clearly erroneous. The very nature of the process involves ascribing to the courts the duty of deciding when these freedoms may be validly abridged. The balancing of interests is merely a means by which the court renders a policy decision without the benefit of any concrete norms.

However, the balancing of interests process could serve as a method of determining the validity of compelling testimony if the courts recognize that: To compel testimony in response to questions which concern the exercise of First Amendment freedoms may abridge these rights; the governmental interest in Congressional investigations may be much greater than that in legislation which directly abridges the First Amendment. However, the individual interest here includes the public interest in the First Amendment and is, thus, also correspondingly increased. With these two working principles before them, the courts might be able to deal adequately with this problem, with a view towards eventually establishing ascertainable limits to the Congressional power of inquiry when compelling testimony.

Of course, the better solution to the entire problem would be for Congress to recognize the results of some of its current practices and by self-restrictive legislation eliminate the problem at its source.[46] Many recommendations have been offered to improve current Congressional procedures in investigations which would at least partially alleviate the danger of abridging First Amendment freedoms.[47]

U. C. C. CONTRIBUTIONS TOWARD THE ADOPTION OF A CONTRACTUAL CONCEPT OF WARRANTIES

The law has never provided a clearly defined theory of liability for breach of warranty.[1] At the time of their inception in the common law, warranties were based on the tort action of deceit.[2] They evolved,

46. Dennis v. United States, 341 U.S. 494, 539-540 (1951).

47. Galloway, *supra* note 1. See also Meader, *Limitations on Congressional Investigation,* 47 MICH. L. REV. 775, 778 (1949); Rogers, *Congressional Investigations: The Problem and Its Solution,* 18 U. OF CHI. L. REV. 464 (1951); Stebbins, *Limitations of the Powers of Congressional Investigating Committees,* 16 A.B.A.J. 425, 428 (1930).

1. This is, in part, a result of a failure to objectively evaluate the purposes of warranties in the beginning. Fuller's comment, in relation to damages, is equally applicable to the law of warranties: "We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed?" Fuller and Perdue, *The Reliance Interest in Contract Damages: I,* 46 YALE L.J. 52 (1936).

2. The warranty action based on deceit actually preceded the assumpsit action. Assumpsit was originally considered a tort action but developed shortly into contract. 1 WILLISTON, SALES § 195 (3d ed. 1948).

very shortly, into a new segment of contract law.[3] Occasionally a third concept has been utilized which declares that warranties are essentially based on a social desire to protect the consumer.[4] Under this view they are controlled by judicially determined social policy without reference to tort or contract principles. Although it is commonly proclaimed that warranties now constitute contractual provisions, the other concepts of liability continue to be woven into warranty law.[5] Fault justification in tort law and, more recently, the doctrine of absolute liability consistently appear in the warranty scene.[6] The contractual concept has been broadened by a more liberal application of implied promises. In the area of social policy, a philosophy of risk avoidance, prevention, shifting, and distribution has superseded the ancient doctrine of caveat emptor.[7] Today each of these theories facilitates imposition of increased

3. *Ibid.*

4. This basis of liability is asserted in some of the privity cases in order to avoid the privity requirement. Decker and Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). The same argument is employed in some cases in order to uphold a warranty which the seller has attempted to disclaim. See Note, 1 VAND. L. REV. 467 (1948). A recent casebook even suggests that all legal obligations are imposed by law, including contract as well as tort obligations. KESSLER AND SHARP, CASES AND MATERIALS ON CONTRACTS 56 (1953).

5. 1 WILLISTON, SALES § 195 (3d ed. 1948). The author states that even though warranties are generally considered as contract today, the tort liability also remains. In addition to the continued effect of tort principles on warranties, an entirely separate branch of negligence and misrepresentation law has developed, covering the same types of sales transactions. The difficulty in negligence recovery has been the adequate proof of negligence. The doctrine of res ipsa loquitur has been utilized to a great extent in this area, but the requirement that the injury be caused by an instrument within the exclusive control of the defendant has hampered its effectiveness. The negligence cases generally lead into considerations of dangerous articles. The deceit action, in tort, has been used to some extent, and the scienter requirement has not been stressed. The application of negligence and deceit has had its greatest influence in food cases. PROSSER, TORTS § 85 (1941); Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929); for an illuminating insight into the inconsistent categorization of dangerous articles, see Levi, *An Introduction to Legal Reasoning*, 15 U. OF CHI. L. REV. 501 (1948). Evidentiary of the confused state of warranty law is the prevailing tendency of the courts to hold that contributory negligence of the customer is a defense to any action against the retailer or producer. Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939). The well recognized contractual nature of warranties appears to have been overlooked on this point. Even though the courts do not always call it contributory negligence, negligence of the consumer usually defeats him even in a warranty action. See Note, 96 U. OF PA. L. REV. 863 (1948). A complete acceptance of a contractual theory would avoid much of the present confusion. The term, contract, has been used to describe three different combinations of things: "(1) The series of operative acts of the parties expressing their assent, or some part of these acts; (2) a physical document . . .; (3) the legal relations resulting from the operative acts of the parties, always including the relation of right in one party and duty in the other." CORBIN, CONTRACTS § 3 (1952).

6. See EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), in which the author traces and analyzes the development of tort law, emphasizing trends toward absolute liability.

7. One of the early theories of negligence liability stemmed from the common

liability for vendors of consumer goods.[8] Each notion, however, establishes different boundary lines for vendors' responsibilities.[9]

Permeation of the common law with a philosophy favoring sellers prevented a purely contractual approach to warranties.[10] That policy was the very opposite of the current risk shifting trend.

The commercial transaction has undergone a gradual transition from the face to face sale to the currently involved processes of distribu-

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law notion that "a man acts at his peril." A slight variation of this position is the entrepreneur theory of liability which imposes obligations as a result of doing business. See HOLMES, THE COMMON LAW 82 (1881). Douglas presents an analysis of the application of the current risk shifting philosophy in *Vicarious Liability and Administration of Risk I,* 38 YALE L.J. 584 (1929). Although this article deals with a consideration of the workability of the theory in the field of vicarious liability, it offers an excellent education in the hardships of application.

8. If the consumer has suffered damages as a result of an article previously declared to be inherently dangerous, his recovery may be quite complete. If, however, the product has not yet been placed in the dangerous category, prediction of decision can be based on little more than a heartful hope. Russell, *Manufacturer's Liability to the Ultimate Consumer,* 21 KY. L.J. 388 (1933). This article presents a survey of similar items which are considered inherently dangerous in one instance and not in the other. The author suggests putting the entire matter on the theory of foreseeability and proximate cause.

The expansion of the contract remedy permits the buyer to extend his opportunity for recovery through the warranties. This same advantage is available through the device of considering the warranties to be freely imposed through social justice. It will readily be observed that the choice of a proper form of recovery may determine the buyer's success. It is difficult to be certain just how far a court will go in any of these areas.

One other source of recovery is through the negligence *per se* statutes. These statutes apply only to food and are reminiscent of early statutes in the law requiring the distribution of food which is fit to eat. Noel, *Products Liability of a Manufacturer in Tennessee II,* 22 TENN. L. REV. 985 (1953).

9. The use of a combination of theories for a cause of action arising out of the damages for a defective product makes the establishment of boundaries impossible. The victim necessarily faces a problem of prediction, and the seller remains obscure as to his area of liability. It is desirable, of course, to formulate a somewhat standard form of liability which will be generally acceptable in order to clarify the rights and duties of the parties involved.

While a certain amount of flexibility may be desirable, a foundation of purely social policy leaves the entire problem to be resolved by arbitrary distinction by the formulators of a Code or entirely up to the discretion of the courts. The tort framework carries the negligence law with it and presents the difficulty of proof. Even the absolute liability extension of tort has involved questionable distinctions. Russell, *supra* note 8.

10. The theory of cavcat emptor was that the buyer purchased at his own risk. Tiffany suggests that the rule is probably attributable to the fact that most sales took place in market overt. TIFFANY, SALES § 78 (2d ed. 1908). It follows that even though the warranty may have been given some of the contract properties, a complete contractual basis could not have been accepted.

In the period of the caveat emptor bloom, it was sometimes held that the intentional nondisclosure of latent defects by the seller did not give rise to an action of fraud. It was entirely a matter of caveat emptor. This rule has not usually been applied to such a great extent in this country, but it is representative of the effects of the caveat emptor doctrine on the early common law. *Id.* at §§ 54-55.

tion.[11] Growing judicial concern for unwary and often remote purchasers has accompanied this transition. It may well be that an investigation would disclose that realistically the buyers' position has not particularly changed. There is some merit, however, in the contention that today's buyers are frequently more dependent on their sellers' integrity than the primitive purchaser of a neighbor's horse.[12] Increasing complexity of products distribution cannot be discounted in the analysis of the causes of caveat emptor's decline, although it does not completely explain the changes which have occurred.[13]

Judicial repudiation of the doctrine of caveat emptor may be largely attributed to variations in social and commercial philosophies. An inquiry into the effects of modern advertising techniques provides some insight into this position.[14] Manufacturers and dealers daily eulogize the qualities

11. Llewellyn traces the nature of sales from the primitive horse trade to the more involved transactions of today. He also traces the theory, which is briefly sketched in the following statement: "The progression is from 'any man in selling will affirm that his wares are good' (arm's length), through 'one must not conceal what he knows, or ought to know' (tort), into 'this is what he has agreed to deliver' (contract); then into: this is what he must answer, generally for putting on the market (*res ipsa loquitur* and third party warranty); and finally, into central regulation: he must, on pain of exclusion or fine (guild or association) or confiscation, fine, or imprisonment (state), show publicly the content of his ware; or even: wares of less than a given standard he *shall not put out!*" (emphasis theirs) Llewellyn, *On Warranty of Quality and Society,* 36 COL. L. REV. 699, 713 (1936). See also Part II of this article, 37 COL. L. REV. 341 (1937).

12. The purchaser of a horse, traditionally considered to be representative of the early sales, was not capable of discerning hidden defects in the animal. Perhaps the standardization which is possible under modern methods of manufacturing renders the buyer safer than he was in the early sales. Nevertheless, the relative positions of the parties have altered. The consumer today may or may not be financially capable of attempting an action at law against his seller. The present seller is usually in a position of commercial advantage. Llewellyn observes the tendency of the courts to apply different rules according to the transaction in mentioning that "the horse cases produce horse-results, and the growth occurs in non-horse cases." Llewellyn, *On Warranty of Quality, and Society,* 36 COL. L. REV. 699, 711 n.39 (1936).

13. One reason given for the burial of caveat emptor is the development of a business practice to stand behind a sale. VOLD, SALES § 142 (1931). For a list of products which are usually backed up by business practice and the types of warranties which are usually given with them, see Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods,* 25 ILL. L. REV. 400 (1930). This article indicates that business has taken the initiative and provided repair or replacement for defective articles. The consumer's recovery does not seem to become complicated unless he suffers personal or property damage as a result of the defect. The average business man will realize that his reputation is improved by adopting the "customer is always right" attitude. The possibility of being held responsible for large financial losses, however, presents a very different situation.

14. The total national expenditure for advertising in 1950 was over 5½ billion dollars. See Note, 6 VAND. L. REV. 376 (1953). This national figure not only supports a direct relationship between the manufacturer and the consumer, but it also represents definite efforts by the seller to induce the potential purchaser to buy. A large percentage of newspaper space is devoted to advertising; most radio programs are commercially sponsored; and the development of television has produced another great means for cultivating a seller's market. Although much of the advertising may be

of their products through diverse means of mass communication. This exemplifies the current position of the seller in the distribution of his products and justifies shifting the loss to him.[15] It would be a contradiction of logic to permit caveat emptor to play the dominant role in this modern sales drama. The astounding proportions of insurance consciousness in the field of product liability demonstrate the sellers' awareness of their obligations.[16]

Development of this new policy favoring the buyer facilitated the application of contractual concepts to warranty law.[17] Originally, the contractual theory was limitedly manifest in the form of express warranties.[18] Further growth of the theory was revealed in the then slowly expanding law of implied warranties. Adoption of the Uniform Sales Act provided for universal application of such warranties but sanctioned their utilization only in transactions accompanied by buyers' reliance on

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considered as merely "puffing," a great deal of it goes beyond that stage, as in Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), where advertising describing the quality of a truck, in the process of rebuilding when the contract of sale was executed, gave the buyer a right of action even though the contract disclaimed any warranties.

15. Carhill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256, involves a floating promise directed to the world in general. This case implies a contract, much as in the reward cases, as a result of extensive advertising campaigns. A similar result in tort, on the theory of a representation to the world at large, is found in Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912). Waite points out that these results are usually confined to the food cases; he asserts that "no sound reason appears why it should be so limited." WAITE, SALES 201 (2d ed. 1938).

16. Over $18,000,000 are spent annually for products liability insurance in this country. See Noel, *supra* note 8. This figure certainly indicates a recognition of liability by people in business. Consumer realization of recovery seems to be dependent, to some extent, on a claims consciousness environment. An analysis of 38,000 claims, including food and other products, made by a products liability insurance expert revealed that 67½% of all claims came from the New York metropolitan area; 12½% came from the Boston area; and 20% came from the rest of the country. This concentrated area of recovery has also accounted for higher premium rates. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 249 (1951).

17. Cohen's analysis of the justification of the contract law is divided into six different theories: (1) the sanctity of promises, which simply recognizes something inherently wrong with breaking a promise; (2) the will theory, based on the will of the parties; (3) the injurious-reliance theory; (4) the equivalent theory, founded on a *quid pro quo* sentiment; (5) formalism in contract, supported by historical respect for forms and ceremonies; and (6) on a distribution of risk theory. COHEN, LAW AND THE SOCIAL ORDER 88 (1933). It will be noticed that each of these theories involves the promise ingredient and a remedy for breach of that promise. The result of the application of one of these theories, even though the basic ingredients remain the same, eannot avoid determining the bounds of the law.

18. Warranties were based only on affirmations or promises made by a seller. If the goods were specified, and no express statements were made, there was no provision that they must be of any particular quality. The common law was developing an implied warranty in the later cases, and the Uniform Sales Act provided for this type of warranty. 1 WILLISTON, SALES § 231 (3d ed. 1948). For a list of states which have enacted the Uniform Sales Act, see BRAUCHER, SUTHERLAND AND WILLCOX, COMMERCIAL TRANSACTIONS xii (1953).

words of description.[19] That statute's sections contain elements of tort principles, but the development of implied agreements appears to have been primarily a contractual enlargement.[20] The limited provisions of the Sales Act were extended by judicial interpretation which, in turn, depicts greater acceptance of this ideology.

Perhaps a contractually based law will not solve all warranty problems. In such instances it may be necessary to reach a decision on purely social considerations. The possibility exists that the very pattern of contract into which warranties have been fitted may essentially represent nothing more than a solution by social policy.[21] Certainly this concept has been expanded by social considerations. Explicit adoption of a contractual basis of liability would, however, standardize responsibility for breaches of warranty.

The Uniform Commercial Code seems to have imbued warranties with more contractual characteristics than existed under interpretations of the Sales Act.[22] The proposed codification contains affirmative implied warranty sections which require the goods in any transaction to be fit for

19. Section 15 of the Uniform Sales Act introduces the implied warranties of quality in the following manner: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows. . . ." The implied warranties which are provided in this section are: (1) a warranty of fitness for particular purpose if the buyer conveys his intended purpose and relies on the seller to choose a suitable product; and (2) a warranty of merchantability if the goods are bought by description.

20. Few agree on whether the basis of the law of warranty in the Sales Act is contractual or tortious. The element of reliance which may be found in the provisions sounds of both contract and tort. The use of the word "affirmation" in Section 12, concerning the express warranty, suggests that something less than a promise is required. This confusion has been responsible for a great deal of variation in the damages which have been recoverable for a breach of warranty. Waite applies the contractual standard; Vold applies the tort standard. Amram and Goodman, *Some Problems in the Law of Implied Warranties,* 2-3 SYRACUSE L. REV. 259 (1950-52). The indecision concerning the basis of liability also causes problems in relation to a wrongful death suit. If the court decides that warranties are contract actions, this type of recovery may be barred. This simply illustrates another element in the buyer's choice of a suitable cause of action. See Note, 96 U. OF PA. L. REV. 863, 869 n.42 (1948).

21. The argument that the expansion of contract to adequately cover the warranty area is merely a device by which to express social policy certainly has merit. Dean Pound views absolute liability in torts and artificially included phrases in contracts as steps toward the service state. He stresses the importance of keeping promises and maintains that this obligation has been considerably altered by modern courts and legislatures. Pound, *Law in the Service State,* 36 A.B.A.J. 977 (1950). On the other hand, the implied warranty or promise that goods will be of a minimum standard would not seem to be completely artificial.

22. The Uniform Commercial Code represents a joint effort by the American Law Institute and the National Conference of Commissioners of Uniform State Law. Artiele Two is a Codification of Sales Law. Unless otherwise indicated, the use of the word Code in this text refers to the 1952 Official Draft. The only state which has enacted the Code as law, at the time of this writing, is Pennsylvania.

ordinary use. Nevertheless, many code provisions depicit a continued search for a basis of liability.[23]

Warranties and Disclaimers.

The most significant pertinent contribution of the Commercial Code is inclusion of the warranty of correspondence with description within the express warranty section; it was an implied warranty under the Sales Act.[24] Older cases condoned application of this latter warranty only to sales in which the buyer purchased an article without opportunity to actually see it and, therefore, in reliance on the vendor's description.[25] Inclusion of a provision in the same section that goods must also conform to an examined sample supports this interpretation.[26] A number of the more recent cases, however, have extended the meaning of warranty of correspondence with description by requiring the product in any sale to be essentially the subject matter bargained for.[27] Philosophically, this criterion may be based on the proposition that any product is defined by the purposes associated with it.[28] An artifact involves several qualities of the product, the most important being its utility.[29] The purchase of a ladder infers a reliance on the part of the buyer that the ladder may

23. The language in Section 2-313 still indicates that an affirmation or promise may give rise to an express warranty. The implied warranty of fitness for particular purpose, Section 2-315, still requires reliance, which may be indicative of contract or tort.

24. Section 14 of the Sales Act provided an implied warranty of correspondence with description. Section 2-313 (1) (b) of the Code makes this an express warranty if the description is made a basis of the bargain. Comment 4 to this Section explains the intended scope of this new express warranty: "In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described."

25. 1 WILLISTON, SALES § 224 (3d ed. 1948).

26. ". . . [A]nd if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description." UNIFORM SALES ACT § 14.

27. The comments to Section 37 of the Uniform Revised Sales Act (1944), which dealt with the express warranty and is now Section 2-313 of the Code, suggests that the vitality of this new express warranty is based on that case law which has refused to permit a disclaimer to destroy the essence of the sale. J. B. Colt Co. v. Bridges, 162 Ga. 154, 132 S.E. 889 (1926), maintains the implied warranty as one imposed by law, and therefore it cannot be disclaimed. The cases of Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861 (1924), and F. C. Austin v. Tillman Co., 104 Ore. 541, 209 Pac. 131 (1922), are mentioned for finding some fundamental subject-matter of the contract which a disclaimer cannot undercut.

28. "In the field of purposive human activity . . . value and being are not two different things, but two aspects of an integral reality." FULLER, THE LAW IN QUEST OF ITSELF 11 (1940).

29. For an analysis of definition in the sphere of logic, see HARTMAN, FUNDAMENTALS OF LOGIC 5 (2d ed. 1949).

be employed satisfactorily for the purposes for which ladders are ordinarily used.[30] The Code adopts this interpretation by suggesting that every transaction is a sale by description as regards its very essence; the essence of the sale would be a normally usable ladder.[31] It is certainly sound contract law to imply a promise that the article purchased will conform to the normal conception of that article. Perhaps this simple contractual formula is the primary basis of liability which has long eluded warranty law.

This new express warranty of correspondence with description may appear to have done little more than exchange the adjective implied for express, until it is observed that "express warranty," as used in the Code, cannot be disclaimed.[32] This provision gives the new warranty vigor for a dynamic life. Heretofore, case law has usually permitted an implied warranty to be disclaimed through utilization of explicit language.[33] However, the trend of cases, followed by the Code, has been

30. Llewellyn's study reveals that numbers of courts have been seeing that "description" goes to the essence of a bargain. He points out that there is a very good case to be made for Section 14 in the Sales Act as an "iron section." By this it is meant that no agreement could upset it, and it would require that the essence of the bargain be complied with. Llewellyn, *On Warranty of Quality, and Society,* 37 COL. L. REV. 341, 385 (1937).

31. Historically, this type of safeguard was provided by a condition of correspondence with description in the English Sale of Goods Act, 1 WILLISTON, SALES § 223 a (3d ed. 1948). Rescission was provided for a breach of this condition, although it was not permitted for breaches of warranty. This particular rescission problem has not existed under the Sales Act in this country; rescission is expressly provided in the event of a breach of warranty. UNIFORM SALES ACT § 69. The election of remedies, however, has contributed an equally perplexing problem.

The English treatment of this obligation as a condition is important as a source of analogy. The condition in the English act would amount to a promise under the application of Corbin's analysis of condition. He contends that conditions, in the true sense, include only a "fact of event on which some legal duty is dependent." CORBIN, CONTRACTS § 634 (1952). The possibility of a breach of condition is denied; only a promise may be breached. This interpretation of the English condition correlates with the tendency of some recent cases in this country to enlarge the Sales Act warranty of correspondence with description into a required ingredient of every transaction. The Code appears to have adopted this construction of the warranty.

32. "If the agreement creates an express warranty, words disclaiming it are inoperative." UNIFORM COMMERCIAL CODE § 2-316 (1). Comment 4 to Section 2-313, which establishes the express warranty, also indicates that the express warranty may not be disclaimed. It will be recalled that the express warranty now includes the warranty of correspondence with description. See note 24 *supra.*

33. The use of the words "as is" or "excluding all warranties, expressed or implied" usually disclaims all warranties, and the courts give them effect. See Note, 1 VAND. L. REV. 467 (1948). The case of Garofalo Co. v. St. Mary's Packing Co., 339 Ill. App. 412, 90 N.E.2d 292 (1950), held that the words "as is" covered not only the admittedly damaged cans, in a shipment of cases of tomato juice, but also included the contents of the cans. A disclaimer using the words "in lieu of . . . all other obligations or liabilities" was recently held to include even negligence. Shafer v. Reo Motors, Inc., 205 F.2d 685 (3d Cir. 1953). Many courts, on the other hand, have been reluctant to permit a disclaimer to completely eliminate the essence of the sale. Three devices used in avoiding harsh disclaimer provisions are: (1) calling the warranty a

to refuse to recognize any attempted disclaimer of an express warranty.[34] The Code has, therefore, provided a new express warranty which requires an unretractable essential conformance of the agreement's object.

Is this a limitation on the right of contractual freedom?[35] The value of the warranty could be completely destroyed if the Code freely permitted the seller to avoid it.[36] Any other position overlooks the bargaining positions of the parties. A buyer whose bargaining power equals that of his vendor would not purchase a ladder if the seller openly stated that he refused to be liable if the ladder did not perform the usual functions for which a ladder is ordinarily purchased. Prohibiting disclaimer of the new express warranty thus protects the right to contract. To permit the seller to disclaim the very essence of the sale is to devitalize the contractual concept.

Although the Code proscribes a disclaimer of an express warranty, it recognizes limitation of remedy by agreement of the parties.[37] The sales agreement may restrict compensation for losses arising from a defective article to replacement or repair unless personal injuries are involved;[38] any limitation of consequential damages for such personal harm is prima facie unconscionable.[39] The same is not true, however,

condition; (2) saying that warranties arise by implication of law, and therefore cannot be contracted away; and (3) simply maintaining the warranty on the grounds of public policy. See Note, 23 MINN. L. REV. 784 (1939). Prosser states that courts have required the goods to be at least warranted genuine according to description, even in the face of a disclaimer. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 160 (1943). Linn v. Radio Center Delicatessen, Inc., 9 N.Y.S.2d 110 (N. Y. Munic. Ct., 1939), held that it was against public policy for a manufacturer of food products to disclaim; the *Garofalo* case, *supra*, is to the contrary. See also Ferguson v. Koch, 204 Cal. 342, 268 Pac. 342 (1928), which holds that even though the warranties are disclaimed, the article must still be of the essential character intended.

34. The view has been expressed that an express warranty and a disclaimer nullify each other. Alaska Pacific Salmon Co. v. Reynolds Metals Co., 163 F.2d 643 n.33 (2d Cir. 1947). But see Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 822 (3d Cir. 1951). In the latter case the court referred to Section 2-316 (1) of the Uniform Commercial Code which affirmatively states that an express warranty eannot be disclaimed. The court says the Code, even though not enacted in most of the states, deserves the same consideration that the restatements receive.

For a discussion of the manner in which the Code handles the parol evidence rule, see Note, 53 COL. L. REV. 858 (1953).

35. See note 21 *supra*.

36. It is unlikely that business enterprises would engage in wholesale disclaimer of any obligations; nevertheless, the possibility is a dangerous one. The same result might practically be reached through making minor warranties for repair while negating any other possible type of recovery.

37. UNIFORM COMMERCIAL CODE § 2-719. This Section states that "the measure of damages recoverable under this article" may be limited "to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."

38. UNIFORM COMMERCIAL CODE § 2-719 (3).

39. The problem which is created by this Section is the meaning of the words "prima facie unconscionable." Comment 1 declares that "it is of the very essence of a

when a property loss occurs.[40] This distinction appears to be entirely arbitrary and illustrates the tendency of the courts to distinguish between personal and property injury. This is exemplified by the liberal attitude toward recovery in food cases, as contrasted with notions of restricted recovery in cases involving other products.[41] The only reasonable explanation must be based on social policy; it is nearly certain that deleterious food, if consumed, will cause a bodily injury. The Code advances a step by realizing that bodily injury may also be caused by other defective goods.[42] It has, however, chosen to draw the line between personal and property harms. A contractual approach to the damages question does not sanction such a dividing line.[43] Any seller is reasonably capable of foreseeing either type of injury resulting from the improper performance of his product.[44] If it is agreed that the essence of the sale must be delivered, compensation for any harm, personal or property, arising because of the defect should be recoverable.

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sales contract that at least minimum adequate remedies be available." The interpretation of the courts will determine the effectiveness of this provision. If this section is liberally construed for the seller, he may not only avoid property damages but might, in some instances, overcome the prima facie presumption against limitation of personal damages. Contrarily, if the judicial interpretation favors the buyer, he may win not only personal damages but might also demonstrate that some limitations on property losses are unreasonable.

40. "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." UNIFORM COMMERCIAL CODE § 2-719 (3).

41. The food cases represent, in many ways, a separate area of warranty law. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER (1951), is a very comprehensive treatment of the food problem. The author points out that the consumer who is injured by defective food has four possible modes of recovery: (1) implied warranty of fitness or merchantability in all states; (2) a special food warranty in some states; (3) negligence in all states; and (4) the pure food statutes in some states. *Id.* at 76. Recovery has been permitted much more freely in each of these actions in cases concerning food. Although food dealers have been held rather strictly liable, restaurant owners have fared much better in the case law. They have often escaped liability on the contention that a sale has not been completed. The Code settles this problem by stating that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." UNIFORM COMMERCIAL CODE § 2-314 (1). Prosser suggests seven reasons for the difference in food: (1) the probability of defect in the class of goods; (2) the magnitude and extent of social harm; (3) the kind of interest threatened—personal or property; (4) the ability of the consumer to protect himself; (5) the necessity of consumer to trade in such products; (6) the cost of inspection by the vendor; and (7) the customs of the business. PROSSER, TORTS § 83 (1941); Note, 96 U. OF PA. L. REV. 863 (1948).

42. No distinction is made in § 2-719 of the Code between personal injury resulting from defects in food products and those arising out of other defective products.

43. "In cases where the defendant's breach of contract has resulted in the injury or destruction of specific property belonging to the plaintiff, the courts have usually felt little difficulty in finding that the defendant should have foreseen the injury." 5 CORBIN, CONTRACTS § 1013 (1951).

44. The seller of a ladder is certainly capable of contemplating the possible damages which may be caused if the ladder is defective. The very nature of the article conveys its intended use.

The remedy provided for any type of injury is effective only insofar as adequate causes of action are available. The Sales Act remedies for breach of warranty consisted of four alternative causes of action. Election of one barred the use of any of the others, obviously eliminating the possibility of a suit for both rescission and damages. Remedies for nonperformance, on the other hand, offered full recovery for damages for breach of contract.[45] This distinction failed to recognize that harm resulting from breach of warranty might be equally (or more) severe than nonperformance by the seller. The Code makes a distinction between nondelivered and accepted goods but apparently allows rescission and damages in either case;[46] this combination of damages is desirable.

The manner in which the Code treats other warranties accentuates the importance of the new express warranty. Implied warranties of merchantability and fitness remain subject to disclaimer and have encountered only minor changes.[47] The express warranty by affirmation or promise appears to be covered either by the implied promise of the new express warranty of correspondence with description as to the essence of the sale or by general contract reliance principles as to agreements beyond the mere essence.[48] The purposes of these warranties would seem to be adequately served by the new express warranty, which demands that the goods be at least merchantable in any sale. Overlapping of these sections indicates that the Code has not given breach of warranty a firmly established theory of liability.

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45. UNIFORM SALES ACT § 67. The buyer has the right to "maintain an action against the seller for damages for nondelivery. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract." Although the word "rescission" is not used, in effect the buyer is provided with an opportunity to consider the contract breached and sue for damages.

46. Section 2-713 gives the buyer's damages for nondelivery. "The measure of damages is the difference between the price current at the time the buyer learned of the breach and the contract price together with the incidental and consequential damages." Section 2-714 concerns the buyer's damages for breach in regard to accepted goods. "The measure of damages . . . is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." There is no requirement of an election of remedies in either category.

47. The implied warranty of merchantability in the Code, Section 2-314, arises in every sale. Section 15 (2) of the Sales Act was a little more complicated, but the new Code Section simply codifies the trend in interpretation of this warranty. Section 2-315, concerning the implied warranty of fitness for particular purpose, has been reworded but has entirely the same elements as Section 15 (1) of the Sales Act, with the exception that it is no longer limited by the patent or other trade name restriction. See UNIFORM COMMERCIAL CODE § 2-315, Comment 5.

48. UNIFORM SALES ACT § 12; UNIFORM COMMERCIAL CODE § 2-313 (1). Both express warranty Sections use the words promise or affirmation, and there are no significant changes generally in this warranty.

Privity.

Privity is probably the most controversial issue involved in a discussion of warranty law.[49] The most notable change in the Code regarding privity is a provision that a member or guest of the purchaser's household, who is injured by use of a defective product, shall have a direct cause of action against the seller.[50] Heretofore, the common law has often denied recovery in such situations except to the immediate purchaser.[51] The major consumer today is the family unit, and the actual purchaser is merely its representative. There is no basis for assuming that the buyer who carries the product away will be the sole user or consumer; members of the family unit eat the food, ride in the auto-

49. The consideration of warranties as contractual in nature has brought about the privity problem in this area of the law. Although it is difficult to understand, privity has even plagued attempted recoveries on a negligence theory. The negligence law has largely eliminated this restriction by the wide following of the case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); see Note, 12 OHIO STATE L.J. 142 (1951). The courts have used several means of avoiding the privity barrier in warranty actions: (1) warranties considered as running with the product, Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); (2) a third party beneficiary theory, Ward Baking Co. v. Trizzino, 27 Ohio App. 275, 161 N.E. 557 (1928); (3) the theory that the middleman is an agent, Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931); (4) an assignment theory, Madouras v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); and (5) on the theory of public policy. See Feezer *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles,* 37 MICH. L. REV. 1 (1938). For a general survey of the privity problem and the reaction of the courts and the authorities towards this problem, see Bohlen, *Liability of Manufacturer to Persons Other Than Their Immediate Vendees,* 45 L.Q. REV. 343 (1929); Dean and Warfield, *Should the Doctrine of Implied Warranties Be Limited to Sales Transactions?,* 2 VAND. L. REV. 675 (1948-49); Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134 (1937); Worth, *Requirement of Privity,* 30 N.C.L. REV. 191 (1952); Note, 29 B.U.L. REV. 107 (1949); Note, INTRAMURAL L. REV. (N.Y.U.) 25 (1945).

50. UNIFORM COMMERCIAL CODE § 2-318. Section 43 of the Uniform Revised Sales Act, which has been replaced by Section 2-318 in the Code, provided an almost complete departure from privity. "A warranty extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in *person* or *property* by breach of the warranty." Hence, if a manufacturer sold to a retailer, it would be reasonable for the manufacturer to expect that the consumer will eventually use the article. So the consumer could sue the manufacturer. This extension of the manufacturer's liability would have encompassed most of the cases involving consumer damages. Buerger, *The Sales Article of the Uniform Commercial Code,* 23 N.Y.S. BAR ASS'N BULL. 116 (1951). Williston expresses concern over an extension of this nature; he suggests that "it is at least questionable whether the law should not remain as is, unless the seller is guilty of negligence or the goods are inherently dangerous," Williston, *The Law of Sales in the Proposed Uniform Commercial Code,* 63 HARV. L. REV. 561 (1950).

51. Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916), illustrates this privity restriction. The wife purchased pork chops from the grocer; she and her husband were injured as a result of eating them. The husband was successful in his suit against the grocer; it was held that the wife made the purchase as his agent. The wife did not win her suit against the grocer because there was no privity. Section 2-318 would give the wife an adequate remedy.

mobile, and play the radio. The seller cannot avoid being aware of that fact. Furthermore, the members and guests of the household are entitled to rely on the general quality of his product. This leads to the conclusion that the vendor should be directly liable to the consumer who is injured through its use. It is not unreasonable to imply a promise by the seller for the benefit of such persons that the article is merchantable. This seems to be an appropriate extension of the contractual theory.

The original third-party beneficiary section, as first drafted in the Revised Sales Act, which was the first attempted revision of the Sales Act, provided that consumers had a direct cause of action for both property and personal damage. The Code now allows third-party recovery only in the event of personal injury.[52] The sole reason suggested for this change is the insurance possibilities.[53] The distinction seems to be rather arbitrary and illustrates the lack of definite boundaries in the application of warranty law. A continued reluctance to provide complete and logical recovery is apparent. This is precisely the same type limitation as that provided in the disclaimer limitation section and apparently is also founded on the food cases in which personal injury is almost certain. The distinction can be explained by the codifiers' willingness to apply a risk distribution theory only in eases involving personal injury. The contractual theory, which requires performance of the essence of the contract, would permit no such distinction.

The most annoying problem created by the privity doctrine has been completely avoided in the Code. Assume that a purchaser buys a sleeping blanket from a retailer, and a defect in it causes it to break into flames,

52. UNIFORM REVISED SALES ACT § 43. The third-party consumer might conceivably still make an argument for property damages. Section 2-715 of the Code provides consequential damages for any "injury to person or property proximately resulting from any breach of warranty." Why should the recovery for a third-party beneficiary be any different? The deletion of property damage from Section 2-318 would, nevertheless, indicate that a change was intended, eliminating this recovery for property damage.

53. TRANSCRIPT OF DISCUSSION ON THE UNIFORM COMMERCIAL CODE 329 (Joint Meeting, The American Law Institute and the National Conference of Commissioners on Uniform State Law, May 1950).

Although the meaning of "insurance possibilities" is not explicit from this transcript, the codifiers were apparently troubled by the extensive insurance coverage sellers would be compelled to have in order to indemnify themselves. This possibility cannot be refuted; nevertheless, it does not seem that this justifies leaving the burden of loss on the consumer. For a discussion of the bankruptcy hazard, particularly in the ease of marginal industries, see Note, 26 N.Y.U.L.Q. REV. 352 (1951). It is generally considered, however, that insurance will sufficiently handle the problem and that privity may be eliminated without causing great hardships. See Note, 37 COL. L. REV. 77, 81 n.26 (1937).

Soia Mentschikoff, Associate Chief Reporter, comments concerning the elimination of property damages: "I, myself, have always thought of it as a compromise solution between those persons who urged that there be relatively unlimited extension to third party beneficiaries, and those persons who thought that there should be no extension whatsoever." (Communication to INDIANA LAW JOURNAL).

injuring the purchaser.[54] It is very likely that the retailer would not be liable because he had no opportunity to discover the defect.[55] Inspection in this type of case would require destruction of the product. Even though the retailer should be held liable, he may be insolvent or virtually so. In addition, the majority of cases deny the consumer the right to maintain an action against the wholesaler or manufacturer.[56] On the other hand, a long line of food cases hold the retailer liable in the case of products which cannot be subjected to inspection; many of the food cases also allow the consumer to jump privity by suing the manufacturer, although there is a sprinkling of cases to this effect concerning other products.[57] Once again, it does not seem that the distinction can be justified.

The Revised Sales Act had several sections which would have largely solved the privity problem. These sections are of present importance only because they offer an opportunity to investigate the most pronounced weakness of the contractual approach. Section 40 imposed an implied warranty of safe resale on a manufacturer who sold to a wholesaler or retailer if it was reasonable to assume that the product was being purchased for resale purposes.[58] Two procedural sections were

54. Wood v. General Electric Co., 112 N.E.2d 8 (Ohio 1953), involves a defective sleeping blanket which caused property damage. The consumer failed to recover on an implied warranty because there was no privity. The reference to this fact situation in the text has been extended into a hypothetical case for the benefit of illustration. The Revised Sales Act would have solved this problem but the Code retreated from its early position. See Note 50 *supra.*

55. Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925); *contra* Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N.E. 225 (1918). For a discussion of these cases and the general liability of the retailer, see Waite, *Retail Responsibility and Judicial Law Making,* 34 MICH. L. REV. 494 (1936).

56. The privity requirement will usually hinder the consumer's action against the manufacturer and the wholesaler. DICKERSON, *op. cit. supra* note 41, at 142, demonstrates that the wholesaler is the most elusive member in the chain of distribution. He exemplifies this by pointing out that Missouri has eliminated privity as concerns the manufacturer but not the wholesaler. DeGouveia v. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936).

57. Waite, *supra* note 55, at 510; Note, 96 U. OF PA. L. REV. 863 (1948). Waite points out that cases holding the retailer and cases jumping privity are usually food cases. Waite is very much against holding the retailer liable in this type of situation. This position is criticized in Brown, *The Liability of Retail Dealers for Defective Products,* 23 MINN. L. REV. 585 (1939); Waite, *Retail Responsibility—A Reply,* 23 MINN. L. REV. 612 (1939), offers a response to this criticism. On the basis of theory, Waite's views are probably more accurate. As a practical matter, however, Brown's position permits a recovery, which is generally desirable.

Cases involving products other than food which permit the jumping of privity manage to grant recovery on negligence, instead of warranty, in order to justify the outcome. Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). See Notes, 7 FORD L. REV. 456 (1938); 12 ST. JOHN'S L. REV. 362 (1938).

58. UNIFORM REVISED SALES ACT § 40 (1944).

provided to facilitate the operation of this warranty.[59] One provided that the retailer could implead his seller and that this procedure could be employed up to and including the manufacturer. The other section granted the consumer a direct cause of action against the manufacturer if he was liable to impleader under the warranty of resale.[60] The act apparently adopted the view that the manufacturer impliedly warrants his products to be at least merchantable and carried this warranty to the consumer through the safe resale section. The retailer and other members of the process of distribution could be involved procedurally in this attempt to accomplish a recovery for the consumer. This proposal would not directly conflict with one authority's opinion that the retailer, who is unable to discover the defect, should not be held liable.[61] A conflict would of course still be possible since the retailer's liability would not be less in the event of an insolvent manufacturer or wholesaler. At this point, it becomes evident that a contractual solution is difficult. While it is not extremely difficult to hold the manufacturer contractually liable for his product, there is less justification for retailer responsibility in the absence of an opportunity to examine the goods.

Perhaps it is impossible to solve the privity problem with contract principles. The final determination of liability in this area of the problem may inevitably depend on risk shifting considerations.[62] It would not be a simple matter, however, to apply this concept successfully. The party to whom the risk is shifted might be unable to bear the burden of risk. If he is insolvent, the desired social end, protection of the consumer, would remain unaccomplished. The contractual rationale, accepting its deficiencies in this area, still seems to be capable of establishing the best defined basis of liability. To imply a promise, by each of the parties involved, that the product will perform its usual purposes does not appear to be an unbearable strain on contractual principles. The retailer or wholesaler, even though incapable of inspecting the article, must

59. UNIFORM REVISED SALES ACT § 120 (1944), provided for impleader by the buyer, which would have enabled the retailer to implead his seller. UNIFORM REVISED SALES ACT § 121 (1944), established a direct cause of action against a prior seller; this would have enabled the consumer to sue the manufacturer directly if the latter was subject to the warranty of safe resale under Section 40.

60. The right of impleader has successfully been accomplished in some jurisdictions outside of the warranty area. The New York third-party practice statutes and Federal Rule of Civil Procedure 14 permit this type of procedure. For a brief discussion of this approach, see Note, 24 A.L.R. 906 (1921). Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951) also reaches a similar result.

61. See note 55 *supra*.

62. See note 7 *supra*. Imperative in the risk shifting approach to the problem is a systematic organization of liability which will facilitate risk distribution. In one case the manufacturer may be capable of shifting the risk; in another case, the reverse may be true. The same is true concerning the retailer and the wholesaler.

realize that the purchaser relies on him, as well as the manufacturer, to deliver the essence of the sale.

It is unfortunate that the Code has retreated from this problem.[63] It might have worked out the parties' rights in this area as clearly as it diagrammed the rights involved in security transactions.[64] Perhaps the absence of such sections indicates that the codifiers did not feel that a socially acceptable and legally expedient basis of liability could be established at this time. The problem certainly requires a consideration of the social desirability of affording consumer protection to this extent. It involves a consideration of risk shifting and distribution. The complex chain of distribution and the phenomenal amount of advertising in modern commercial practice renders the antiquated privity restriction inappropriate. Drafters of the Code, even though they did not accept proposals which would have completely eliminated the privity problem, should have established the manufacturer's, wholesaler's, and retailer's responsibilities. One of the most confused areas of commercial law has been entirely ignored.

The warranties, although divided into several specific types, are essentially an attempt to provide that the essence of the contract must be performed. The new express warranty of correspondence with description, properly interpreted, should fulfill this function without assistance from other warranties. The limitation on the seller, which makes it impossible for him to disclaim this warranty, strengthens its potentiality. The remedies, also taking a more consistent contractual form, have become broader and more equitable. Even the privity problem has been eliminated in one particular situation.

Much of the confusion which exists in the law of warranties might well be attributed to a failure to perceive the contractual concepts involved. This failure may be largely ascribed to the social philosophy of caveat emptor. A shift in social thinking has effected a change which facilitates a solution based on an increased application of contractual principles to warranty problems.

63. Joint Meeting of the Codifiers of the Code, *op. cit. supra* note 53, at 328, indicates that the meat packing industry was strongly opposed to these sections. It was considered impossible for the Code to be enacted in Illinois, and probably in other states, with these provisions included. The sections were not eliminated at this meeting, but it is likely that they were deleted because of this type of opposition. Miss Mentschikoff, in the transcript, observes that the negligence field has largely eliminated the privity problem, and she suggests that it would be desirable for the Code to affirmatively eliminate these privity difficulties.

64. The Code has attempted to establish definite lines of rights of the parties by settling which class of creditors prevails in various situations. UNIFORM COMMERCIAL CODE §§ 9-301—9-318. For a discussion of this article of the Code, see Kripke, *The Modernization of Commercial Security Under the Uniform Commercial Code,* 16 LAW & CONTEMP. PROB. 183 (1951).