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Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code

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INTRODUCTION

The Uniform Commercial Code ("U.C.C.") at one time indisputably owed more to Professor Karl N. Llewellyn than to anyone else. Although Llewellyn did not initiate the plan to combine various uniform state laws on business subjects into a coherent code,[1] he played a pivotal role in translating this objective into the U.C.C. Llewellyn led the U.C.C.'s drafting as the "Chief Reporter" from 1942 until his death in 1962.[2] He and his wife, Professor Soia Mentschikoff, also served as reporters for three of the nine "articles"—or principal parts—of the U.C.C.[3] Throughout this process, Llewellyn consistently strived to make the U.C.C. distinct from other statutes and laws by imbuing it with features that reflected his deeply held juridical beliefs.[4] For these reasons, the U.C.C. has acquired

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1. Mr. William A. Schnader proposed the idea in 1940 when serving as the President of the National Conference of Commissioners on Uniform States Laws ("N.C.C.U.S.L."). *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 300 (1973); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d prac. ed. 1988).

2. *See* TWINING, *supra* note 1, at 284.

3. *See id.*

4. *See id.* at 271 (concluding that "there is no doubt that Llewellyn was easily the most important single figure" involved in the U.C.C.'s creation); Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n.3 (1964) (noting that "[d]espite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling").

nicknames like "Karl's Kode"[5] and "Lex Llewellyn."[6]

Llewellyn was a leader of the Legal Realist movement that emerged in this country during the 1920s and 1930s.[7] Scholars associated with this school of jurisprudence did not agree on everything, but they all held an intense interest in understanding what actually influences judges when they decide cases.[8] As discussed more fully within, some of the Legal Realists, including Llewellyn, shared a prescriptive vision for crafting legislation. They believed that statutes should seek to improve judicial decisions by recognizing that judges inevitably act with considerable discretion, and by seeking to guide this discretion rather than futilely attempting to eliminate it.[9]

When Llewellyn set to work on the U.C.C. project, he naturally wanted to implement his jurisprudential ideas.[10] As the following in-depth discussion will show, Llewellyn succeeded in giving the U.C.C. at least five important features inspired by

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5. *See* Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

6. *See* Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330–34 (1951); *see also* TWINING, *supra* note 1, at 271 (identifying similar appellations).

7. *See generally* KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962) (presenting a series of essays of the version of Realism Llewellyn developed from the 1920s until his death in 1962).

8. Professor Brian Leiter concisely has summarized the typical contemporary understanding of Legal Realism as follows: "Legal Realism is fundamentally: (1) a descriptive theory about the nature of judicial decision, according to which, (2) judges exercise unfettered discretion, in order (3) to reach results based on their personal tastes and values, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons." Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997). *See also* James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, *in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 401, 401 (Werner Krawietz et al. eds., 1994) (arguing that the Legal Realists believed that "judges' decisions arise not merely from the rules they state in their opinions, but at least as much from unstated reasons—from the facts before them, from the expectation of the parties in the trade, and from the judges' own judgment about fairness."). As Leiter points out, however, this characterization lacks complete accuracy because numerous writers identified themselves with Legal Realism, but had somewhat different ideas. *See* Leiter, *supra*, at 269.

9. *See* LLEWELLYN, *supra* note 7, at 189–90; Leiter, *supra* note 8, at 284.

10. *See* TWINING, *supra* note 1, at 321–22 (describing how and why Llewellyn wanted to implement his jurisprudential views into the drafting of the U.C.C.): 1 WHITE & SUMMERS, *supra* note 1, § 1, at 3 (describing the history of the project).

Legal Realism. In particular, as a result of his influence, the U.C.C.:

- favored open-ended standards over firm rules;
- avoided formalities;
- required and facilitated the "purposive interpretation" of its provisions;
- did not attempt to provide an exclusive statement of the law, but instead directed courts to supplement its rules with general legal and equitable principles;[11] and
- provided a range of remedies that principally served to make injured parties whole.

In recent years, the U.C.C. has undergone considerable expansion and revision. Article 2A on leases of goods and Article 4A on funds transfers have been added.[12] Articles 2A, 3, 4, 5, 6, 8, and 9 have been extensively revised.[13] Moreover, drafts of new versions of Articles 1, 2, and 2A are currently in the works.[14]

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11. Arguably, Llewellyn also sought to make the U.C.C. nonexclusive by incorporating rules established by prior dealings between the parties and by customs and usages of trade. *See* U.C.C. § 1-205(3) (1999) ("A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."); *id.* § 1-205(5) ("An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance."). I have not discussed this aspect of the U.C.C.'s nonexclusivity in this article for two reasons. First, prior contract law also incorporated this feature to a large extent. *See* U.C.C. § 1-205 cmt. (citing the Uniform Sales Act §§ 9(1), 15(5), 18(2), and 71 as relevant prior uniform statutory codifications); RESTATEMENT OF THE LAW OF CONTRACTS §§ 247, 248 (1932) (making operative both usages between the parties and usages of trade). Second, I found it difficult to discern whether the recent revisions to the U.C.C. have retained or rejected this principle separately from their more general abandonment of non-exclusivity. For an excellent recent review and criticism of the U.C.C.'s incorporation of customs and usages of trade, see Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: a Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

12. *See* U.C.C. art. 2A (1999), 1B U.L.A. 647 (1989); U.C.C. art. 4A (1999), 2B U.L.A. 455 (1991).

13. *See* Kathleen Patchel, *The Uniform Commercial Code Survey Part I: Introduction*, 53 BUS. LAW. 1457 (1998) (summarizing the various developments).

14. The American Law Institute ("A.L.I.") and N.C.C.U.S.L. have been working on these articles for several years, and had hoped to complete Articles 2 and 2A in 1999, and Article 1 in 2001. *See id.* In July 1999, however, the N.C.C.U.S.L. decided that the draft of Article 2 would face too much industry opposition to permit its widespread adoption. Accordingly, it has decided to redirect Article 2's drafting to make it less controversial. This development will delay promulgation of revised versions of Articles 1, 2, and 2A for an unknown period. *See State Law Commission Appoints New Group to Finish Drafting Work on Arti-*

This article contends that these substantial additions and revisions have done more than merely alter and augment the legal rules in the U.C.C. They have had the additional effect of diminishing Llewellyn's jurisprudential contributions. The modern drafters and revisers of the U.C.C. have not strived to retain the five legislative features identified above. Indeed, in some instances, they specifically have rejected them and the philosophy behind them.

This thesis may strike those who have not been following U.C.C. developments as rather extraordinary because the U.C.C. long has been regarded as the apogee of the Legal Realists' practical accomplishments. Those who have practiced or taught in the area of commercial law, however, will find the argument less surprising, for the jurisprudential changes to the U.C.C. during the recent revisions would have been hard to miss.[15] Yet, no one has attempted to analyze the U.C.C.'s new jurisprudence in a systematic manner. As a result, even readers familiar with the amendments to the U.C.C. may find the extent to which Llewellyn's influence has faded startling.

The remainder of this article contains four parts. Part I describes the U.C.C. and its amendments over the past five decades.[16] Part II then seeks to document the U.C.C.'s jurisprudential shifting.[17] Considering each of the five features listed above, it contrasts the early versions of the U.C.C. with the present official text and the latest drafts of proposed revisions. It shows in each instance that, while Llewellyn's jural input has persisted to some extent, it has diminished considerably.

Part III discusses the implications of this development.[18] It infers from Llewellyn's fading imprint on the U.C.C. that his brand of Legal Realism no longer holds its dominant position in American legal thought. It further conjectures that our legal

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cles 2, 2A, 68 U.S.L.W. 2120 (Aug. 31, 1999); *ALI and NCCUSL Announce New Drafting Committee for UCC Articles 2 and 2A* (Aug. 18, 1999) <http://www.nccusl.org/pressrel/ucc2a2.htm> [hereinafter ALI/NCCUSL Press Release] (describing the current status of these revisions).

15. Many commercial law textbooks call attention to the change in jurisprudential styles. *See, e.g.*, ROBERT L. JORDAN & WILLIAM D. WARREN, NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS 2 (4th ed. 1997) (noting that the "drafting style reflected in revised Article 3," for which the authors served as reporters, "is quite different from that of the previous statute").

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

culture may have become too pluralistic to expect major codifications to reflect forever any one school of jurisprudence.

The last section states a brief conclusion.[19] It urges judges and lawyers at a minimum to recognize the new character of the U.C.C. It also calls for modifying the draft of the proposed revision to Article 1 to make its provisions consistent with the U.C.C.'s new character.

I. CREATION AND REVISION OF THE U.C.C.

A. Origins of the Uniform Commercial Code

In the late 1800s, various leaders of the bar urged the enactment of uniform state laws on commercial subjects.[20] Their call led to the formation of a group called the National Conference of Commissioners on Uniform State Laws ("N.C.C.U.S.L.") in 1892.[21] From that time until the present, the N.C.C.U.S.L. has sought to draft model laws and to persuade legislatures to enact them.[22]

The N.C.C.U.S.L. achieved early success. In 1896, the N.C.C.U.S.L. published the Uniform Negotiable Instruments Law ("N.I.L."), a model law governing checks, notes, and bills of exchange.[23] Many states quickly enacted the N.I.L. By 1940, the N.C.C.U.S.L. had convinced every state and various other American jurisdictions to adopt it.[24]

Inspired by the favorable reception of the N.I.L., the N.C.C.U.S.L. promulgated several additional model uniform laws.[25] These laws included the Uniform Sales Act[26] and the Uniform Warehouse Receipts Act,[27] both drafted by Professor Samuel Williston,[28] and the Uniform Trust Receipts Act,[29]

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19. *See infra* CONCLUSION.

20. *See* WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE—A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 17–18 (1991) (describing the movement for uniform state laws).

21. *See id.* at 11.

22. *See generally id.*

23. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 2–3.

24. *See* William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 2 (1967).

25. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 3.

26. *See* UNIF. SALES ACT, 1 U.L.A. 1 (1950).

27. *See* UNIF. WAREHOUSE RECEIPTS ACT, 3 U.L.A. 1 (1959).

28. *See* SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 219 (1940).

drafted by Professor Karl Llewellyn.[30] Many state legislatures adopted these model laws.[31]

In 1940, William Schnader, who was then the President of the N.C.C.U.S.L., proposed creating a complete commercial code that would address and unify a variety of different business-related laws.[32] In view of the massive nature of this undertaking, the N.C.C.U.S.L. agreed to work on the project with the American Law Institute ("A.L.I."),[33] which had published the Restatements of the Law of Contracts, Torts, Property, and other subjects.

The A.L.I. and N.C.C.U.S.L. decided that the U.C.C. should address eight subjects: sales of goods, commercial paper (negotiable instruments), bank deposits and collections, letters of credit, bulk sales, documents of title, investment securities, and secured credit.[34] The N.C.C.U.S.L. appointed Llewellyn to serve as the "Chief Reporter."[35] Despite his nontraditional legal views and spirited personality, the N.C.C.U.S.L. evidently thought that his energy, enthusiasm, experience in commercial law, and prior success with the Uniform Trusts Receipts Act, made him an appealing candidate for the position.[36] Llewellyn's wife, Soia Mentschikoff, served as his principal assistant.[37] Together, they worked with a number of the most gifted academic and practicing attorneys in drafting the U.C.C.[38]

In drafting the U.C.C., Llewellyn wanted to improve upon various prior uniform acts that the N.C.C.U.S.L. had promul-

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29. *See* UNIF. TRUST RECEIPTS ACT, 9C U.L.A. 231 (1957).

30. *See id.*; Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fifth Annual Meeting 595–607 (1925) (statement of Karl Llewellyn as draftsman of the Uniform Trust Receipts Act).

31. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 3.

32. *See id.*

33. *See id.*

34. *See* 1 WILLIAM T. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES 1-101:1 (1998) (identifying the subjects and principal drafters of the U.C.C.).

35. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 3.

36. *See* James J. Connolly et al., *Alcoholism and Angst in the Life and Work of Karl Llewellyn*, 24 OHIO N.U. L. REV. 43, 97–98 (1998); Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 710 n.10 (1998).

37. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 3.

38. The principal drafters of the other articles of the U.C.C. included William Prosser, Fairfax Leary, Jr., Friedrich Kessler, Charles Bunn, Allison Dunham, and Grant Gilmore. *See id.* at 4.

gated on commerical subjects.[39] He wanted to create a statute that would reduce conflicts among jurisdictions, that would clarify the law, that would make the law more accessible, and that would modernize legal rules to keep them in harmony with commercial developments.[40] Moreover, as Part III of this article will show, the project gave Llewellyn a practical opportunity to implement many of his jurisprudential ideas.

B. Promulgation and Enactment

The A.L.I. and N.C.C.U.S.L. promulgated the first version of the U.C.C. in 1951, calling it the "1952 Official Text."[41] This initial version contained nine substantive articles. Article 1 stated general principles and definitions that applied throughout the Code.[42] Article 2 covered sales of goods.[43] Articles 3 and 4 dealt with commercial paper and bank deposits and collections. Article 5 addressed letters of credit.[44] Articles 6, 7, and 8 governed bulk sales, documents of title, and investment securities.[45] Finally, Article 9 covered security interests in personal property.[46]

Pennsylvania enacted the 1952 Official Text in 1953.[47] During the next few years, a law reform commission in New York reviewed the model law and identified numerous problems that needed to be corrected before New York could adopt the Code.[48] In 1957 and 1958, the A.L.I. and N.C.C.U.S.L. modified the U.C.C. in response to these recommendations.[49] Minor additional changes followed in 1962.[50]

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39. *See* Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 779 (1953).

40. *See id.* at 779–82.

41. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 4.

42. *See id.* § 1, at 2.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.* § 1, at 4.

48. *See generally* NEW YORK STATE LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1956 68 (1956) (concluding the "the Uniform Commercial Code is not satisfactory in its present form and cannot be made satisfactory without comprehensive re-examination and revision").

49. *See* 1 WHITE & SUMMERS, *supra* note 1, § 1, at 4.

50. *See id.*

These early revisions corrected shortcomings in the U.C.C., and made it acceptable to legislatures across the nation. By 1968, every state except Louisiana had adopted every article of the U.C.C.[51] Louisiana initially had difficulty incorporating the U.C.C. into its civil law system, but eventually enacted much of it or modified other state laws to make them similar to the U.C.C.[52] The District of Columbia and the U.S. Virgin Islands have enacted all of the U.C.C.,[53] and Puerto Rico has enacted some of it.[54]

A major revision of Article 9 occurred in 1972, but the changes did not alter its theory, scope, or style.[55] Instead, the amendments mostly addressed technical problems that had arisen with the original draft.[56] Eventually, forty-nine states adopted the revised version of Article 9.[57] The drafters also revised Article 8 in 1977.[58]

C. Extensive Modern Revisions

Starting in the late 1980s, the A.L.I. and N.C.C.U.S.L. began what has become an extensive expansion and overhaul of the U.C.C. The process generally has proceeded as follows. Upon hearing persuasive arguments for adding or revising an article, the Executive Committee of the N.C.C.U.S.L. and the Council of the A.L.I. have voted to begin new drafting.[59] The President of N.C.C.U.S.L. then has appointed a drafting committee.[60] This committee typically has consisted of about a dozen members, a few from the A.L.I. and the rest from the

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51. *See id.* § 1, at 5.

52. *See* Christian Callens, Comment, *Louisiana Civil Law and The Uniform Commercial Code: Interpreting the New Louisiana U.C.C.-Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649, 1650–51 (1995).

53. *See* 1 WHITE & SUMMERS, *supra* note 1, § 2, at 5.

54. *See* Negotiable Instruments and Banking Transactions Act, Law No. 176 of Aug. 31, 1996, P.R. LAWS ANN. tit. 19, § 401 (Supp. 1997) (adopting articles 3, 4, and 4A).

55. *See* 2 WHITE & SUMMERS, *supra* note 1, § 2, at 5.

56. *See id.* § 23-1, at 240 & n.1.

57. *See* William M. Burke et al., *Interim Report on the Activities of the Article 9 Study Committee*, 46 BUS. LAW. 1883, 1884 (1991) (indicating that only Vermont did not adopt the revised version of Article 9).

58. *Compare* U.C.C. art. 8 (1977), *with* U.C.C. art. 8, 2C U.L.A. 267, 267 (1991).

59. *See* Miller, *supra* note 36, at 714.

60. *See id.*

N.C.C.U.S.L.[61] Usually one or two law professors, who are also members of the A.L.I., have served as the reporter(s) of the articles. In addition, the drafting committee has had the input of an appointed review committee and various advisors and consultants.[62] After completing the drafting, the A.L.I. and N.C.C.U.S.L. then have voted on whether to approve the revised articles. Upon approval by both organizations, and endorsement by the American Bar Association, the N.C.C.U.S.L. has presented the revisions to the state legislatures for enactment into law.[63]

Through this process, the A.L.I. and N.C.C.U.S.L. promulgated the original version of Article 2A on leases of goods in 1987,[64] and a revised version of Article 2A in 1990.[65] In 1989, they created Article 4A on funds transfers.[66] They subsequently revised Articles 3,[67] 5,[68] 8,[69] and 9,[70] and substantially amended Article 4.[71] In addition, the A.L.I. and N.C.C.U.S.L. have recommended that states either adopt a revised version of Article 6 or repeal the original version.[72]

For the past several years, the A.L.I. and N.C.C.U.S.L. also have been working on complete revisions of Articles 1, 2, and 2A.[73] At one point, they expected to promulgate the final official texts of these articles in 1999 or 2000,[74] but disagreement has delayed the project.[75] Of the entire code, only Article 7 remains unchanged and not under revision. The following table

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61. *See id.*

62. Prefatory notes to each of the revised articles identify the various persons who have worked on them. *See, e.g.*, U.C.C. art. 3 pref. note (1990).

63. The N.C.C.U.S.L. maintains a website presenting facts about the revised U.C.C. articles. This site lists the persons who worked on the drafts and the endorsements by the American Bar Association. *See The National Conference of Commissioners on Uniform State Laws* (last modified Aug. 24, 1999) <http://www.nccusl.org>.

64. *See* U.C.C. art. 2A (1987); UNIF. COMMERCIAL CODE art. 2A, 1B U.L.A. 647, 649 (1989).

65. *See id.* (1990); 1B U.L.A. supp. 182, 184 (1990).

66. *See id.* (1989); 2B U.L.A. 455, 455 (1991).

67. *See* U.C.C. art. 3 (1990); 2 U.L.A. 5, 5 (1991).

68. *See* U.C.C. art. 5 (1995); 2B U.L.A. 133, 133 (Supp. 1999).

69. *See* U.C.C. art. 8 (1994); 2C U.L.A. 47, 47 (Supp. 1999).

70. *See* U.C.C. art. 9 (1999); 3 U.L.A. 9, 9 (Supp. 1999) (effective July 1, 2001).

71. *See* U.C.C. art. 4 (1990); 2B U.L.A. 5, 5 (1991).

72. *See* U.C.C. art. 6 (1987); 2C U.L.A. 5, 5, 7 (1991).

73. *See supra* note 14.

74. *See supra* note 14.

75. *See supra* note 14.

summarizes the status of each of the articles of the U.C.C. since the late 1980s:

ART.	TITLE	STATUS OF REVISIONS	JURISDICTIONS ADOPTING REVISIONS	REPORTER(S)
1	General Provisions	In progress	n/a	Neil Cohen
2	Sales	In progress[76]	n/a	Henry Gabriel[77]
2A	Leases	Added 1987, Amended 1990, & In Progress	48 / 47[78]	Henry Gabriel[79]
3	Negotiable Instruments	Revised 1990	49	William Warren & Robert Jordan
4	Bank Deposits & Collections	Amended 1990	49	William Warren & Robert Jordan
4A	Funds Transfers	Added 1989	52	William Warren & Robert Jordan
5	Letters of Credit	Revised 1995	38	James J. White
6	Bulk Sales	Revised 1987 & 1989[80]	5 / 38[81]	Steven Harris & William Hawkland

76. *See supra* note 14.

77. *See* ALI/NCCUSL Press Release, *supra* note 14.

78. *See* S.D. CODIFIED LAWS § 57A-2A-101 (1999) (pre-revision version of of article 2A).

79. Ronald DeKoven served as reporter for the original version of Article 2A. *See* 1B U.L.A. 648 (1999).

80. The 1987 revision substantially changed Article 6. The 1989 revision suggested as alternatives either repealing Article 6 or adopting the 1987 Official Text. *See* 6C HAWKLAND, *supra* note 34, §§ 6-101 to 6-102.

81. Five states have adopted and retained the 1987 revision. Thirty-eight states have repealed Article 6. *See A Few Facts About Revised Article 6 of the UCC* (last modified Jan. 11, 2000) <http://www.nccusl.org/factsheet/ucc6-fs.html> (listing states that have adopted the revision or repealed the original).

ART.	TITLE	STATUS OF REVISIONS	JURISDICTIONS ADOPTING REVISIONS	REPORTER(S)
7	Documents of Title	No revision	n/a	n/a
8	Investment Securities	Revised 1994	48	James Rogers
9	Secured Transactions	Revised 1999, (effective July 1, 2001)	5	Charles Mooney & Steven Harris

The drafting process has not been confidential. On the contrary, numerous outsiders have had access to the proposed revisions, and have had the opportunity to influence their substance. For example, the prefatory note to the revised version of Article 5 on letters of credit explains:

> Hundreds of groups were invited to participate in the drafting process. Twenty Advisors were appointed, representing a cross-section of interested parties. In addition 20 Observers regularly attended drafting meetings and over 100 were on the mailing list to receive all drafts of the revision.
>
> The Drafting Committee meetings were open and all those who attended were afforded full opportunity to express their views and participate in the dialogue. The Advisors and Observers were a balanced group with ten representatives of users (Beneficiaries and Applicants); five representatives of governmental agencies; five representatives of the U.S. Council on International Banking (USCIB); seven from major banks in letter of credit transactions; eight from regional banks; and seven law professors who teach and write on Letters of Credit.
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> . . . .
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> The drafts were regularly reviewed and discussed in *The Business Lawyer*, *Letter of Credit Update*, and in other publications.[82]

82. U.C.C. art. 5 pref. note (1999).

The influence from consumer and industry groups, according to some observers, has increased greatly in the past decade.[83] Some evidence of the power of outsiders comes from recent failures of three proposed articles. First, in the early 1980s, the A.L.I. and N.C.C.U.S.L. worked on an article that would have covered all payment transactions. This project engendered controversy among banks and consumer groups and ultimately had to be abandoned.[84] Second, the A.L.I. and N.C.C.U.S.L. worked for several years on a new proposed Article 2B, which would have governed computer information transactions. In 1999, however, the A.L.I. and N.C.C.U.S.L. decided that Article 2B would not become part of the UCC; instead, the N.C.C.U.S.L. would promulgate the law as the "Uniform Computer Information Transactions Act."[85] Finally, as noted above, the proposed revised Article 2 recently failed to gain the approval of the N.C.C.U.S.L.[86] Objections by industry groups suggested to the N.C.C.U.S.L. that state legislatures would not support the revision.[87]

II. THE U.C.C.'S DISTINCTIVE JURISPRUDENTIAL FEATURES

The revisions to the U.C.C. have added many new legal rules, and have altered the substance of numerous existing rules. Lawyers familiar with pre-revision versions of the U.C.C. have had to relearn much of what they previously studied. One writer has lamented that the "Uniform Commercial Code of today is not the Uniform Commercial Code of our youth."[88]

The changes to the U.C.C., however, have done more than alter the substance of the law. They also have eroded the most

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83. My colleague, Professor Andy Spanogle, who has served as a member of the A.L.I. for many years, informs me that he has observed a great increase in the number of lobbyists attending U.C.C. drafting meetings. *See also* Miller, *supra* note 36, at 719–20 (describing industry input into the drafting).

84. *See* Gregory E. Maggs, *New Payment Devices and General Principles of Payment Law*, 72 NOTRE DAME L. REV. 753, 773–75 (1997) (discussing the history of the Uniform New Payments Code).

85. *See N.C.C.U.S.L. to Promulgate Freestanding Uniform Computer Information Transactions Act* (Apr. 7, 1999) <http://www.nccusl.org/pressrel/2brel.html>.

86. *See* ALI/NCCUSL Press Release, *supra* note 14.

87. *See id.*

88. Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 286 (1999).

important jurisprudential characteristics that Llewellyn gave the U.C.C. The following discussion shows how the additions and revisions have not preferred standards over rules, have not avoided formalities, have not sought to foster purposive interpretation, have tried to make the U.C.C. a more exclusive statement of the law, and have fashioned remedies based on considerations other than fully compensating aggrieved parties.

A. Using Standards Instead of Rules

Llewellyn and his collaborators made the U.C.C. distinct from other statutes by striving to employ open-ended "standards" instead of bright-line "rules." Although disagreement exists over the difference between rules and standards,[89] commentators typically distinguish them in the following manner. Rules generally define the permitted or prohibited conduct with precision, leaving the courts to determine only what happened. Standards, by contrast, usually require courts to decide not only what happened, but also to some extent what the law should permit and what it should not.[90]

Consider, for example, section 2-205 on firm offers.[91] In this section, the drafters made offers by merchants temporarily irrevocable if the merchants had promised to keep them open, even if the merchants received no consideration for their promises. In writing section 2-205, the drafters needed to specify a period of irrevocability. They could have used a rule, saying, for example, that firm offers cannot be revoked for ninety days. Instead, they chose to employ a standard. Section 2-205 says that, unless otherwise indicated, a firm offer will remain irrevocable for "a reasonable time" up to three months even without consideration.[92] In applying this standard, a court must determine both how long an offer has remained

89. *See* Mark P. Gergan, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 409 n.3. (1999) (citing and discussing numerous sources addressing the distinction between rules and standards).

90. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

91. *See* U.C.C. § 2-205 (1999).

92. *See id.*

open and the reasonableness of the period under the particular facts.

Llewellyn did not invent standards. They have been used for centuries in legislative documents. The Constitution, for example, prohibits "cruel and unusual" punishments[93] and "unreasonable" searches and seizures.[94] Even prior to the U.C.C., commercial laws relied on standards. For example, the Uniform Sales Act—drafted by Samuel Williston, a strong opponent of Legal Realism—had open-ended standards.[95]

The U.C.C., however, differed from other laws because of the extent and frequency of its reliance on standards instead of rules.[96] Article 2 alone uses the term "reasonable" in numerous contexts, such as good faith,[97] the statute of frauds,[98] firm offers,[99] contract formation,[100] battle of the forms,[101] construction of terms,[102] modifications,[103] and dozens of additional provisions.[104] The other articles of the U.C.C. all contain similar examples. The original Article 5, for example, employed the term "reasonable" to specify the duration of notations of credit.[105] Similarly, Article 9 says that secured parties may dispose of collateral after taking "commercially reasonable" steps.[106]

Indeed, so successful were the drafters in implementing open-ended standards that many observers thought they went too far. Professor David Mellinkoff, for example, complained:

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93. *See* U.S. CONST. amend. VIII.

94. *See id.* amend. IV.

95. *See* UNIF. SALES ACT § 45(2), 2 U.L.A. 52 (1950) ("[I]t depends in each case on the terms of the contract, and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further . . . .").

96. *See* TWINING, *supra* note 1, at 335 ("The Code differs from prior legislation more in the extent than in the manner of use of [standards]."); Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 260 (1995) (describing the "shift from rules to standards" as one of the "main characteristics" of the U.C.C.).

97. *See* U.C.C. § 2-103(1)(b) (1999).

98. *See id.* § 2-201(2).

99. *See id.* § 2-205.

100. *See id.* § 2-206(1)(a), (2).

101. *See id.* § 2-207(1), (2)(c).

102. *See id.* § 2-208(2).

103. *See id.* § 2-209(5).

104. The following search in WESTLAW's ULA database identified 54 sections in article 2 that use some variant of the term reasonable: "PR("UNIFORM COMMERCIAL CODE" AND "ARTICLE 2") & TEXT(REASONABL!)."

105. *See id.* § 5-108(2)(b); 2B U.L.A. 588 (1991).

106. *See* U.C.C. § 9-504(1) (1999).

"The word *reasonable*, effective in small doses, has been administered by the bucket, leaving the corpus of the Code reeling in dizzy confusion."[107] Professor Richard Danzig described the drafters' overuse of standards as a "renunciation of legislative responsibility and power."[108]

The early versions of the U.C.C., to be sure, also employed a number of bright-line rules. Most notably, the pre-revision versions of Articles 3 and 4, which dealt with negotiable instruments, contained very definite provisions on liability.[109] The same held true for the pre-revision version of Article 5 on letters of credit.[110] Even in Article 2, Llewellyn declined to use standards instead of rules in some instances. For example, the statute of frauds requires a "writing" as opposed to some "reasonable evidence" of the making of a contract.[111] Likewise, Article 2 generally sets forth specific damage measurements,[112] rather than merely telling judges to use any reasonable means of compensating the plaintiff for losses.[113]

Llewellyn, however, usually favored standards, and had several jurisprudential reasons for this preference. First, Llewellyn generally trusted judges and business persons to develop, recognize, and follow commercial norms.[114] As one commentator explained:

> The Code is founded not only on faith in the capacity of the business community for satisfactory self-regulation within a framework of very broadly drafted rules, but also on a faith

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107. David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185–86 (1967).

108. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622 (1975).

109. *See* Peter A. Alces, *Toward a Jurisprudence of Bank-Customer Relations*, 32 WAYNE L. REV. 1279, 1320 (1986) ("Llewellyn's Sales Article proceeds from a different jurisprudential perspective than that which guided the drafting of Article 4. The reasonableness of the transactors' conduct . . . is inapposite in the law of commercial paper . . . .").

110. *See, e.g.*, U.C.C. § 5-114(1) (1994) (revised 1995), 2B U.L.A. 614 (1991) (stating the issuer's duty to honor drafts in unequivocal terms).

111. *See* U.C.C. § 2-201(1) (1999).

112. *See, e.g., id.* §§ 2-706, 2-708, 2-709 (measures of seller's damages); *id.* §§ 2-712, 2-714 (measures of buyer's damages).

113. For a counterexample in which the drafters did use a standard of reasonableness, see, for example, *id.* § 2-714(1) (stating that when a buyer has accepted nonconforming goods, he may receive compensation for the nonconformity "as determined in any manner which is reasonable").

114. *See* Llewellyn, *supra* note 39, at 782 (arguing against legislative drafting efforts that seek to "corral" rather than guide judges).

> in judges to make honest, sensible, commercially well-informed decisions once they have been given some baselines for judgment.[115]

Second, Llewellyn wanted to make the Code a durable, "semi-permanent" body of legislation.[116] He believed that using open-ended standards would allow courts to adjust the law as commercial practices change, without having to wait for statutory amendments.[117] Grant Gilmore has explained in this regard that the U.C.C. sought to "[abolish] the past without attempting to control the future."[118]

Third, Llewellyn did not see much advantage to rules. He doubted that they actually created more certainty than standards. On the contrary, Llewellyn thought that "legal rules have a . . . marginal role to play in generating business expectations."[119] Llewellyn believed that certainty exists because the market creates uniform practices.[120]

The recent changes to the U.C.C. have not eliminated all of its standards. Every article, for example, continues to use the term "reasonable."[121] At the same time, however, the drafters of the new and revised articles of the U.C.C. often have curtailed the use of standards, and have resorted instead to rules. For instance, in revising Articles 3 and 4, the drafters announced that they were seeking to improve the certainty of the law and reduce litigation.[122] They did this in part by tightening open-ended standards. The new version of Article 3 now defines more specifically what constitutes "ordinary care" for a bank.[123] It further creates some per se categories of failure to exercise ordinary care.[124]

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115. TWINING, *supra* note 1, at 336.

116. *See* U.C.C. § 1-102 cmt. 1 (1999).

117. *See* Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 555–56 (1997); Leiter, *supra* note 8, at 284–85.

118. GRANT GILMORE, THE AGES OF AMERICAN LAW 85 (1977).

119. TWINING, *supra* note 1, at 336.

120. *See id.*

121. *See, e.g.*, U.C.C §§ 1-102(3), 2-103(1)(b), 2A-103(1)(u), 3-103(a)(4), 4-103(d), 4A-105(a)(6), 5-108(b), 6-103(3)(i), 7-204(1), 8-102(a)(10), 9-104(a)(4)(C).

122. *See* U.C.C. art. 3 pref. note (1999) (Benefits in the Public Interest).

123. *See id.* §§ 3-103(a)(7), 4-104(c).

124. *See id.* § 3-405 (addressing forgery of indorsements by certain employees).

The drafters of the new Article 4A similarly eschewed open-ended standards. Although they employed tests of "reasonableness" in a few instances,[125] they generally tried to establish firm rules. An official comment to Article 4A says: "A deliberate decision was . . . made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, *rather than to rely on broadly stated, flexible principles.*"[126] For example, the drafters specified a certain date upon which unaccepted payment orders become canceled by operation of law.[127] They also used specific rules to determine who bears liability for unsuccessful funds transfers.[128]

The drafters of the revised version of Article 5 similarly recognized that "[c]ertainty of payment . . . is a core element of the commercial utility of letters of credit."[129] They thus tightened the law considerably. For example, the revised Article 5 now "clearly and forcefully states the independence of letter of credit obligations."[130] It also institutes a rule of "strict compliance" to specify when the issuer of a letter of credit may dishonor a presentation,[131] and defines specifically what constitutes strict compliance.[132] The article further narrows the definition of good faith because "greater certainty of obligations is necessary and is consistent with the goals of speed and low cost."[133]

The drafters of the revised version of Article 8 also attempted to avoid standards like "reasonableness." For example, section 8-110 sets forth definite choice-of-law rules, rejecting more open-ended principles.[134] The official comment explains:

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125. *See, e.g., id.* § 4A-202(b)–(c) (allowing banks to adopt reasonable security measures); § 4A-204(a) (requiring customers to report an unauthorized payment order within a reasonable time not to exceed 90 days).

126. *Id.* § 4A-102 cmt. (emphasis added).

127. *See id.* § 4A-211(d).

128. *Id.* § 4A-402(b), (d) (stating liability for completed and uncompleted payment orders).

129. *Id.* art. 5 pref. note (Benefits of Revised Article 5 in General).

130. *Id.*

131. *See id.* § 5-108(a).

132. *See id.* § 5-108(e).

133. *Id.* § 5-102 cmt. 3.

134. *See id.* § 8-110.

> Because the policy of this section is to enable parties to determine, in advance and with certainty, what law will apply to transactions governed by this Article, the validation of selection of governing law by agreement is not conditioned upon a determination that the jurisdiction whose law is chosen bear a "reasonable relation" to the transaction.[135]

The drafters of the new version of Article 9 also stressed certainty over flexibility. For example, they made the priority rules in connection with securities more rigid. The official comment justifies the move toward firm rules as follows:

> One of the circumstances that led to the revision was the concern that uncertainty in the application of the rules on secured transactions involving securities and other financial assets could contribute to systemic risk by impairing the ability of financial institutions to provide liquidity to the markets in times of stress.[136]

As these changes indicate, the drafters of the new and revised articles often have moved away from open-ended standards. They have worried that standards produce litigation. They also have doubted that the benefits of flexibility justify the costs of the uncertainty that it produces. While standards may have benefits in some contexts, such as those addressed in the Bill of Rights, the drafters appear to have doubted Llewellyn's belief that they are preferable to rules in commercial law. Professor James J. White, the reporter for the revised Article 5, has taken this position explicitly. He has expressed that it is "[b]etter to leave an occasional widow penniless by the harsh application of the law than to disrupt thousands of other transactions by injecting uncertainty and by encouraging swarms of potential litigants and their lawyers to challenge what would otherwise be clear and fair rules."[137]

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135. *Id.* cmt. 3.
136. *Id.* § 9-328 app. XVI cmt. 8 (1999, effective July 1, 2000).
137. 2 WHITE & SUMMERS, *supra* note 1, § 26-20, at 554–55.

B. Avoiding Formalities

Llewellyn also wanted to make the U.C.C. distinct from prior commercial acts by avoiding "formalities."[138] In other words, he did not think the U.C.C. should treat commercial transactions differently depending on whether the parties used technical words, or structured their transaction in particular ways, or created special kinds of records. He considered the actual facts and circumstances of commercial transactions much more important than the forms that they might take.[139] Where formalities formerly existed in the law, Llewellyn sought to eliminate them.

For example, contract law traditionally required the formality of a distinct offer and acceptance before formation of a contract could occur.[140] In section 2-204, however, the U.C.C. eliminated the requirements of an offer and acceptance for the formation of contract by saying: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[141]

Llewellyn was not a fanatic opponent of formalities. In his view, formalities did not necessarily cause problems in commercial transactions.[142] Indeed, at one time, he specifically questioned whether the law needed to enforce commercial promises not under seal.[143] He also described the statute of frauds as "an amazing product . . . . [a]fter two centuries and a half . . . better adapted to our needs than when it was first

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138. *See* BLACK'S LAW DICTIONARY 652 (6th ed. 1990) (defining "formality" as the "conditions, in regard to method, order, arrangement, use of technical expressions, performance of specific acts, etc., which are required by the law in the making of contracts or conveyances, or in the taking of legal proceedings, to insure their validity and regularity").

139. *See* Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1311 (1994) (discussing Llewellyn's focus on the intention of the parties).

140. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1691–92 (1976) (discussing how the traditional requirement of an offer and acceptance is a formality).

141. U.C.C. § 2-204(1) (1999).

142. *See* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1156 (1985) (discussing how Llewellyn saw some benefits in formal rules like the statute of frauds).

143. *See* Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 740 (1931).

passed."[144] His view was that "a business economy demands a means of quick, not one of 'informal' contracting."[145]

Usually, however, Llewellyn still wanted to avoid formalities in commercial transactions for three reasons. First, formalities can often create injustices.[146] For example, the statute of frauds may prevent recognition of a contract, even though the parties in fact had formed an agreement that they wanted the courts to enforce. Eliminating formalities, Llewellyn believed, may permit a fairer treatment of individual cases.[147]

Second, Llewellyn generally wanted the U.C.C. to reflect business practices,[148] and worried that imposing formalities would stand at odds with this goal. After all, some business persons would not know the required forms or technical rules.[149] Others who did know the law would have to take cumbersome steps to rearrange their conduct in order to conform to the rules.[150]

Third, Llewellyn thought that many judges would seek to resolve cases in a just manner regardless of whether the parties satisfied required formalities.[151] In the extreme, they would decide on an outcome, then mischaracterize the facts or legal authorities to support their decision, and thereby distort the law with their lack of candor.[152] Eliminating formalities would aid judges and the justice system by allowing them to explain their reasoning truthfully.[153]

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144. *Id.* at 747; *see also* CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 384 (3d ed. 1993) (quoting this passage and suggesting that Llewellyn's beliefs contributed to the decision to include the statute of frauds in Article 2).

145. Llewellyn, *supra* note 138, at 741.

146. *See* G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1203 n.23 (1988) (arguing that legal realism reflects a "desire to break through the formality of legal classifications to the actual conduct of commercial parties").

147. *See* Llewellyn, *supra* note 143, at 748–50.

148. *See generally* TWINING, *supra* note 1, at 313–21.

149. *See* Mooney, *supra* note 5, at 218 (noting that Llewellyn rebelled against traditional formal contract doctrines that amounted to "meaningless technicalities").

150. *See id.* at 219.

151. *See* White, *supra* note 8, at 401.

152. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 56 (1960).

153. *See* L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435 (1934) ("The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to ac-

Llewellyn had considerable success in eliminating formalities from the U.C.C.[154] For example, as noted above, the original Article 2 greatly simplified the process of offer and acceptance in the law of sales.[155] In addition, the U.C.C. created large exceptions to the traditional formalities imposed by the statute of frauds[156] and the parol evidence rule.[157] It also made seals completely inoperative.[158]

Perhaps most significantly, Articles 1 and 9 made the characterization of different types of secured financing largely irrelevant.[159] They treat all forms of liens, collateral, and pledges as creating a "security interest," regardless of the names or forms used.[160] For instance, they require courts to treat a purported lease as a secured sale if the transaction has the characteristics of a secured sale,[161] saying that "[w]hether a transaction creates a lease or security interest is determined by the facts of each case" and listing various factors for the courts to consider.[162]

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cept as sufficient justification for a decision the 'non-technical' considerations which really motivated it.").

154. The drafters of the original U.C.C. generally sought to avoid formalities, yet decided to include a number of them. For instance, the original Article 2 retained a statute of frauds for contracts for the sale of goods. *See* U.C.C. § 2-201(1) (1999). The original Article 3 similarly contained various formalities. *See* Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 458 (1979). For example, it said that a note or check must be in writing, must be signed, and must contain specific words. *See* U.C.C. § 3-104, 2 U.L.A. 224 (1991). It also gave great significance to the use of signatures and the words accompanying them. *See id.* §§ 3-413 to 3-416, 2A U.L.A. 208–295 (1991) (stating the effect of various kinds of signatures). The original Article 5 required letters of credit to be in writing. *See id.* § 5-104, 2B U.L.A. 575–76 (1991). Article 7 similarly requires written bills of lading and warehouse receipts. *See id.* § 7-202(2) (1999). Article 8 created a statute of frauds for investment securities. *See id.* § 8-319, 2C U.L.A. 563 (1991). Article 9 stated formal requirements for financing statements. *See id.* § 9-402 (1999).

155. *See* U.C.C. § 2-204(1) (1999) (allowing a "contract for sale of goods . . . [to] be made in any manner sufficient to show agreement").

156. *See id.* § 2-201(2)–(3) (creating exceptions for confirmatory memoranda between merchants, specially manufactured goods, admissions, and part performance).

157. *See id.* § 2-202(a)–(b) (creating exceptions based on course of dealing, usage of trade, course of performance, and consistent additional terms).

158. *See id.* § 2-203 (making seals inoperative in sales of goods).

159. *See id.* § 9-102(1)(a) (making Article 9 applicable to "any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures"). *See generally* Grant Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659 (1968).

160. *See* U.C.C. § 9-102(1)(a).

161. *See id.* § 1-201(37) (defining security interest).

162. *Id.*

Some opposition to formalities has persisted throughout the many recent changes to the U.C.C.[163] The June 1999 draft of the proposed revision of Article 2 would lessen the impact of the statute of frauds in the context of sales of goods.[164] The revised version of Article 3 now permits presentment of negotiable instruments to take place electronically instead of only physically.[165] Similarly, letters of credit no longer have to be written on paper.[166] The statute of frauds in Article 8 has been removed.[167]

Much more commonly, however, the drafters of the new and the revised articles have *added* formalities to the U.C.C. In the June 1999 draft of the proposed revision of Article 2, for example, the drafters have taken a more formal approach to the "battle of the forms" problem. A battle of the forms problem arises when the offeree attempts to accept an offer, but states in the acceptance terms that are different from, or additional to, the ones in the offer. The current version of section 2-207 says that the terms of a contract made by battling forms depend on what the parties would have considered material.[168] The revised version of the section, by contrast, would state a fixed rule that the contract simply includes whatever terms are common to both the offer and acceptance.[169]

Article 2A created a statute of frauds for leases of goods,[170] even though in most jurisdictions no writing previously had

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163. *See* Richard E. Speidel, *Contract Formation and Modification under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1311 (1994) (noting the drafters of the revised version of Article 2 sought to minimize formality).

164. *See* U.C.C. § 2-201(1) (Annual Meeting Draft 1999), *available at National Conference of Commissioners on Uniform State Laws* (last modified June 28, 1999) <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm> (raising the dollar threshold, eliminating the quantity requirement, and expanding the exceptions). The N.C.C.U.S.L., as noted above, voted not to approve this draft. *See* ALI/NCCUSL Press Release, *supra* note 14. Consequently, only time will tell what changes to Article 2 actually will occur.

165. *See* U.C.C. § 3-502.

166. *See id.* §§ 5-102(a)(14), 5-104.

167. *See id.* art. 8 pref. note.

168. *See id.* § 2-207(2)(b).

169. *See id.* § 2-207(c)(1) (Annual Meeting Draft 1999), *available at* (last modified June 28, 1999) <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm> (stating terms in the offer and acceptance become part of the contract "to the extent that they agree").

170. *See* U.C.C. § 2A-201(1) (statute of frauds of sales of goods).

been required for enforcement of leases of personal property.[171] The revised version of Article 3 specifies that any instrument having the form of a check must be negotiable.[172] Unlike the issuer of a note, the drawer of a check may not prevent application of the holder in due course doctrine by writing something like "Not Negotiable" on the instrument.[173]

Although the new Article 4A does not require payment orders to take any special form, it established numerous new formal requirements. The drafters required over half a dozen different kinds of agreements or notices to be in writing. For example, an unauthorized payment order will not be effective, even if it passes a security procedure, unless the customer "expressly agreed in writing" to be bound by any payment order that passed the security procedure.[174] Similarly, a bank can limit its right to enforce verified payment orders only by "express written agreement."[175] A bank, moreover, can avoid responsibility for certain payment orders that misdescribe the beneficiary if the bank delivered to the customer a "signed . . . writing" stating information about the processing of payment orders.[176] In addition, a bank that delays or improperly executes a payment order bears liability for consequential damages only "to the extent provided in an express written agreement."[177]

The recently revised version of Article 9 also imposes new formalities. For example, a new provision recognizes and gives effect to a federal regulatory requirement that consumers receive written notices regarding waiver of defense clauses.[178] Another new section requires a written record indicating that a creditor has decided to retain collateral in satisfaction of the debt.[179]

These examples of new and continuing formalities reveal that the drafters of the various revisions did not oppose for-

171. *See* WILLIAM D. HAWKLAND & FREDERICK H. MILLER, HAWKLAND & MILLER U.C.C. SERIES § 2A-201:01 (1997) (noting that some courts had applied section 2-201 to lease cases by analogy).

172. *See* U.C.C. § 3-104(c), (d).

173. *See id.*

174. *See id.* § 4A-202(c).

175. *See id.* § 4A-203(a)(1).

176. *See id.* §§ 4A-207(c)(2), 4A-208(b)(2).

177. *Id.* § 4A-305(c).

178. *See id.* § 9-403(d) (revised 1999).

179. *See id.* § 9-610(b) (revised 1999).

malities as strongly as Llewellyn and his collaborators. On the contrary, they appear to have recognized that formalities may have some value. For example, they can promote clarity in the law. One observer has commented that Articles 4A, 5, and 8 now tend to operate almost exclusively on symbols.[180] Banks and businesses favor this development because "[i]f these symbols are appropriately communicated, authenticated, and preserved, then there is absolutely no room for ordinary factual disputes."[181] Even consumers may favor formalities because formalities allow them to distinguish between acts that have legal consequences and those that do not. Several commentators—including the reporters of the revised Article 5 and the June 1999 draft of the proposed revision of Article 2—have remarked:

> Rules specifying *how* to "make it legal" are fundamental. Without them, private ordering under law could not exist. One of the primary functions of bodies of commercial and consumer law is to facilitate and sanction private ordering and private autonomy.[182]

C. Purposive Interpretation

Llewellyn and his collaborators wanted to require and facilitate the "purposive interpretation" of the U.C.C.'s provisions.[183] In other words, they did not want judges necessarily to apply the U.C.C.'s provisions as they were literally written.[184] Instead, they wanted judges to understand the goals of the law, and to interpret and apply its provisions to carry out the law's purposes.[185]

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180. *See* Joseph H. Sommer, *A Law of Financial Accounts: Modern Payment and Securities Transfer Law*, 53 BUS. LAW. 1181, 1197 (1998).

181. *Id.* at 1198.

182. RICHARD E. SPEIDEL ET AL., SALES AND SECURED TRANSACTIONS: TEACHING MATERIALS 2 (5th ed. 1993).

183. For a helpful discussion of purposive interpretation, see Peter A. Alces & David Frisch, *Commercial Codification as Negotiation*, 32 U.C. DAVIS L. REV. 17, 20–28 (1998); Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 797–98 (1978).

184. *See* McDonnell, *supra* note 183, at 797–98.

185. *See id.*

Judges practiced "purposive interpretation" before promulgation of the U.C.C. Chief Justice John Marshall, for example, arguably used purposive interpretation in construing the Constitution.[186] Llewellyn, however, wanted to make the U.C.C. the first major codification that strived to help judges in this task. Prior uniform acts—like most laws—merely stated rules and standards.[187] They did not attempt to tell judges explicitly what purposes the law sought to serve.[188] They also did not insist that judges engage in purposive interpretation. Llewellyn desired a new kind of legislation.[189] He said: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[190]

The U.C.C. specifically calls for purposive interpretation in its first substantive provision. Section 1-102(1) says: "This Act shall be liberally construed and applied to promote its underlying purposes and policies."[191] Carrying this injunction further, the official comment to section 1-102 instructs:

> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole,

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186. *See* David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's* The Hollow Hope: Can Courts Bring About Social Change?, 12 J.L. & POL. 63, 63 & n.3 (1995) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which interpreted the Necessary and Proper Clause, as an example).

187. *See* TWINING, *supra* note 1, at 323.

188. *See id.*

189. *See* LLEWELLYN, *supra* note 7, at 189–90.

> The statute in the new style is no minor change, no mere detailed corrective. It vaults areas on scale heretofore undreamed of; it does not codify and mildly reform on the basis of past legal experience; it brings forth at one stroke a policy, a measure, a whole new field of operation, an appropriate administrative machine, and blanket provisions for what . . . is in effect continuing large-scale delegated sublegislation.

Id.

190. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

191. U.C.C. § 1-102(1) (1999). The section then specifies: "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." *Id.* § 1-102(2).

> and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[192]

Llewellyn and the other drafters of the U.C.C. did more in section 1-102 than instruct judges to engage in purposive interpretation. The drafters also sought to help judges discern the purposes of the U.C.C.'s rules so that they would find the task easier. This assistance took two principal forms. First, the drafters prepared "official comments" for every section of the U.C.C.[193] The functions served by these comments included explaining the goals of the statutory commands. Llewellyn wanted the comments to reveal "where the particular sections are trying to go."[194] Second, in various places, the drafters incorporated statements of purpose directly into the statute. For example, the original version of Article 4 not only allowed banks to set the close of their business day at 2:00 p.m., but also explained the reason for this rule. Section 4-107 said:

> *For the purpose of allowing time to process items, prove balances and make the necessary entries on its books to determine its position for the day*, a bank may fix an afternoon hour of two P.M. or later as a cut-off hour for the handling of money and items and the making of entries on its books.[195]

The goal of promoting "purposive interpretation" stemmed directly from Llewellyn's conception of Legal Realism. Llewellyn believed that good judges would strive to do justice and promote sound legal policies.[196] For this reason he considered it more important to inform judges of the purpose of the law than to attempt to specify in a strict manner what the law permitted and what it did not. Indeed, Llewellyn rejected the notion that legislation should be phrased as though it were "written for dumbbell judges whom you are trying to corral."[197]

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192. *Id.* § 1-102 cmt.

193. *See generally* Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 (1966).

194. Llewellyn, *supra* note 39, at 782.

195. U.C.C. § 4-107, 2B U.L.A. 121 (1901) (pre-revision) (emphasis added). *See* TWINING, *supra* note 1, at 323 (citing U.C.C. section 4-107 as the most prominent example of this type of provision).

196. *See* Llewellyn, *supra* note 39, at 782.

197. *Id.*

In addition, Llewellyn was skeptical about the possibility of eliminating ambiguity from statutes. He believed that telling judges the purposes of statutes generally would do the most to help them resolve open questions in a consistent manner:

> Borderline, doubtful, or uncontemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the* reason; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of caselaw.[198]

Judges have cited section 1-102(1) in hundreds of cases.[199] In many instances, they have recognized arguments against the purposive method of construing statutes, but nevertheless have followed the section's directive. For example, in *In re Halmar Distributors, Inc.*,[200] the United States Court of Appeals for the First Circuit had to interpret sections 9-103(1)(d)(i) and (ii). A question arose as to whether the court should read the provisions literally, or attempt to follow their purpose. The court recognized the existence of jurisprudential disagreement on this issue, citing commentary by Professor James J. White and Robert S. Summers in their Uniform Commercial Code treatise.[201] In the end, however, the court decided to follow section 1-102(1), and to construe the provisions liberally in light of their purposes.[202]

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198. Karl N. Llewellyn, *Collection of Karl Llewellyn Papers in the Law School of the University of Chicago*, J, VI, I, e at 5 (1944) (unpublished manuscript using method of citation in Raymond M. Ellinwood Jr. & William W. Twining, *The Karl Llewellyn Papers: A Guide to the Collection* (rev. ed. 1970)), *quoted in* TWINING, *supra* note 1, at 322.

199. Performed search in WESTLAW's UCC-CS database using "1-102(1)" as search criteria.

200. 968 F.2d 121 (1st Cir. 1992).

201. *See id.* at 125; *see also id.*, citing 2 WHITE & SUMMERS, *supra* note 1, § 26-20, at 554–55 (describing Professor White's argument that literal interpretation promotes certainty).

202. *See id.*

Karl Llewellyn, however, did not succeed entirely in fostering purposive interpretation. Relatively few sections in the U.C.C. contain the kind of explicit statement of purpose found in pre-revision section 4-107.[203] In addition, many of the official comments did not provide the helpful guidance that they might have.[204] The notorious comments following section 2-207 on the battle of forms provide a good example.[205] These comments have confounded observers who have attempted to discern what the drafters wanted.[206]

The effort to state purposes ran into some difficulty because the drafters of the U.C.C. did not favor all of the provisions that they included. Section 2-201, the statute of frauds for sales of goods, provides one example.[207] As noted above, Llewellyn and other drafters of the U.C.C. generally did not like formalities. Nevertheless, they apparently felt pressure to retain the statute of frauds.[208] The official comments to section 2-201, therefore, do not seek to explain the goal or purpose of the general requirement of a writing.[209] Instead, they merely explain the elements.[210] In contrast, the comments to section 2-201 clearly state the reasons for exceptions to the general requirement of a writing. For example, in discussing an exception that applies when goods have been accepted or paid for, the official comments say: "Receipt and acceptance either of the goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists."[211]

Throughout the changes to the U.C.C., purposive interpretation has persisted to some extent. The 1997 draft of the proposed revision of Article 1 retains a general provision, like the current section 1-102(1), which directs courts to engage in pur-

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203. *See* TWINING, *supra* note 1, at 323.

204. *See* 1 WHITE & SUMMERS, *supra* note 1, § 4, at 13 (noting that the comments are not exhaustive, that they sometimes fail to take account of last-minute changes in the law, and that they may attempt expand or restrict what the actual provisions say).

205. *See* U.C.C. § 2-207 cmts. 1–4 (1999).

206. *See* Letter from Professor Grant Gilmore to Professor Robert S. Summers (Sept. 10, 1980), *reprinted in* SPEIDEL ET AL., *supra* note 177, at 513–15.

207. *See* U.C.C. § 2-201 (1991).

208. *See* UNIF. SALES ACT § 4, 1 U.L.A. 71 (1922) (superseded by U.C.C. § 2-201, 1962).

209. *See* U.C.C. § 2-201 cmts. 1–7 (1999).

210. *See id.*

211. *Id.* § 2-201 cmt. 2.

posive interpretation.[212] In addition, when the drafters have created the new versions of other articles, they often have spelled out the reasons for the changes. The revised Article 4 provides an excellent example. The drafters included expansive comments identifying the purpose of altering the legal rules.[213] The comments allow courts to know which rules make substantive changes,[214] and which merely make technical drafting corrections.[215]

In addition, some new official comments in other articles overtly explain the purposes of the law. An official comment to the revised section 3-104, for instance, states the reasons for defining what constitutes a negotiable instrument and what does not as follows:

> Total exclusion from Article 3 of other promises or orders that are not payable to bearer serves a useful purpose. It provides a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which is not intended to be a negotiable instrument.[216]

Enthusiasm for purposive interpretation, nonetheless, appears to have declined significantly during the recent revisions. Although the evidence for this proposition is largely impressionistic, it manifests itself in several ways. First, in revising the U.C.C., the drafters greatly tightened the phrasing of all of the rules. The revised Articles 3 and 4, for instance, contain more detailed rules than their predecessors, and these rules strive to eliminate previous ambiguities. The same is true for the new Article 9, which is much longer than its predecessor. A fair inference is that the drafters slowly came to realize that it

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212. *See* National Conference of Commissioners on Uniform State Laws, Draft Revision of Uniform Commercial Code § 1-102(a) (1997), *available at Draft; For Discussion Only; Revision of Uniform Commercial Code* (visited March 3, 2000) <http://www.law.upenn.edu/bll/ulc/ucc1/ucc1.htm> (requiring purposive interpretation).

213. *See, e.g.*, AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE, 1972 OFFICIAL TEXT WITH COMMENTS AND APPENDIX SHOWING 1972 CHANGES app. IX (1972).

214. *See, e.g., id.* § 4-108, Reason for 1990 Change.

215. *See, e.g., id.* § 4-406, Reason for 1990 Change (discussing numerous substantive changes).

216. U.C.C. § 3-102 cmt. 2 (1999); *see also id.* § 3-414 cmt. 5 (explaining the purpose of preventing a drawer from issuing a check without recourse).

is better to eliminate uncertainties in statutes than to expect judges to deal with them through purposive interpretation.

Second, in creating new articles and in revising old articles, the drafters largely abandoned the practice of stating the purpose of rules in the statute itself. The new Articles 2A and 4A, and the revised versions of Articles 3, 4, 5, 6, and 8 contain few provisions that expressly state their purposes. Instead, like most other statutes, they mostly just contain rules.

Third, although the drafters greatly expanded the official comments when revising the U.C.C., these new comments rarely say anything about the goals of the law. Instead, they are much more likely to provide illustrations showing how the language of the rules applies.[217] The comments do not strive to show where the law is "trying to go," as Llewellyn said of the original comments, but instead attempt to ensure that judges know what the rules are.

Fourth, some of the newest official comments appear to take a hostile view of liberal construction and purposive interpretation. The best example appears in the new Article 4A on funds transfers. The official comment to section 4A-102 indicates that courts should not stray from the carefully formulated rules in the article, stating:

> In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.[218]

Fifth, the courts in recent times noticeably have moved away from purposive interpretation. Between 1980 and 1995, courts cited section 1-102(1)—the provision requiring purposive interpretation—more than 135 times.[219] Since 1995, however, a

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217. *See, e.g.*, U.C.C. § 3-305 cmts. 1–5 (1999) (explaining in depth which defenses are applicable to holders in due course and non-holders in due course, without explaining the justification for the holder in due course doctrine).

218. *Id.* § 4A-102 cmt.

219. Search performed in WESTLAW's UCC-CS database using "DATE(>12/31/1979) & DATE(<1/1/1995) & 1-102(1)" as search criteria.

mere fourteen cases have cited section 1-102(1).[220] The recent widespread revisions to the U.C.C. presumably caused or contributed to this decrease.

In lieu of purposive interpretation, courts are taking an increasingly textualist approach in commercial cases. For instance, in *Corfan Banco Asuncion Paraguay v. Ocean Bank*,[221] a bank sent a fund transfer that stated the beneficiary's name correctly, but contained a nonexistent account number. Section 4A-207 contains a dispositive rule when the name and account number refer to different persons, but not when the account number refers to a nonexistent account.[222] Commentators have recognized this problem as a drafting oversight, and have urged courts to apply the provision anyway because it would serve the same purpose.[223] The court in *Corfan*, however, refused to apply the provision because it literally did not cover the situation at issue.[224] Ignoring section 1-102(1) and citing cases from other subject matters, the court said that judges foremost must strive to apply the plain meaning of statutes. The court concluded: "In the present case, although the payment order correctly identified the beneficiary, it referred to a nonexistent account number. Under the clear and unambiguous terms of the statute, acceptance of the order could not have occurred."[225]

Although Llewellyn and the other Legal Realists with whom he worked had some good arguments for wanting purposive interpretation, the approach has various difficulties. One problem is that telling judges the purpose of provisions is lengthy and cumbersome.[226] The drafters of the numerous revisions to the U.C.C. may have concluded that it is better just to state the rules as simply as possible.

Another problem is that giving reasons for rules often creates controversy. People may disagree about the ends to be accomplished. For instance, commentators have debated whether

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220. Search performed in WESTLAW's UCC-CS database using "DATE(>12/31/1994) & 1-102(1)" as search criteria.

221. 715 So. 2d 967 (Fla. App. 1998).

222. *See* U.C.C. § 4A-207(2) (1999).

223. *See* WILLIAM D. HAWKLAND & RICHARD MORENO, UNIFORM COMMERCIAL CODE SERIES § 4A-207:1 (1999) (suggesting that the limitation was not intended by the drafters).

224. *See Corfan*, 715 So.2d at 970.

225. *Id.*

226. *See* TWINING, *supra* note 1, at 323.

the statute of frauds, or the battle of the forms rule, or even the negotiablity of instruments should continue to exist.[227] The drafters of the U.C.C., accordingly, have had difficulty agreeing on "the purpose" of these rules.

Finally, statements of policy can be just as ambiguous at the rules themselves.[228] For example, section 1-106 instructs courts to administer remedies liberally "to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."[229] Yet, without specific rules, courts would have difficulty deciding exactly what this position would be.[230]

D. Non-Exclusivity

Llewellyn clearly had great ambition.[231] He also must have had supreme self-confidence to believe that he could lead an effort to codify and make uniform a substantial portion of the commercial rules in the United States. No one previously had undertaken a law reform effort even approaching the scale of the U.C.C. project.[232] Yet, Llewellyn also had a conservative side. Although he favored the creation of the U.C.C., Llewellyn did not want it to serve as the sole source of law on the subjects that it covered. Instead, he wanted the U.C.C. to settle into, and to be supplemented by, a common law background.

Section 1-103 concisely captures and expresses Llewellyn's goal of making the U.C.C. a nonexclusive body of law. It states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,

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227. *See id.* at 324.

228. *See id.*

229. U.C.C. § 1-106 (1999).

230. *See id.* §§ 2-706, 2-708, 2-709 (seller's damages); *id.* §§ 2-712 to 2-715 (buyer's damages).

231. *See* TWINING, *supra* note 1, at 423 n.130 (1973) ("Llewellyn's private ambition, as he once confessed in a lecture, was to perform the role of a Dewey in jurisprudence, trying to do for law what the great man had done for other subjects."); Connolly et al., *supra* note 36, at 59–60 (discussing Llewellyn's professional ambitions).

232. *See* TWINING, *supra* note 1, at 270 (describing the ambitious nature of the U.C.C. project).

> mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.[233]

This section establishes that the U.C.C. does not attempt to regulate all of commercial law, but merely strives to state some rules. Background law fills in all of the gaps.

Various commentators have identified the nonexclusivity principle in section 1-103 as one of U.C.C.'s most significant features. Professors White and Summers have characterized the section as "probably the most important single provision in the Code."[234] Grant Gilmore, who served as the reporter for Article 9, believed that this section distinguished the U.C.C. from civil-law codes, explaining:

> We shall do better to think of [the U.C.C.] as a big statute—or a collection of statutes bound together in the same book—which goes as far as it goes and no further. It assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to least possible extent, and without which it could not survive.[235]

The drafters of the U.C.C. had several reasons for wanting to make the U.C.C. nonexclusive. First, Llewellyn and the other drafters perceived a tension between having general legal rules and considering the equities of particular cases.[236] They believed that section 1-103 provided a solution by requiring judges to use all available law to reach just and equitable results unless the U.C.C. specifically displaced the pre-existing background law.[237]

Second, the drafters saw theoretical difficulties with attempting to make the U.C.C. an exclusive body of law. They did not believe that any statute could codify completely all of the necessary legal rules and principles.[238] The official com-

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233. U.C.C. § 1-103 (1999).

234. 1 WHITE & SUMMERS, *supra* note 1, § 2, at 6.

235. Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285–86 (1966).

236. *See* Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 N.W. UNIV. L. REV. 906, 906–08 (1978).

237. *See id.* at 909.

238. *See* 1 HAWKLAND, *supra* note 34, at § 1-103:1 ("[R]elevant outside law must be used from time to time, because no law or set of laws can exist in isola-

ment to section 1-103 explains that the listing of various supplemental principles "is merely illustrative; no listing could be exhaustive."[239]

Third, Llewellyn did not want to "corral" judges.[240] As a Legal Realist, Llewellyn admired the ways in which judges had used (and sometimes manipulated) common law and equitable principles to achieve justice in particular cases.[241] Although he wanted to reform the commercial law, he did not want to deprive judges of their ability to apply "validating" and "invalidating" causes.[242]

Llewellyn and his collaborators succeeded in making the U.C.C. a nonexclusive body of law. Article 2, for example, addresses contracts for the sale of goods.[243] The article nevertheless says very little about many basic contract doctrines. It does not define or require consideration.[244] It does not address mistake or frustration of purpose.[245] It says nothing about conditions or the consequences of their nonoccurrence.[246] Article 2 does not attempt to eliminate these doctrines; instead, it merely leaves their governance to the common law, to the principles of equity, and to other statutes.[247]

Article 3, which addresses negotiable instruments, similarly contains many gaps that the common law must fill. For example, although Article 3 indicates when holders of instruments take them subject to defenses, it mostly leaves the definition of the defenses to background law;[248] it does not state the rules regarding infancy, lack of consideration, mistake, and so forth.[249] The original Article 3 similarly said nothing about periods of limitation, and little about joint and several liability on instruments.

Article 9, which covers security interests, provides more examples of nonexclusivity. For instance, it gives rights to a

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tion. Section 1-103 illustrates some of the supplementary general principles making up this 'outside' law.").

239. U.C.C. § 1-103 cmt. 3 (1999).

240. *See* Llewellyn, *supra* note 39, at 782 (arguing against statutes that excessively limit judicial discretion).

241. *See* LLEWELLYN, *supra* note 7, at 134–36.

242. *See* U.C.C. § 1-103 (1999).

243. *See id.* §§ 2-102, 2-106.

244. *See id.* § 1-103 (leaving this issue to supplemental general principles).

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.* § 3-305(a) (categorizing defenses that other law might supply).

249. *See id.* cmt. 1.

secured party to foreclose upon a default.[250] The article, however, never specifies what constitutes a default.[251] Instead, as with the other articles, it leaves this question—and others like it—to background law.[252]

The drafters of the recent revisions to the U.C.C. have not explicitly retreated from the principle of nonexclusivity. The 1997 draft of the proposed new Article 1 has altered the language of the original section 1-103 only slightly.[253] The official comments to the new version of Article 5 state: "Like all of the provisions of the Uniform Commercial Code, Article 5 is supplemented by Section 1-103 and, through it, by many rules of statutory and common law."[254] The new Article 8, expressly disavows attempting to state a "comprehensive code of the law" governing the purchase of securities or broker-dealer relations.[255] Along these same lines, the June 1999 draft of the proposed revision of Article 2 has not attempted to capture all of contract law.[256] Like the original version, it does not attempt to define or require consideration, discuss capacity to contract, or address any number of other basic contract law doctrines.[257]

Although the U.C.C. continues to rely on supplemental general principles, the drafters of the various revisions have come closer to making the U.C.C. the exclusive source of law on various commercial transactions. The best example of this

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250. *See id.* § 9-501(1) (stating consequences of a default).

251. *See id.*

252. In some areas, the drafters of the original version of the U.C.C. sought to fill in gaps. For instance, sections 2-703 and 2-711 list the remedies available to the buyer and seller of goods. *See id.* § 2-703(a)–(f) (allowing the seller to withhold or suspend delivery, identify goods, recover damages by various measures, or cancel); *id.* § 2-711(1)–(2) (allowing the buyer to cover, collect damages, and resell). They appear to present, along with other provisions in the U.C.C., exclusive rules. Likewise, Article 3 states various warranties that a person makes when transferring or presenting a negotiable instrument. *See id.* § 3-416(a)(1)–(5). The article does not contemplate additional implied warranties associated with negotiable instruments. Still, these few exclusive aspects of various articles did not undermine the general principle of nonexclusivity in the original U.C.C.

253. *See* U.C.C. § 1-102(b), *Draft, Revision of the Uniform Commercial Code, Annual Meeting 1997* (visited Oct. 30, 1999) <http://www.law.upenn.edu/bll/ulc/ucc1/ucc1.htm> (allowing supplementation by principles of law and equity).

254. U.C.C. § 5-103 cmt. 2 (1999).

255. *Id.* art. 8 pref. note, pt. 3(b).

256. *See* U.C.C. § 2-103(a), *Draft, Proposed Revisions of the Uniform Commercial Code, Annual Meeting 1999* (visited Oct. 30, 1999) <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm>.

257. *See id.* art. 2 (containing no provisions on these topics).

trend appears in Article 4A, which governs funds transfers.[258] The text of the article appears to state all of the rights and duties of the parties, leaving very little room for supplementation. The official comments, moreover, contain a strong exhortation to courts to exercise caution in supplementing the article. It says:

> Funds transfers involve competing interests—those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. *Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.*[259]

While this comment does not contradict section 1-103, it does show a shift in attitude. This provision, moreover, has discouraged courts from relying on supplemental general principles.[260]

The new version of Article 9, which will become effective in 2001,[261] contains a similar comment cautioning judges about employing general equitable principles to determine priority:

> Section 1-103 provides that "unless displaced by particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." There may be circumstances in which a secured party's action in acquiring a se-

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258. *See id.* art. 4A.

259. *Id.* § 4A-102 cmt. (emphasis added).

260. *See* George A. Schneider, *Article 4A: Developments at the Crossroad of Law and Foreign Bank Compliance (Part I)*, 114 BANKING L.J. 319, 327 (1997) ("[C]ourts have been restrictive in permitting non-Article 4A theories to be applied"); Hyung J. Ahn, Note, *Article 4A of The Uniform Commercial Code: Dangers of Departing from a Rule of Exclusivity*, 85 VA. L. REV. 183, 183–84 (1999) (arguing that the drafters intended Article 4A to be the "exclusive source of law" and that "it is essentially impossible to permit exceptions without breaching the integrity of the rules regime of Article 4A").

261. *See* U.C.C § 9-701 (1999) (setting July 1, 2001, as the uniform effective date for all states adopting the revision).

> curity interest that has priority under this section constitutes conduct that is wrongful under other law. *Though the possibility of such resort to other law may provide an appropriate "escape valve" for cases of egregious conduct, care must be taken to ensure that this does not impair the certainty and predictability of the priority rules.*[262]

This language probably will discourage courts from invoking supplemental general principles.

In addition, in nearly all of the revisions, the drafters have sought to make the articles more comprehensive. In Articles 3 and 4, for example, they have included more definitions.[263] They also have added periods of limitation,[264] and explicit provisions on joint and several liability.[265] Furthermore, they have included specific rules covering subjects that courts previously addressed under principles of equity. For example, under the pre-revision version of Article 4, courts sometimes used estoppel to address issues arising from the misencoding of checks.[266] The new section 4-209(a) has a rule specifically dealing with this issue.[267]

A review of citations confirms that courts are relying increasingly less on supplemental general principles. From 1984 through 1988—the five years prior to most of the recent revisions of the U.C.C.—255 cases cited section 1-103.[268] In the past five years, from 1994 to 1998, only 151 cases cited section 1-103.[269] Remarkably, in 1998, a mere nine cases cited the provision.[270] With all the revisions that have taken place, the courts have seen little need to stray from the U.C.C.'s express provisions.

At least two factors appear to explain the move from the original goal of nonexclusivity. First, banks and businesses

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262. *Id.* § 9-328 cmt. 8 (1999 Revision) (emphasis added).

263. *Compare* U.C.C. §§ 3-103, 4-104 (1990) *with* U.C.C. §§ 3-102, 4-104 (1999).

264. *See* U.C.C. § 3-118 and cmt. 1 (1999).

265. *See id.* § 3-116.

266. *See* First Nat'l Bank v. Fidelity Bank, 724 F. Supp. 1168, 1172 (E.D. Pa. 1989).

267. *See* U.C.C. § 4-209(a) (1999).

268. Results of search in Westlaw's UCC-CS database: "date(>12/31/1983) and date(<1/1/1989) and 1-103".

269. Results of search in Westlaw's UCC-CS database: "date(>12/31/1993) and date(<1/1/1999) and 1-103".

270. Results of search in Westlaw's UCC-CS database: "date(>12/31/1997) and date(<1/1/1999) and 1-103".

have taken an increasingly strong interest in the content of the U.C.C., and have more influence now than in the past.[271] They have seen the revision process as an opportunity to resolve important questions about their rights and duties, and have decided that they do not want to leave these questions to uncertain supplemental general principles that courts might employ.[272] For example, during the drafting of Article 4A, banks presumably worried that courts might award consequential damages or impose liability for negligence in funds transfers.[273]

Second, the whole idea of writing an enormous code but leaving many of the most important issues to supplemental general principles goes against the grain of current legal thinking. Many lawyers and judges have failed to understand that, although the U.C.C. is a long and detailed statute, it does not strive to govern all aspects of the subjects that it addresses. Section 1-103, to many attorneys, is simply a mystery. Accordingly, errors have occurred, which the drafters have decided to resolve with more explicit or detailed rules. These revisions then reinforce the unintended view that the U.C.C. strives to be a comprehensive code.

E. Compensatory Remedies

Karl Llewellyn and his collaborators had a specific policy concerning remedies. In particular, they sought to implement rules that would focus on making the injured party whole. They desired that judges would look backward, envisioning what remedy an aggrieved party would need for restoration after a wrong occurred. They did not concern themselves with the forward-looking question of how damages might affect behavior in the future. In current terminology, Llewellyn and the

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271. *See supra* Part II.C. *See also* A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 645–50 (1996) (describing complaints about this new influence).

272. *See, e.g.*, U.C.C. § 4A-102 cmt. (1999) (explaining how Article 4A attempts to create a balance among competing interests that were well-represented in the drafting process).

273. *See id.*; *see also* Ahn, *supra* note 260, at 185–86 (discussing the risks banks face).

other drafters worried about *ex post* rather than *ex ante* considerations.[274]

Although Llewellyn understood that remedies could serve purposes other than making the plaintiff whole, he nevertheless chose that end for the U.C.C.[275] Llewellyn believed that people who engage in commercial transactions should not have to alter their customary practices to meet the needs of the law.[276] On the contrary, the law should reflect actual commercial behavior as nearly as possible.[277] In this respect, Llewellyn was not interested in creating incentives. Rather, he wanted to establish remedies that would correct harms done by people who failed to live up to business standards.

In addition, much of Llewellyn's jurisprudential interest concerned the behavior of judges. Llewellyn thought that judges of good faith would attempt to do justice in individual cases, one way or another.[278] To address this reality, Llewellyn wanted to give them statutory authority to act on their remedial impulses. Although judges might attempt to take this approach in any event, Llewellyn famously quipped that "[c]overt tools are never reliable tools."[279]

Furthermore, as a central tenet of his jurisprudence, Llewellyn believed that people only had legal rights to the extent that the law provided them remedies.[280] As a result, remedies had to focus on the aggrieved party because they ultimately defined that party's rights. This view of remedies did not leave much room for considering future incentives.

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274. *See generally* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984); Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Form*, 76 CORNELL L. REV. 341, 347 (1991); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 455 (1990) (discussing the difference between *ex ante* and *ex post* liability rules).

275. *See* Michael T. Gibson, *Reliance Damages in the Law of Sales under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. L.J. 909, 927–28 (1997); Daniel W. Matthews, *Should the Doctrine of Lost Volume Seller Be Retained? A Response to Professor Breen*, 51 U. MIAMI L. REV. 1195, 1210 (1997).

276. *See* U.C.C. § 1-102(2)(b) (1999) (stating that the law should permit the continued expansion of business practices).

277. *See* Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L. FORUM 321, 330 (1962).

278. *See* K. N. LLEWELLYN, THE BRAMBLE BUSH 56–70 (2d ed. 1951).

279. Karl N. Llewellyn, *Book Reviews*, 52 HARV. L. REV. 700, 703 (1939).

280. *See* Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1244 (1931) ("Not only 'no remedy, no right,' but 'precisely as much right as remedy'.").

The drafters of the U.C.C. had considerable success in implementing their compensatory policy with respect to remedies. Section 1-106(1) declares:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.[281]

Notice in reading section 1-106(1) that it focuses on the "aggrieved party." The provision seeks to remedy injuries that already have occurred; it does not contemplate that remedies might affect behavior in the future. The end is not to encourage business transactions (perhaps by reducing potential liability) or to discourage wrongdoing (by increasing liability), but simply to remedy injuries.

The prohibition in section 1-106(1) on special or penal damages is consistent with the policy of using remedies to compensate victims. The drafters excluded these remedies because they do not remedy injuries that aggrieved parties have suffered. Instead, these damages serve to punish and thus affect future conduct. Again, Llewellyn was not interested in creating incentives, but instead on making injured parties whole.[282]

In contrast, the restriction on consequential damages at first might appear to conflict with Llewellyn's remedial goal. After all, making an injured plaintiff whole requires compensating the plaintiff for all damage suffered, whether direct or consequential. Several factors, however, suggest that the general prohibition on consequential damages does not sharply undercut the goal of fully compensating aggrieved parties.

First, many commercial lawsuits involve claims that the defendant failed to pay money owed. For example, the seller of

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281. U.C.C. § 1-106(1).

282. Cours or legislators logically could decide to exclude punitive damages from a field for the purpose of creating incentives. For example, they reasonably might conclude that business people will be more willing to enter particular commercial transactions if they do not have to worry about the possibility that a jury later might impose a large penalty. Little, if any, evidence, however, supports a hypothesis that Llewellyn and the other drafters wanted to exclude punitive damages for the purpose of creating such incentives. On the contrary, the factors cited above suggest that they did not permit these kinds of damages because they did not see them as compensatory.

goods may sue the buyer for not tendering the purchase price,[283] or the holder of a negotiable instrument may sue the maker for dishonoring it.[284] The law traditionally has embraced the theory that a person should suffer no consequential damages by reason of failing to receive a payment of money because he or she can borrow the money until the courts provide a remedy.[285] Although the injured party will have to pay interest for the additional loan, the U.C.C. generally makes this interest recoverable as a form of incidental damages.[286] The prohibition on consequential damages thus does not inhibit the policy of full compensation in these cases.

Second, despite the general prohibition on the recovery of consequential damages, the U.C.C. contains many exceptions. Unlike a seller of goods, the buyer of goods may recover consequential damages.[287] Similarly, a bank may have to pay consequential damages for wrongfully dishonoring a check or failing to stop payment.[288] For the most part, these exceptions ensure that full compensation occurs.

Third, to the extent that the prohibition on consequential damages actually has any force, it does not necessarily reflect a rejection of Llewellyn's overall remedial goals. The drafters of the U.C.C. appear to have been concerned mostly about the difficulty of proving consequential damages.[289] They thus saw a practical reason to limit recovery by a plaintiff, even though

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283. *See* U.C.C. § 2-511(1) (requiring the buyer to tender payment).

284. *See id.* § 3-412 (requiring the maker of note to pay it to the holder according to its terms).

285. *See* 1 SUTHERLAND ON DAMAGES § 76, at 228–29 (3d ed. 1903) ("The failure to pay a debt when due may disappoint the creditor and embarrass him in his affairs and collateral undertakings; he may consequentially suffer losses for which interest is a very inadequate compensation; but they are remote and do not result alone from the default of his debtor. Money, like the staples of commerce, is, in legal contemplation, always in market and procurable at the lawful rate of interest . . . .").

286. *See, e.g.*, U.C.C. § 2-710 (stating measure of seller's incidental damages); *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1369 (7th Cir. 1985) (holding that the seller may recover certain forms of interest as incidental damages).

287. *See* U.C.C. §§ 2-712(1), 2-713(1), 2-714(3) (allowing the buyer to collect consequential damages); *id.* § 2-715(2) (defining buyer's consequential damages).

288. *See id.* § 4-402(b) (consequential damages available for wrongful dishonor); *id.* § 4-403(c) (certain forms of consequential damages available for failure to stop payments).

289. *See id.* § 2-715 cmt. 4 (considering the difficulty of proving consequential damages).

their theory of remedies suggested the plaintiff should receive compensation.

Llewellyn's remedial policy has persisted to some extent throughout the numerous changes and proposed changes to the U.C.C. The 1997 draft of the proposed revision to Article 1 perpetuates section 1-106(1) almost verbatim.[290] Indeed, in a few ways, the drafters of the new versions of other articles have strived to set damages so that they will accurately reflect actual losses. For example, the revised Articles 3 and 4 have several new provisions that use comparative fault principles to allocate losses between a customer and a bank.[291] In addition, Article 4 now has a rule that a depository bank which fails to revoke a provisional credit promptly no longer loses its right to revoke, but instead may revoke after paying the depositor for any damages caused.[292] The drafters further made explicit that bank customers may recover consequential damages stemming from the wrongful dishonor of checks.[293]

In many instances, however, the drafters of the revisions have backed away from a strict goal of complete compensation. Instead, they have considered much more carefully how remedies affect behavior. In this regard, they have sought to adjust damages to create appropriate incentives and disincentives. They have realized that reducing potential liability can encourage desirable business transactions. They also have recognized that imposing additional damages may discourage undesirable conduct.

In the new section 3-411(b), for instance, the drafters made it possible to recover consequential damages against a bank that wrongfully dishonors a cashier's check, teller's check, or certified check.[294] Although consequential damages conceivably might make the injured party whole, the drafters did not justify the rule on these grounds. Instead, they cared about how the recovery would affect the bank's behavior. The prefatory note to the revised Article 3 specifies that consequential dam-

290. The proposed revision of Article 1 would change the number of this section, but would not make any substantive changes to its text. *See id.* § 1-307(a) (Annual Meeting Draft 1997) (visited March 3, 2000) <http://www.law.upenn.edu/bll/ulc/ucc1/ucc1.htm>.

291. *See id.* § 3-405(b) (employee forgery cases); § 3-406(b) (negligence cases); § 4-406(e) (delay in reporting unauthorized checks).

292. *See id.* § 4-214(a).

293. *See id.* § 4-402(a).

294. *See id.* § 3-411(b).

ages will provide "disincentives to wrongful dishonor"[295] by banks.

The drafters of the revised version of Article 4A also considered how damages might affect behavior. For example, section 4A-305 specifically rejects the suggestion of an important common law decision, *Evra Corp. v. Swiss Bank Corp.*,[296] that the originator of a payment order might recover consequential damages from a bank that failed to execute it or delayed in executing it.[297] The drafters worried that the possibility of consequential damages would make banks reluctant to take payment orders. An official comment to section 4A-305 says:

> The success of the wholesale wire transfer industry has largely been based on its ability to effect payment at low cost and great speed. Both of these essential aspects of the modern wire transfer system would be adversely affected by a rule that imposed on banks liability for consequential damages. A banking industry amicus brief in *Evra* stated: "Whether banks can continue to make EFT [Electronic Funds Transfer] services available on a widespread basis, by charging reasonable rates, depends on whether they can do so without incurring unlimited consequential risks. Certainly, no bank would handle for $3.25 a transaction entailing potential liability in the millions of dollars."[298]

The drafters of the revised Article 5 also rewrote its damage provisions from an *ex ante* perspective. As in Article 4A, they barred recovery of consequential damages because they feared that these damages might make the price of letters of credit prohibitive. The prefatory note explains: "If consequential and punitive damages were allowed, the cost of letters of credit could rise substantially."[299] The drafters also used remedies to discourage misconduct. Section 5-111 now requires issuers who wrongfully dishonor or repudiate demands for payment to pay attorney's fees and litigation expenses.[300] The

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295. *See id.* art. 3 pref. note.

296. 673 F.2d 951 (7th Cir. 1982).

297. *See* U.C.C. § 4A-305 cmt. 2 (rejecting the suggestion in *Evra* that a bank might have to pay consequential damages if it had notice of the special circumstances giving rise to those damages).

298. *Id.*

299. *See id.* art. 5 pref. note.

300. *See id.* § 5-111(e).

drafters explained that imposing these costs as damages "provides strong incentives for issuers to honor" letters of credit.[301]

III. IMPLICATIONS

The foregoing discussion attempted to document how Llewellyn's influence on the jurisprudence of the U.C.C. is diminishing. Many of the original goals that he and others worked to accomplish have faded. The U.C.C. now relies more on formalities. Complete and specific statements of the law have become more common, with reliance on standards and purposive interpretation diminishing. The drafters of the new and revised articles have attempted to make them more exclusive, and remedies presently serve purposes other than compensation for loss..

What has caused Llewellyn's imprint to fade? No doubt it would be dramatic and also intellectually satisfying to identify a single person, interest group, or idea as the impetus for all of the changes in the U.C.C.'s jurisprudence. This question, however, does not have a simple answer. As the foregoing discussion indicates, many separate revisions have occurred. These revisions have taken place over a period of about dozen years. Numerous individuals, including consumer and business advocates, academics, and government representatives, had their hands in most of them. As result, a wide variety of factors probably brought about the changes in the U.C.C.'s jurisprudence.

One partial hypothesis is that change has occurred because of the considerable practical experience with the U.C.C. that has accumulated over the past fifty years. Many lawyers and judges have found the U.C.C. difficult to understand.[302] Whether correctly or incorrectly, the drafters may have concluded that purposive interpretation, open-ended standards, the elimination of formalities, and the use of supplemental general principles tend to create confusion. They have opted for what they consider more straightforward ways of expressing the law.

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301. *Id.* art. 5 pref. note.

302. *See* RICHARD HYLAND & DENNIS PATTERSON, AN INTRODUCTION TO COMMERCIAL LAW 1–3 (1999) (explaining the reasons for the difficulty of commercial law).

Another hypothesis that explains some of the change is that the law and economics movement has changed the way many legal scholars evaluate legal rules. In particular, nearly everyone now thinks more carefully about how the law can create incentives that will affect behavior. Perhaps for this reason, as noted above, the drafters of the new articles and the various revisions have seen that remedies may serve purposes besides compensation.

A third hypothesis is that, in the decades between the original drafting of the U.C.C. and its large-scale revision in the past ten or fifteen years, trust in judges has diminished among the business community. The perception of judicial activism in constitutional and statutory interpretation may have contributed to this feeling. Whatever the cause, subsequent reformers have not shared Llewellyn's optimism that judges will strive to reach correct results. As noted above, banks and industry groups have played a larger role in drafting the law.[303] Unlike Llewellyn, they have seen a need to "corral" wayward judges.[304]

A fourth hypothesis is that Llewellyn's jurisprudential influence has faded to some extent because the textualist school of statutory interpretation has become very influential. This school emphasizes that judges should follow legislative commands as expressed in statutes, and should limit their consideration of other factors.[305] To some, principles of textualism lead to the correlative view that legislatures should take responsibility for making the law, and should not delegate the task to judges.[306] Purposive interpretation, open-ended standards, and supplemental general principles do not fit well into this model.

Finally, business practices or our knowledge of them may well have changed in the past fifty years. Undeniably, the marketplace has become less localized and more competitive. For example, a bank located in one city may compete with banks in other cities in issuing letters of credit, certificates of deposit, cashier's checks, wire transfers, and other instruments

303. *See supra* Part II.C.

304. *See* Llewellyn, *supra* note 39, at 702.

305. *See* Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine*, 28 CONN. L. REV. 393, 396–98 (1996) (describing textualism).

306. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9–14, 23–24 (1997).

governed by the U.C.C. This competition may lead to calls for clearer rules because each participant wants to know exactly what is permitted and what is not.

Determining the exact causes of the changes, or arguing for or against what has occurred, is simply beyond the scope of this article. Llewellyn and others involved in the U.C.C.'s creation strongly believed in their positions. The revisers of the U.C.C., on the other hand, apparently have seen reasons for adopting different approaches in many instances. This article makes only the claim that a change in the jurisprudence of the U.C.C. has occurred.

The development, nevertheless, has implications that warrant attention. A controversial new idea in a field may, over time, become the prevailing way of thinking. Yet, after the new idea becomes generally accepted, it may retain that position only temporarily. Economics provides a good example. During the 1930s, John Maynard Keynes advocated deficit spending by the government to stimulate the economy. Although conservatives initially opposed the idea, it later gained near-universal support. President Richard Nixon, indeed, famously justified his deficit spending by exclaiming: "We are all Keynesians now."[307] A few decades later, however, monetarism largely has replaced Keynesian theory in current economic thinking.

Llewellyn's fading imprint on the U.C.C. suggests that the same three-step phenomenon has occurred in the law. In the 1920s and 1930s, the Legal Realists were expressing new ideas. In the 1950s, their views had become so widely accepted that Llewellyn could shape the nation's commercial law with his jurisprudence. By 1988, echoing Nixon in a much cited review, Professor Joseph Singer confidently quipped: "We are all legal realists now."[308] But as this article shows, just ten years later, we are not all Legal Realists, or at least not in the mold of Karl Llewellyn.

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307. *See* MILTON FRIEDMAN & ROSE FRIEDMAN, TWO LUCKY PEOPLE 231 (1998) (quoting Nixon's statement from a 1965 article in *Time* magazine). Professor Milton Friedman earlier had made the same remark, but he was not advocating the philosophy. Instead, he was arguing only that Keynesian rhetoric had become predominant. *See id.*

308. Joseph William Singer, Review Essay, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

If Llewellyn's theories had remained dominant, then the drafters of the U.C.C. would not be adding formalities and replacing standards with rules. They would not be backing away from purposive interpretation, nonexclusivity, and the policy of using remedies solely for compensation. Perhaps this development suggests that attempting to maintain a single consistent jurisprudence in the U.C.C., or any major codification, for a long time is impossible. Our legal culture probably is too pluralistic for any one school of legal thought to dominate an entire field of law for half a century. Llewellyn's success in at least setting the U.C.C. on its initial jurisprudential path may have been the best accomplishment possible.

CONCLUSION

This article tells a story of accomplishment and loss. Karl Llewellyn achieved great success in implementing his ideas in the U.C.C. Yet, as nearly half a century has passed, the U.C.C. has undergone substantial revision. The changes have altered not just the substance of the law, but also its underlying jurisprudence. Much of Llewellyn's influence has dwindled as the drafters of subsequent revisions have rejected or ignored Llewellyn's insights from Legal Realism.

This development might have saddened Llewellyn, but it probably would not have surprised him. In his last book, *Jurisprudence*, Llewellyn observed that two legal styles have competed with each other throughout the history of the nation.[309] In the 1830s and 1840s, judges adopted a rather flexible manner of interpreting the law.[310] Between 1885 and 1910, however, a formal style supplanted this mode of judging.[311] Starting in the 1920s and 1930s, the less formal approach reemerged, leading to the jurisprudence of the U.C.C. two decades later.[312] Llewellyn, I am sure, could foresee that times again would change, and that the formal approach would regain adherents.

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309. *See* LLEWELLYN, *supra* note 7, at 303. Many thanks to my colleague, Professor Andy Spanogle—a former research assistant for Llewellyn—who pointed out this passage to me.

310. *See id.*

311. *See id.*

312. *See id.*

Llewellyn's fading imprint on the jurisprudence of the U.C.C. should influence the law's future interpretation and revision. As explained above, Article 1 presently contains sections that explicitly instruct courts to engage in purposive interpretation,[313] to rely on supplemental general principles,[314] and to use remedies to compensate aggrieved parties.[315] As the nature of the U.C.C. has changed, these sections have become inconsistent with the rest of the code.

The latest draft of the proposed revision to Article 1 restates Llewellyn's principles in several sections as though the rest of the U.C.C. has not undergone any transformation.[316] The drafters should rethink this decision because the sections no longer reflect the current character of the code. To reaffirm them after so much of the U.C.C. has changed has no justification. Unless the revisers plan to reinvigorate Llewellyn's ideas throughout all of the articles, they should redraft or eliminate Article 1 provisions that misleadingly would state abandoned objectives as general principles.

313. *See* U.C.C. § 1-102(1).
314. *See id.* § 1-103.
315. *See id.* § 1-106(1).
316. *See id.* art. 1 (Annual Meeting Draft 1997), *supra* note 290.