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### Foreword

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# FOREWORD: "IS THE UCC DEAD, OR ALIVE AND WELL?"

*Bryan D. Hull\**

We are told that Contract, like God, is dead. And so it is. . . .

. . . .  
Speaking descriptively, we might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort."<sup>1</sup>

## I. INTRODUCTION

Just as the late Professor Grant Gilmore announced the death of classical contract theory approximately twenty years ago, one wonders whether it might be appropriate to declare that the Uniform Commercial Code is dead. Just as classic contract rules such as consideration were eroded by such notions as promissory estoppel, the rules of the Uniform Commercial Code have been supplanted to a great extent by federal legislation, state consumer rules, international law and common-law tort rules. No longer does the Uniform Commercial Code provide a discrete set of rules permitting the quick and inexpensive resolution of commercial disputes—assuming that it ever did.<sup>2</sup> As was the case before the Code was promulgated, someone faced with a commercial law problem must research statutes apart from the UCC and relevant case law in order to do a thorough job. The applicable law is likely to vary from jurisdiction to jurisdiction. Changes in the way people conduct business render the Code incomplete in its coverage and to some extent obsolete.

But, to borrow from Mark Twain, some might say that reports of the UCC's death are greatly exaggerated. It is enacted in some form in all fifty states. The Code is kept vibrant by its sponsors, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). Several articles of the UCC have been revised within the last several years. Others, including Articles 2 and 9,

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1. GRANT GILMORE, *THE DEATH OF CONTRACT* 3, 87 (1974).

2. To provide such a discrete set of rules was a goal of the drafters. See 1 STATE OF N.Y., *REPORT OF THE LAW REVISION COMMISSION FOR 1954*, at 28-36 (1954) (statement to Law Revision Commission by Professor Karl N. Llewellyn, Chief Reporter of Code and Member of Editorial Board).

are in the revision process. The scope of the Code has been expanded through the addition of an article on wire transfers<sup>3</sup> and another article on leases of personal property.<sup>4</sup>

Some of the contributors to this Symposium argue that the Uniform Commercial Code provided, and still provides, a useful framework within which a significant number of commercial transactions are efficiently and effectively conducted. The UCC was never intended to be the exclusive body of commercial law. It was expected that other rules, both state and federal, would supplement the Code.<sup>5</sup>

Following are twenty articles and essays, discussing the continuing vitality of the Uniform Commercial Code, written by many of the most distinguished scholars in the commercial law community. Each author has his or her unique perspective on the Code, its past and its future. While the articles and essays are organized for convenience in alphabetical order by author, I have chosen to introduce them by grouping them in certain categories.

*A. The UCC Drafting Process and the Process of Legislative Enactment*

The various articles of the UCC reflect varied drafting styles. Article 9 (Secured Transactions) seeks to provide certain answers to questions while Article 2 (Sales) provides liability rules based on commercial reasonableness. Professor Peter Alces discusses the difference in drafting styles, preferring Karl Llewellyn's Article 2. To Professor Alces, it is unclear that the less certain Article 2 style produces more litigation than Article 9. Even if it does, the results may be better under Article 2. Supporting the view that Article 2 remains viable is the fact that new Article 2A (Leases) more closely reflects Article 2 than Article 9. According to Professor Alces, drafters of future versions of the UCC should not give up on Llewellyn's jurisprudential approach.

Professors Neil Cohen and Barry Zaretsky question whether the current UCC drafting process is the best way to promulgate uniform commercial law. With the significant number of revisions to the various Code articles and the creation of new articles, it is difficult to maintain uniformity among the fifty states. In addition, problems may arise with the new provisions after enactment that must be left to the courts or addressed in the official commentary. Professors Cohen and Zaretsky

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3. U.C.C. art. 4A (1990).

4. *Id.* art. 2A.

5. *See id.* § 1-103.

consider the possibility of federal enactment and discuss the advantages and disadvantages of federalization.

Professor Corinne Cooper discusses her experiences in commenting on the UCC and in trying to enact various parts of the Code in Missouri. She views the drafting and enactment of the UCC as a battle between those who seek clarity, uniformity and elegance in the Code and those who seek special provisions in order to protect their interests. Because the lobbyists representing the special interests are better financed, there is a danger that the Code will become "a patchwork quilt of special interest legislation."<sup>6</sup>

Professor Lary Lawrence believes that the UCC drafting process tends to make the Code inaccessible to practitioners and judges who are not expert in the area. He discusses the recent revisions to Articles 3 and 4 and some problems that exist under those revised articles. In Professor Lawrence's view, the drafting process could be improved by adding individuals to the drafting committee who are not experts in the UCC. Those individuals might be able to assist in making the Code more understandable and responsive to the needs of judges and practitioners and thus more "user friendly."<sup>7</sup>

Professor Fred Miller discusses the drafting process of the UCC from his perspective as the Executive Director of the NCCUSL, one of the sponsors of the UCC, and as a member of the ALI, the other UCC sponsor. In his view, the UCC is still working and is preferable to federalization of commercial law. The UCC drafting process is better than the congressional process because of the expertise of those involved in drafting and revising the Code. The Code is largely uniform and can tolerate some non-uniformity on non-core issues. It can respond to changes through periodic amendment and through commentaries on issues written by the Permanent Editorial Board. For the UCC to continue to prosper, interested parties should continue to work on improving the Code and promoting it, rather than questioning results arrived at through a participatory and open process.

Professor Edward Rubin takes a different view of the UCC drafting and enactment process. He writes from his perspective as former chair of the American Bar Association subcommittee studying the revision of Articles 3 and 4. Professor Rubin believes that the drafting process was

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6. Corinne Cooper, *The Madonnas Play Tug of War With the Whores or Who is Saving the UCC?*, 26 LOY. L.A. L. REV. 563, 577 (1993).

7. Lary Lawrence, *What Would Be Wrong with a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659, 659 (1993).

biased in favor of banking interests, with consumer views receiving scant consideration. The product of the revision effort is being pushed through the legislative process without much opposition because of ignorance among legislators regarding the contents of Articles 3 and 4 and because the revised articles carry the imprimatur of the supposedly neutral ALI and NCCUSL. Professor Rubin believes that the ALI and NCCUSL need to be reformed to provide a more balanced viewpoint, or they should be abolished.

Professor William Warren provides a contrasting view of the Article 3 and 4 revision process. Professor Warren was the co-reporter (with Professor Robert Jordan) for revised Articles 3 and 4 and for new Article 4A covering wire transfers. He has respect for the drafting process because of the number of people with expertise who participate. The commissioners of the NCCUSL serve without pay and contribute large amounts of their time. On consumer-oriented issues, it is difficult to build the consensus necessary for a uniform law. Congress and state legislatures are in a better position to deal with consumer issues. One can look to congressional enactments, such as the Truth in Lending Act,<sup>8</sup> and individual state enactments dealing with consumer protection to validate this view.

Professor James J. White draws on his experience as a participant in the UCC review process in noting that the revision committees tend to make modest revisions to the UCC rather than revolutionary changes. To the extent that more significant changes are to be made, the moving force must be academics and practicing commercial lawyers outside of the drafting committees. Professor White proposes a significant change to Article 9 of the Code: repeal of section 9-301(1)(b), which gives lien creditors (and bankruptcy trustees) priority over unperfected security interests. In his view, the repeal of section 9-301(1)(b) would not lead to unfair results and would significantly reduce the amount of litigation in bankruptcy courts.

### *B. Historical Criticisms of the Code and Its Performance in Light of Those Criticisms*

At the time the UCC was promulgated, it was criticized as not being comprehensive, as being difficult to understand and as unduly favoring certain special interests.<sup>9</sup> Professor Carl Felsenfeld explores some of the historical criticisms of the Uniform Commercial Code in light of the last

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8. 15 U.S.C. §§ 1601-1667 (1988).

9. See Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952).

forty years' experience. He determines that the criticisms raised at the time of the Code's enactment have not proven to be significant. The UCC has been a success, particularly Article 9 dealing with secured transactions.

Professor Julian McDonnell also examines the Code in light of the criticism that it is not the comprehensive domain of all commercial law. While the UCC is far from perfect and has been supplanted to some extent by other law, Professor McDonnell concludes that it provides a basic framework around which commercial activity can be planned. Problems caused by the Code's lack of comprehensiveness are not that great when compared to other societal problems.

### *C. The UCC's Relationship to Other Laws*

The UCC states in section 1-103 that unless displaced by a particular UCC provision, general principles of law and equity supplement the Code. It is not always easy to tell when a UCC provision displaces a general legal principle. Professor Steven Harris discusses problems courts have had in applying general principles of law in UCC cases, focusing on cases involving application of the doctrine of derivative title. In Professor Harris's view, courts need to interpret the UCC with general principles of law and equity in mind, rather than simply attempting to interpret the statutes literally. It is important for judges, law clerks and lawyers to be educated in the principles that underlie the UCC in order to keep the Code alive and well.

Professor Anita Hill observes that the UCC is alive and well and influences commercial law throughout the world. Its future requires taking into account the political, economic and social changes that have occurred internationally. Domestic commercial ideology must address the reality that law is about more than efficiency.

Dean Gerald McLaughlin writes on the continuing evolution of the UCC and its relationship to other laws. He views the Code as becoming more comprehensive through the creation of new articles covering additional transactions. In the future, however, the Code may become less important because of the growing significance of international transactions not covered by the UCC and the impact of laws, such as those designed to protect the environment, that protect societal interests as compared to the interests of parties to a contract.

Increasing federalization of commercial law poses a threat to the UCC's usefulness. Professor Charles Mooney critiques a proposed United States Treasury Department regulation regarding transfer of interest in U.S. Treasury securities. This regulation is being proposed at

the same time as the revision of Article 8 (Investment Securities) goes forward. Professor Mooney finds flaws in the proposed regulation and suggests that the Treasury Department wait until the Article 8 revision process is completed before finalizing the regulation. He believes that the process used by the Treasury Department in drafting regulations is inferior to the NCCUSL drafting process, which is open and deliberative.

#### *D. The Need to Keep Up with Technological Developments*

The drafters of the UCC hoped the UCC would be a "semi-permanent piece of legislation" and that its provisions would be "developed by the courts in the light of unforeseen and new circumstances and practices."<sup>10</sup> Since the 1950s, much has changed in the way people conduct business, and the question arises as to whether the UCC has been able to keep pace. Professor John Dolan looks at several changes in business practices. For example, he notes that credit reporting is much more efficient today than when the Code was promulgated, making unsecured credit more attractive, and that the service sector of the economy is much more significant than it was when the Code was initially promulgated. It is important for Code revisions to reflect changes in the way that business is conducted and to provide a climate hospitable to further commercial growth.

Professor Patricia Fry focuses on the need for the UCC to take into account the increasing use of electronic media. Rather than simply reinterpreting or redefining existing Code terms such as "written" or "writing," functions served by writings must be identified. The Code must provide a definition of a new concept that embraces both paper-based and electronically based communications and information storage. It must then be determined whether electronic media should be permitted to substitute for traditional written documents in light of the functions served by writings, with a bias toward eliminating specific paper requirements.

#### *E. The UCC's Coverage*

The Uniform Commercial Code is as notable for the topics it does not cover as for the topics it does cover. Real estate contracts and contracts for the provision of services are not covered. Professor Egon Guttman discusses the failure of the Code to deal with situations involving nonmerchant parties. The absence of consumer-oriented rules has led courts to draw analogies in order to satisfactorily resolve disputes

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10. U.C.C. § 1-102 cmt. 1.

involving consumers and has led Congress to enact consumer protection laws. Professor Guttman urges adoption of "specific 'user' oriented laws that will consider the need for efficiency but will not sacrifice the protection of the user at the altar of market efficiency."<sup>11</sup>

Professor Raymond Nimmer argues that the scope of the UCC is inadequate in light of today's economy. Because services and sales of intangibles are currently so significant, a commercial code should include those transactions. Professor Nimmer analyzes the question of whether contracts for the provision of services and sale of intangibles are appropriate topics for codification.

Professor Richard Speidel, the reporter to the drafting committee studying revisions to Article 2, discusses some of the issues that need to be considered in revising the Code. In his view, current Article 2 does not adequately address long-term relational sales contracts. In order for Article 2 to reflect commercial reality, any changes to Article 2 must take into account relational sales contracts.

#### F. *Attitudes Toward the Code*

Negative attitudes regarding the Code and ignorance of its terms may prevent it from being applied liberally. Some lawyers may actually litigate cases without knowing that the UCC applies, and judges may not correct them. Professor Kerry Macintosh discusses the need to educate law students, practitioners and academics on the importance of the UCC. Such education can occur at the law school level and through continuing education after admission to the bar. Professor Macintosh emphasizes the need for experts in the Code to impart their knowledge to others.

## II. CONCLUSION

On the rise and fall of classical contract theory, Professor Gilmore wrote: "The instinctive hope of the great system-builders was, no doubt, that the future development of the law could be, if not controlled, at least channeled in an orderly and rational fashion. That hope has proved, in our century of war and revolution, delusive."<sup>12</sup> Considering the ongoing attempts to revise the Uniform Commercial Code, it is clear that some still share the hope that commercial law can be channeled in an orderly and rational fashion. Whether that hope will prove delusive has yet to be seen. The thoughts on the UCC provided by the contributors to this

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11. Egon Guttman, *U.C.C. D.O.A.: Le Roi est Mort, Vive le Roi*, 26 *LOY. L.A. L. REV.* 625, 636 (1993).

12. GILMORE, *supra* note 1, at 102.



Symposium should give food for thought to those involved in the continuing development of the UCC.