Hastings Law Journal

Volume 52 | Issue 3 Article 9

3-2001

Questions and Answers

UC Hastings College of the Law

Questions and Answers

Linda Rusch, Moderator, Hamline University: Now, I can only believe that so many people are still here at 4:30 in the afternoon because they want to get to the microphone and ask questions or make comments. So we have now come to that portion of the program—you've heard what our panelists have to say—where I invite you to participate.

John Oakley, University of California at Davis: My bias, I guess, is that I'm a Reporter for an ALI statutory project, so I've been fascinated by the description of the concerns over the functionality of processes of private legislation. I took the microphone because a key point that was raised early on and touched upon in several subsequent discussions and presentations was: Just what happened in July of 1999 when the agenda was changed? And Professor Miller talked about the general processes of decision-making, but didn't touch upon what happened in terms of withdrawing discussion of a draft that was before the body, and I wondered if he would elaborate his view of both the facts of the matter and what role whatever process was used plays—should play—in our overall consideration of the functionality of the process.

Linda Rusch: Thank you. Fred?

Fred Miller: I am glad you raised that question, because I really wanted to address that. I have tried to stay away from responding to counter-charges and charges because I don't think that's very productive. But since you raised the question, that gives me an opportunity to do so. I think that this has been an interesting discussion—it may even be useful—but it certainly is very important to remember what Dick Speidel said, and that is that he was giving you his impression. Also, Professor Cohen gave you his impression of what occurred. Let me tell you what did, in fact, occur.

Richard Speidel: Or your impression of it at least.

Fred Miller: Well, I have a colleague back in Oklahoma who was a legislator for many years and when he would come before a court, he would always make the argument, "what I am telling you, Court, is the right answer because I was there and created it," so if you want to take it with a grain, okay. Essentially, the National Conference agenda in that particular year had a lot of things on it. There were acts up for a first reading, other than Article 2 and others, and there were acts for a final reading other than Article 2 and others. And,

essentially, we try to allocate a certain amount of time on our best judgment for each act and at that point we had thought that the debate on Article 2 would likely take "x" amount of time and we had allocated the rest of the agenda accordingly.

It was apparent by the end of the morning that the debate on Article 2, if left to run, would take a great deal more, and it would push other things off the agenda where promises had been made. And so under those circumstances, the thought was that since it was unlikely we were seeing a consensus anyhow, the end result would be to take 2 off the agenda and think about whether we ought to reconstitute and come back another year or not, and that's what we did. Now, that was in the prerogative of the President. He arranges the agenda. Somebody has to control it. That was his judgment based on advice from a number of different people. Now Neil also alluded to the juxtaposition of the decision on UCITA as well as on Article 2, because UCITA did take a lot of time, and it was allowed to continue.

The reason there was that the judgment call on UCITA was that there was nothing more that could be done in the drafting process to reach consensus. The only way that could possibly produce consensus was to send it out and have the debate in the legislatures. And that is, in effect, what's occurring. There has been amendment in Maryland, there has been amendment in Virginia, there are amendments going on, possibly, to satisfy other groups. And it's because of the legislative process putting the pressure on.

UCITA was taken out of the Code because we could see that that was coming. If we had left it as 2B, you would end up with, if you will, an enactment record on the UCC that would be compromised. By taking it out and putting it out as a Uniform Act, you can tolerate more of that kind of debate. So that was the decision that was made with respect to Article 2 and the reasons for it.

Linda Rusch: Does anybody on the panel or in the audience want to say anything on that issue? Boy, we are certainly a polite group.

Randy Barnett, Boston University: Actually, I have to tell you, I haven't heard so much discussion of right answers since I was a student in Ronald Dworkin's Jurisprudence class many years ago. I thought that went out of fashion in some circles, but I can see it is still in fashion in other circles I was unaware of.

I consider myself to be quite an outsider to this process. I am not all that familiar with how the process of making uniform laws operates, so the description of how the procedure worked was illuminating to me. But I also heard something that I hadn't really expected given my outsider status here, and that is a dichotomy of rhetoric. On the one hand, we had the good guys: the buyers, the

consumers. While on the other hand we had bullies, lobbyists, dark outside forces, which were referring, it seems to me from my little knowledge of this to be sellers. When I teach Contracts, half the transacting parties are sellers, the other half are buyers, and I hadn't assumed that one side was necessarily the good side, the good guys, and the other side was necessarily the bad guys.

Now I realize this is in the aftermath of a very draining and emotional experience for the drafters and the Committee, so I guess one has to make allowances for that. But the tenor of the comments I've heard from all the members of the panel who were actually involved in the process—unlike Bob Scott who's the one member of the panel who was not involved in the process—makes me wonder how balanced and fair the process actually was. Just sitting here listening, if you were a court and I were a lawyer representing a bullying, lobbyist, outsider, "strong seller," would I feel like I would get a fair trial from this court? Or would I want a change of venue in order to have my case heard?

So maybe I need to hear more about the process to know why it is that these sellers are so repulsive that they are to be discussed this way in these terms. I mean I realize they successfully, apparently, delayed the implementation of Article 2 and that's a reason to hate them, but they may have had some reasons for doing this. I'm wondering what confidence those of us who are outsiders should have in the process of decision-making that's been described here.

And I should also add that it struck me that there are no sellers on this panel. I mean, I suppose that maybe they were invited. Maybe lawyers representing the evil sellers who actually were powerful enough in some way to block Article 2, and I don't even know how that power was exercised—that hasn't been described today—maybe they were invited to participate on this panel to give their view of how they thought the process turned out and they just couldn't make it. But it seems to me that if that if that wasn't the case, and they actually weren't invited to participate here that maybe this also says something about the fairness and balance of the overall process and the kind of outcome we could expect from it. So anyway, thank you.

Linda Rusch: Henry.

Henry Gabriel: Randy, did you want a response?

Randy Barnett: I don't know, was it necessary to put that in the form of a question? Are we playing Jeopardy? The question is—reassure me, I'd like to know more about the process, that suggests that it is fairer than this panel suggests to me that it is.

Henry Gabriel: I think it is fair and I can tell you who the good guys and bad guys are. The short answer is the bad guys are anybody that disagrees with the Drafting Committee. No, I'm joking. In fact,

to the degree that you heard today, people who came here who are lobbyists or have a particular persuasion, then the world is good and bad, depending on it. But I think that the Drafting Committee has never seen people as good or bad: they seem them as difficult, right? Difficult because things have to get done. But the process, as I've seen it, has been just an interminable attempt to be balanced and to listen to both sides. In most, no I won't say most, in many situations, people who are there advocating for whatever their position is, and positions from everywhere, would make intelligent comments that would add tremendously to the dialogue. And I think that to the degree that an impression has been given that there is this world of good and bad guys, from my perspective, down in the trenches as the Reporter, I don't think there really are good or bad guys. I just think there are a lot of competing values out there in the process trying to balance it. And Gail's going to tell you who the bad guys are.

Robert Scott: Randy, there aren't good guys and bad guys, but there are big guys and little guys.

Henry Gabriel: But, Bob, we know the difference and we take, I think we take it into consideration.

Robert Scott: I'm not saying you don't. I'm just saying that that's a positive statement of fact.

Gail Hillebrand: I need to add. I'm a registered lobbyist, I'm proud of it. But, we came into this process for a very specific purpose: to advance the views that we believe would help consumers in this process. That's my job, that's what I did. In the Article 2 process, the sellers came in and advanced the views they thought would help their clients. There's nothing wrong with that, on either side. The Article 2 process went wrong in my view, because the Conference leadership was afraid to say to those sellers, "we're going to stand behind our Drafting Committee and we're going to try to enact what our Drafting Committee has put forward." They backed up too early in the negotiation process, if you will. Now, obviously, there will be disagreement about that. But, I don't think the process went wrong because the sellers advocated what they believe was the best law for their clients; the process went wrong because the Conference was afraid to stand up to the sellers in a context where their Drafting Committee, after repeated votes, and the Executive Committee in 1996 said, "we disagree."

Linda Rusch: Anybody else on the panel?

Neil Cohen: One last thing. I think that the composition not so much of the Drafting Committee but of the drafting group, including the observers, was in fact much more evenly balanced than this panel. This is a law professors panel. For these purposes Gail is an honorary law professor. She's certainly taught me a lot over the years, and drafting committees, UCC drafting committees, are like law professor

heaven. You get to sit around for four, five, six, twelve years in Dick's case, and debate about what the answer ought to be. And you sit around, you debate and you debate and you debate and sometimes you write an article about the debate explaining why of course you're right, and some decisions are made. And we sort of like the decisions we make, and, as someone pointed out, law professors tend to be the majority on many of these committees, but "law professor" comes from the Greek word for "naïve."

And in fact there's a lot of that going on here because I think that, what I'll somewhat neutrally call the powerful interest groups, they weren't naïve. They knew that the Drafting Committees and the National Conference and the ALI, in a sense, were an exercise. A very important exercise, but an exercise. The law isn't made by these non-legal organizations, non-legislative organizations. Law is in fact made by legislators. And I think a number of us have fallen prey to this feeling that "well that's not fair, they lost in our process and they went over our heads."

And at one level, it's not fair. At another level, it's their right. No one told them they had to sign on to this process where whatever came out of this process they had to live by if they could convince a legislature to do something else. And while we may not like the fact that there are other organs that have power, not law professors, I think that we somehow at least have to accept that reality. But as a law professor-dominated panel, I think sometimes we have trouble swallowing it, at least swallowing it and smiling at the same time.

Richard Speidel: If I could make one comment. Professor Barnett has raised I think an important question, and that has to do with the so-called strong sellers that I assert didn't capture the process, they blocked it. And they blocked it because they were content with the way Article 2 is now structured, because it gives them a variety of advantages in making deals with consumers and others. But that's a legitimate position if you accept that the power to block is part of the democracy that Neil was talking about.

The thing that bothered us, Randy, was that Linda and I took a whole year between 1996 and 97; NCCUSL put us on hold after the 1996 draft, apparently because they thought the Drafting Committee had gotten out of control and was trying to get too much consumer protection in there. There was constant reaction adverse to it. I've got all the files and documents. I've got a whole office full of stuff. Linda and I spent a whole year going through every letter, every brief, every memo from all of the sellers, analyzing the issues that we thought they were objecting to, trying to get the Drafting Committee to respond to them, setting up positions for negotiation so we could go to them, basically, and say "we see your point here, let's adjust that, let's work that."

We made probably fifty or sixty changes in that two-year period, trying to get a draft that could be worked out and approved. And what we got essentially was "guess again." We'd send memos; people would negotiate. The bottom line never was stated. The folks who opposed it never told us, at least, they may have told Fred, what it would take to get approval of that draft. And the result is that you could see, over the course of four or five years, this sort of opposition that was developing, that was reinforced by, I think, the software producers that "let's take the position that to the extent that there are more improvements for buyers in this Article 2 draft, we're not going to buy them."

Now that goes back to Dean Scott's comments about whether this is the place for consumer protection. I've always worried about that. All I can say about Dean Scott is if he considers me a mentor, I'm very proud of the product that's been produced there.

Norm Silber, Hofstra Law School: I've been involved in this process in a number of places, usually from a consumer point of view. But the question that I want to ask about is enactability. And I certainly understand that enactability is an important consideration for NCCUSL, but I wonder if we could pay some more attention to both the timing of enactability decisions and also the locus for that decision, and how much deference might be due to Reporters and members of the Drafting Committee, at least considering that they themselves think about enactability at the time that they make those decisions.

In the case of Article 2, I guess the question that occurs to me is does one, if I were to get involved in a project such as this, could I wait another four, five, six years and then at 11:58 (two minutes before midnight) have an enactability decision or criterion applied which would then lead the Executive Committee and not the Committee as a whole to withdraw another draft? And I understood Professor Miller, Fred, I understood you to say that it may be that there are more of these situations in the future. And it would seem to me that that's terribly corrosive of the willingness of anybody to participate in the drafting process, if they think that you can go through these things for a long period of time only to have them withdrawn.

Linda Rusch: Anybody on the panel care to respond?

Fred Miller: I think it's very difficult to assess this Article 2 experience. There are many, many factors that are involved and I don't think at this hour that we could do justice to talking about it. But what we are doing in terms of what I said in the context of the Executive Committee is, I think, taking a harder look. Enactability is important. As some people have said, you can write a law review article or you can write a statute.

And I think Neil put his finger on it. He is talking about democracy. We don't have one right answer. There are a selection of possible right answers. There may be some better than others, but opinions can differ. And so the bottom line is, very often we find that when we have a study committee, for example, we have very few study committees that come in and say, "It's not worth doing." They get a life of their own. The same thing happens with a drafting committee, and quite frankly, that happened in spades with the Article 2 Drafting Committee. And I think it is possible that one has to stand back a little bit and take a more objective assessment.

And in that sense, we're learning from our sister organization, because, quite frankly, I was personally very upset when the council elected not to put UCITA in front of the membership. I do not believe that their view of UCITA was my view of UCITA. But as a member of the ALI I could not debate it because it didn't go to floor. I think there is some virtue in that, and as I said, I think it adds a little objective content to it. The Executive Committee does have considerations to look at in addition to the fact of the substance of it, and so that may be a little less democratic, but on the other hand, it also may avoid some of these problems in the future. We have to find a way to work this out together. If we don't, this process will fail. And I don't think personally, it's a good thing if it does fail. I think the alternatives are worse.

Linda Rusch: Anybody else? Now we have a line at the microphone.

Jay Feinman, Rutgers University: I'm particularly intrigued by the first half of Bob Scott's analysis, but the part that puzzles me about it, is when you talk about large "P" politics, you talk about structural features of the uniform law process. When I think of large "P" politics, particularly comparing the institutional competence of uniform law drafting institutions with legislatures and courts, I try to think about what else is going on at the time. And, Dick's smart sellers—such as GE—are the perfect example. What else is GE doing at this moment when they're engaged in the Article 2 drafting process? Well, they're going to the State legislatures and in state after state, along with others, they're successful in enacting tort reform statutes. Back to the ALI, they're attempting to influence the Restatement (Third) of Products Liability to repeal most of the developments of the 1960s and 1970s. They are enacting and attempting to enact, both in the State Legislatures and the Congress, and by Federal Executive Order, various efforts to make it difficult for Government to regulate, for example, land use. They're raising ninety million dollars which transforms George W. Bush from relative unknown to President of the United States in a relatively short period

of time. So I think there is this larger dimension of the politics, rather than just the structure of the uniform process that is involved here.

Robert Scott: My only comment, Jay, would be that, my argument is not based on a normative preference for one set of outcomes over the other, but that the uniform laws process will tend to bias ways in which the rules are made in a way that's not necessarily consistent with, whatever it is, the structure of the rules themselves. If your priors are that you want a certain outcome and then you step back and say "how can I best achieve that outcome," it may very well be that you would prefer to champion the uniform laws process because in fact it is preferable to ordinary legislative process in terms of reaching the normative outcomes that you want. I was being agnostic on normative outcomes with respect to the uniform law process, merely saying that it skewed the legislative products more systematically than the ordinary legislative process would, but not necessarily in any normative way.

Deborah Hellman, University of Maryland: I was puzzled by Neil Cohen's comments that seemed to argue that a commitment to democracy requires that enactability. This seems a fairly attenuated sense of democracy to me. And given Dean Scott's criticism of the process in general—particularly the idea that value choices are certainly in play in whatever legislation is drafted—I'd like to hear more from those who believe that enactability is important. Other than the desire to maintain the power of the organization, what kind of normative argument is there for inevitability?

Neil Cohen: I guess that depends on how you define democracy. And I guess I'm thinking of a negative component—I don't mean normatively negative—as well as a positive component. Democracy is what the system will produce through the democratic process and what the system won't produce through the democratic process. There are collections of wonderful books of unbuilt architecture, buildings that were designed that are never built because the market didn't support them or some other reason, and if we produce a wonderful draft statute that the political process, for good or for evil, will not enact, that is a result of democracy. It may not be one that I endorse, it may not be one that I agree with, but it doesn't mean it doesn't happen.

And I think that in the process we can sometimes decide to be silent, because promulgating something that can survive democratically and can get enacted isn't something we'd want to associate our names with and so we'd rather be silent than to promulgate something just because its enactable. There are other times where we might choose to pick from among rules that are equally right except for the one that's normatively "right-er" because I agree with it. We might choose to pick from among the right rules

one that is enactable because we want *a* rule. I don't think democracy is a synonym for all things true and beautiful. It's a synonym for, in a sense, what the political process will produce or will fail to produce.

Deborah Hellman: But a prediction about what it will produce is not the same thing as what it will produce.

Neil Cohen: Absolutely. The predictions may well be wrong and I profess zero expertise on making those predictions, which is why I don't care to challenge the Conference leadership's prediction because they've got more experience than I do.

Linda Rusch: Jean?

Jean Braucher, University of Arizona: I wanted to make a quick comment, and then I have a question for Bob Scott. The comment, I guess, goes to an issue that a number of people have referred to which is federal versus state. I think its absolutely clear that when you're talking about consumer rules, the federal process does better and Henry used the example of UETA and E-sign. With E-sign you got a set of bright-line consumer rules in the last Congress. And it was through the National Consumer Law Center which came in and got two senators involved in the process, and we got some consumer rules. Now they might not be the ones I would have chosen. I don't think they're perfect, but they were part of the package.

But the other point I wanted to make, or question really, for Bob Scott is, I guess, I want to try to make a defense of "mush." And, because you said getting it right in the commercial world, and I'm not talking about consumer rules now, but for the commercial world, would involve having an Article 2 that involved certainty and predictability. And I think, since this is a Contracts Session, that that comment struck me as a sort of a relational view of the world, that you have this idea that you could write a contract document up front and that you could predict everything. And the advantage of our current Article 2 is that it, at least in certain interpretations of it, right, with a sort of broad parol evidence rule and that sort of thing, is that it looks to the adjustment of relations over time. I, for one, don't buy the Lisa Bernstein analysis; I think what it does is it rewards strategic behavior at the expense of those who cooperatively adjust arrangements. And when she comes up with these categories of relationship-preserving norms, that those shouldn't be honored by the courts. Instead we should go to so-called "endgame norms." That assumes that everybody's thinking that way, and trying to predict and write into the contract at the outset very detailed rules.

Robert Scott: Very fair question, Jean. I guess I do share, although I don't buy Lisa Bernstein's particular analysis, but I do share a starting point that she has. I actually think, to be embarrassed, I started with it first, which is why I share it. About thirteen years ago I wrote an article on conflict and cooperation in

long term contracts, and the point I tried to make was that patterns of cooperation develop even in the absence of legal regimes. And I still think that that's true, and so I've long thought that there was, you know, Ellickson said "beware of the myth of legal centrism," that there are powerful normative forces in relational contracts and that they regulate a great deal of the relationship—McCaulay told us this a quarter of a century or more ago—and that therefore legal default rules serve a minor but very important purpose as kind of a nuclear umbrella. And from that perspective, I don't find it arelational. Now I think Dick would disagree with me and would agree with you, and I think he has said that I am no longer arelationist now that I've gone this down this path and maybe I'll turn around, maybe I'll decide I was completely wrong. Who knows? But my sense of it is that there's a difference between Contract as an institution, which is synthetic and relational, and Contract Law which is simple, formal, classical—not neo-classical or relational in that sense at all. And that it may not be such a bad thing that we have two sets of rules. We have a set of rules for umbrella legal enforcement, and then a set of informal social norms that are better if not judicialized. But, anyway, that's where I was coming from.

Gail Hillebrand: Jean, I'd like to comment on the assumption that you make that you get a better or stronger consumer protection rule from Congress than from a State Legislature. It has been my experience that you often can get a strong consumer protection from Congress only after a State has acted and quite often only after a State has acted non-uniformly. It's the fact that there is a state rule out there and that other States are considering different variations of that same state rule that creates the leverage and the environment in which the industry doesn't just say, "no new protections for consumers," in fact they have to play and have to talk about what those should be. And the commitment shown by the author of the California ETA, Senator Byron Sher, to do the right thing and to put significant non-uniformity into the California ETA was a tremendous spur to Congress looking at consumers—they couldn't say "Oh, those consumers are out to lunch." They had to say, "How can a legislature, by a large margin, have thought these protections were more important? We don't want these protections, but we have to have some protections. What should they be?"

Jean Braucher: I agree. I was talking about the state uniform laws process, that you get a better result out of Congress than out of the uniform process for consumer rules.

Henry Gabriel: Jean, my point on that was that you're going to get a technically better drafted statute.

Spencer Neff, Case Western Reserve: What troubles me about explaining what happened with Article 2 on the basis that it couldn't

be enacted is, number one, the Executive Committee as I understand it made a decision on what they thought was politically acceptable, and what they thought was that if General Electric and General Motors and these people are against you, it doesn't matter how many voters you have in favor of you. Because the Legislatures in the states are going to respond to the big money and not respond in any kind of a democratically responsive way. And, it seems to me, that's wrong. As an empirical matter, and also wrong as a way of the responsibility that NCCUSL has.

Linda Rusch: I want to thank the panelists for all of your interesting and provocative ideas.

***