessing integrity, a wonderfully versatile term that suggests both intellectual coherence and moral righteousness. Intellectually, the common law is depicted as various embodiments of general principles, forming a unified whole. When Ronald Dworkin, our leading contemporary enthusiast for common law, 131 speaks of integrity, this is essentially what he means. Morally, the common law is the application of intuitive judgments about right and wrong behavior in a wide variety of situations; it is a compendium of hundreds of thousands of little morality plays about the vicissitudes of ordinary existence. Regulation CC has no such integrity; it is an industry-specific, situation-specific set of detailed instructions, entirely bereft of moral overtones. To consign the rules for check collection to this administrative purgatory struck many members of the subcommittee as offensive. They preferred promulgating a well-formulated, familiar-looking statute, brimming with integrity, even if much of it was inoperative and obsolete from the moment of its promulgation.

Perhaps some of the opposition to federalizing check collection was political; bank attorneys may have felt that they could control the state law process more effectively than they could control the formidable Fed. But that cannot be a complete explanation because federalization produced a split among the bank attorneys on the subcommittee that was not duplicated on any other major issue. This is not difficult to understand; complete control of a statute that is only partially operative is not

necessarily superior to partial control of a statute that is completely operative. Moreover, the Fed evinced no particular opposition to the banks' position regarding check collection and seemed willing to be guided by their judgment on most issues. Indeed, it is not clear that there were any opposing positions; the collection process does not implicate consumer issues, and the most churlish member of the subcommittee, namely, me, expressed no views on collection that were not shared by a significant number of the bank attorneys. The source of the opposition of "Fed"-eralization seems to have been the abiding belief that real law, or proper law, should follow the common-law model.

The federalization issue was never resolved by the subcommittee. By the summer of 1990, the drafting committee felt it had completed its work, and the NCCUSL had indicated its approval of the proposed revisions.132 Thus, it was time for the ABA committee to vote on its recommendation to the ABA House of Delegates. The proposed recommendation was to approve the revisions to Articles 3 and 4, and to include an accompanying document indicating the arguments for and against federalization.133 Ballots due September 1 were sent by mail to all committee members.134 Not surprisingly, the result was an overwhelming approval of the revisions; indeed, out of 38 ballots cast, there were only five negative votes.135 One of the negative votes was Gail Hillebrand's, and it was accompanied by a lengthy letter stating Consumers Union's objections.136 This was answered by an equally substantial memorandum, written by Roland Brandel and William Davenport, which responded to these objections point-by-point.137 It was a much more serious treatment of consumer issues than anything I had even managed to elicit, and once again indicated the need for including organ-
ized consumer groups in legislative projects of this sort. Hillebrand did not persuade anyone, however, and the committee's recommendation went forward as proposed. The ABA House of Delegates approved the revisions, without reference to the federalization issue, on February 12, 1991.

Having recommended a partially preempted statute to the House of Delegates, the ABA committee experienced an attack of conscience, and began exploring the possibility of drafting a further revision of Article 4 to make that now-beatified statute conform with the prevailing federal law. In the summer of 1991, the committee circulated a memorandum outlining fourteen major changes, involving fifteen separate sections of Article 4 that would be required. By this point, however, the NCCUSL was tired of check collection and indicated that it would not sponsor any further revisions. This dampened the committee's initial enthusiasm for the idea; as far as I am aware, the proposal died, and the ABA decided not to bother with the effort to make Article 4 consistent with the law.

V. ACTING LIKE A LOBBYIST

It did not seem appropriate for me to lead the subcommittee when my views diverged so markedly from those of the members, so I resigned my position as chair in November of 1990. Although I remained a member of the subcommittee, I lost track of its activities. I happened to be in Washington, D.C., the following April, however, at the same time that the committee was meeting in Colonial Williamsburg, and I decided to drive down for the day to see how things were progressing. The meeting itself was brief, consisting primarily of a report that several states had already adopted the revisions, or were about to do so. Some of the senior members showed me the room where “it” took place—“it,” of


140. Memorandum from William Davenport to Members of the Ad Hoc Committee on Payment Systems (July 1991) (on file with Loyola of Los Angeles Law Review) (regarding poll on proposed new Article 4 project for NCCUSL-ALI Drafting Committee).


course, being the meeting where Hal Scott's New Payments Code was assassinated.

One other thing I learned at the meeting was that Consumers Union had abandoned its opposition to the Article 3 and 4 revisions, at least in California. Its principal concern had been the preservation of a well-known California Supreme Court decision, *Perdue v. Crocker National Bank*, which held that a bank's bounced check charges could be void as unconscionable. Gail Hillebrand negotiated with the drafting committee for a favorable reference to this case in the official comment to section 4-401. The comment, worded as carefully as a provision in the Strategic Arms Limitation Treaty, did not express approval of the case. It simply stated that Article 4 "does not regulate fees that banks charge their customers," but that "courts have reviewed fees and the bank's exercise of a discretion to set fees," citing *Perdue* and one other case. This was not a large concession, but it seemed to me that it was the best that could be accomplished under the circumstances.

One month later, I was scheduled to go to Sacramento to testify before a committee of the California Legislature on a consumer protection bill, when I noted that the Article 3 and 4 revisions were being considered by the Senate Judiciary Committee on the very day I would be there. I quickly sent a letter of opposition to the legislative staff, and appeared before the committee on May 21, 1991. In my testimony, I concentrated on loss allocation issues, but I also addressed NSF checks and check truncation. The committee members were particularly struck by the truncation provisions and the lack of accompanying protections for customers. My impression was that they had no idea what the revisions contained. Apparently, the legislature assumed the bill was good legislation because it was introduced under the auspices of the ALI and the NCCUSL, and was sponsored by one of California's most respected state senators, Robert Beverly. Had I not testified, it probably would have been placed on the "Consent Calendar" and passed without discussion. After being made aware of the potential problem with the bill, however, the Senators tabled it pending further analysis.

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144. See U.C.C. § 4-401 cmt. 3 (Revised).
145. Id.
148. Senator Beverly introduced the revision on March 7, 1991, as Senate bill 833.
Rather than proceeding with the Senate process, the proponents introduced the Article 3 and 4 revisions in the California Assembly. The proponents, led by the California Bankers Association, were now very well organized; my sense was that they had lobbied the committee quite extensively, although I had no way of knowing, and certainly no time or resources to lobby on my own. The Assembly Committee approved the revisions and, two months later, the bill went to a Senate-Assembly Staff Conference.

I attended this conference as the sole opponent of the legislation. Gail Hillebrand also attended, but was bound by her pledge of neutrality. Four representatives of the proponent groups were present, including one of the reporters, Robert Jordan, the President of NCCUSL, Carlyle Ring, and a representative of the California Bankers Association, Neil Martin. Their position, in essence, was that no one opposed the legislation except me, which was essentially true. If the legislature had concerns about consumer protection, they pointed out, it should enact a separate statute rather than disrupting the uniformity of the UCC; a pointed question from Hillebrand, however, about whether the California Bankers Association would support consumer legislation of this sort, drew an inconclusive response. In the end, the legislative staff members decided to recommend approval of Article 4 with a seven-to-ten year sunset provision for check truncation and a few minor changes to the loss allocation rules.

The proponents of the revisions, however, were not satisfied with this result. Apparently, they wanted complete uniformity and were concerned that any violation of that principle, however slight, would have repercussions in other states. Thus, the bill remained on hold for one year. In the summer of 1992, a Senate-Assembly Conference Committee was convened and approved Article 4.149 There was enough concern among the legislators, however, to produce several changes in the text. Banks were required to provide two copies of checks free of charge in each statement period. A five-year sunset feature was added to the provision specifying that banks could report only the item number, amount and rate of payment for truncated items. The word "substantially" was eliminated as a modifier for the bank's contribution to the loss in the comparative negligence provisions in section 4-406, and in the loss shift-

ing provisions of sections 3-404, 3-405 and 3-406, and several changes were made to the official comments.\textsuperscript{150}

Although the ultimate result of my efforts in California was somewhat meager, I had been struck by the total lack of attention that unopposed bills seem to receive in state legislatures, and I quickly wrote a letter to the legislatures of all the states that had not yet enacted the revisions—so far as I could determine. Most of these letters seem to have been lost, but I tried to keep track of legislative developments in the states and write follow-up letters when the revisions came to the attention of the legislators. My letters produced some results, again because the legislators were apparently unaware of the bill’s provisions until a letter of opposition arrived. In Michigan, the bill was withdrawn from the floor of the House of Representatives, after having been passed by the Senate, for further consideration;\textsuperscript{151} in Washington State, the House Financial Institutions and Insurance Committee refused to approve the bill without further study.\textsuperscript{152} Colorado rejected the revisions,\textsuperscript{153} largely through the effort of Neil Littlefield, a professor at the University of Denver, and so did West Virginia,\textsuperscript{154} largely through the effort of David McMahon, of West Virginia Legal Services Plan, Inc. In several other states, including New Jersey, New York and Texas, my letter reached study commissions to which the legislature had initially referred the bill. In still others, it vanished or was ignored, and the revisions sailed through the legislature.

Throughout the process, the ALI and NCCUSL adopted the same stance. If I did not manage to attract the attention of anyone in the legislature, they would simply present the revisions as an uncontested bill. I was never once informed by either organization that the revisions were being introduced or considered in any state. If I did manage to bring consumer concerns to someone’s attention, the ALI and NCCUSL would respond with a fairly massive lobbying campaign, often spearheaded by the Bankers Association of the state. Lengthy documents were prepared, representatives of various organizations flew to the state capitol, and individual meetings with state legislators were held. Con-

\begin{itemize}
  \item \textsuperscript{150} See Memorandum from Gail Hillebrand to Persons Interested in Articles 3 and 4, at 2 (Sept. 9, 1992) (on file with Loyola of Los Angeles Law Review).
  \item \textsuperscript{152} See H. 1014, 53d Leg., Reg. Sess. (Wash. 1993), available in LEXIS, Legis Library, STTRCK file.
  \item \textsuperscript{154} See H. 2353, 70th Leg., 2d Sess. (W. Va. 1992), available in LEXIS, Legis Library, STTRCK file.
\end{itemize}
sumers Union was described as endorsing the revisions, and Hillebrand had to write to several state legislatures explaining her actual position.155

Needless to say, I lacked the resources to counterbalance all, or indeed any, of this heavy lobbying artillery. I was unable to travel to any state legislature except Washington's, where I happened to have taken a family vacation. I also was unable to keep track of legislation as it moved through the various state legislatures, and I certainly could not lobby individual legislators.

None of this is surprising of course. ALI and NCCUSL behaved exactly the way any American organization behaves when it is trying to get legislation passed. When they could get their bill through without anyone opposing it, or even noticing it, they took advantage of that opportunity. When they faced opposition, they responded by trying to overwhelm that opposition or by using allies, like the various Bankers Associations, to put political pressure on the legislators. Nor is it surprising that I was unable to respond in kind. Lobbying legislatures is a game played by organizations, and there is no way for an individual to participate unless he is H. Ross Perot.

But the fact that the ALI and NCCUSL played the game like ordinary lobbyists is in itself worth noting. They are, after all, not interested parties but organizations that purport to represent the public interest. They claim legitimacy for their legislative products not only on grounds of expertise, but also on grounds of the democratic process—that their products have been enacted by the various state legislatures. Yet they made no effort to educate the legislators, to acknowledge the disadvantages of their proposals, or to encourage outsiders to participate. Instead, they did what any advocacy group does—they used every legitimate method to ram through the legislation.

There is an interesting relationship between this sort of lobbying and the thought processes, described above, that characterize lawyers. Lobbyists, like lawyers, are agents who represent a client and, like lawyers, develop an identification with their client. In some cases, unlike most attorneys, they were originally a member of the client group but even if not, they quickly came to see the world through their clients' eyes. Thus lobbyists, like lawyers, will tend to be deeply committed to the views of those they generally represent, if not by conscious choice, by long-established patterns of thought.

The legislative system, like the adversary system, works—when it does work—because of the balance between opposing forces. In the adversary system, each side comes before the court with its own advocate, presenting its own views; the judge or jury then decides between them on the basis of the law. The adversary system also allows for negotiation rather than litigation; here the two adversaries meet and compromise their position “in the shadow” of the legal decision that would result if they were to resort to litigation. In the legislative system, each side makes its presentation to the legislature by means of letters, testimony and individual meetings. An advocate, in this case a lobbyist, represents each side and presents its views; the legislature then decides between them, it is hoped, on public policy grounds. This system also allows for negotiation; legislatures will often enact any law on which the two opposing forces have been able to agree. Recent federal legislation legitimizes and routinizes this negotiation process with respect to administrative regulations—a form of legislation, of course.156 The rationale here, as in the case of legislation itself, is that the parties are bargaining in the shadow of public policy.

In the final analysis, acting like a lobbyist is not just similar to thinking like a lawyer; it is thinking like a lawyer. The only difference is that lobbying occurs in the policymaking process, not in the adjudicatory process. But lobbying is nothing more than the transposition of the adversary model to that policymaking process, and the differences between traditional lobbying and traditional lawyering are almost entirely attributable to the different settings in which they occur.

The ongoing commitment to the common-law model that I observed among the members of the subcommittee also corresponds directly to an aspect of the lobbying process. Lobbying, by definition, being directed toward legislation, would seem quite remote from the common law. The link between the two springs from the limitations that the adversarial approach imposes on the adjudicatory and legislative processes. In adjudication, the adversary system produces an artificial restriction on fact-

156. See generally ALBERT P. MELONE, LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS (1977) (applying social science techniques to examine role of lawyers in shaping laws, and concluding that American Bar Association exerts extraordinary influence on behalf of business interests); LESTER W. MILBRATH, THE WASHINGTON LOBBYISTS (1963) (discussing lobbying and its relation to government); NORMAN J. ORNSTEIN & SHIRLEY ELDER, INTEREST GROUPS, LOBBYING, AND POLICYMAKING (1978) (examining role of interest groups in American political process and factors that enable interest groups to organize, persist and attain goals); KARL SCHRIFTGIESSER, THE LOBBYISTS: THE ART AND BUSINESS OF INFLUENCING LAWMAKERS (1951) (tracing history of lobbying and discussing its importance in democratic legislative process).
gathering, a tendency to reach decisions by weighing the opposing arguments, and an emphasis on dispute resolution as a means of structuring the legal system. In legislation, that same adversarial system yields similar results. Facts tend to be limited to those that the opposing parties present; while there is obviously not the same prohibition against non-party fact-gathering, there is a pragmatic difficulty in doing so, particularly for understaffed state legislatures. Similarly, legislatures tend to regard the decision-making process as one of choosing between opposing sides. This becomes particularly apparent from the willingness of legislatures to accept statutes that have been produced by negotiation between these opposing sides, or that are submitted without opposition.

Finally, just as the adversary system generates a certain traditionalism, a commitment to the common law in the adjudicatory area, it generates an equivalent traditionalism in policymaking. When two parties are competing for the favor of the legislature, they will want to submit a proposal that looks familiar, and will not want to be adventuresome. While legislation does not aspire to the same integrity as common law, it does bear the imprint of inherited conceptions about statutes. These conceptions are not necessarily useful anymore, but lobbyists are unlikely to devise alternatives, and legislators will not do so either, as long as they rely on lobbyists to design legislation.

Opinions will vary about whether these adversarial patterns are detrimental to good social decision making. One thing is clear, however: If the adversary process is employed, those who employ it must be scrupulous about ensuring that all relevant interests are represented. In the absence of a representative, no one will speak for that interest, because all the other participants are committed to, and indeed conditioned by, their own perspective. To derive a proper rule or policy from the clash of opposing forces seems to be a questionable strategy, but it does not even offer the possibility of good results if the opposing forces are not present.

VI. CONCLUSION

In the process of drafting and enacting the revisions of Articles 3 and 4, however, one of the major forces was not present. Banks were well represented; corporate users were represented intermittently; but consumers were virtually unrepresented. The result was that the banking industry and its attorneys dominated the entire process, save for a few brief interludes. This domination was amplified by the fact that the representatives involved were lawyers, with their characteristic tendency to bond with their client group.
The banking industry is entitled to be represented, of course, and it can be expected to lobby assiduously for its positions. But the American Law Institute and the National Conference of Commissioners on Uniform State Laws should not lend their names to the bankers' enterprise. When they do, as occurred with the Article 3 and 4 revisions, they give the banking industry the ability to clothe itself with public policy, and to overwhelm most state legislatures with a false aura of public-oriented impartiality. This was a disgrace. If the ALI and NCCUSL cannot do better under their present structure, both organizations should be extensively reformed or entirely abolished.