

4-1-1993

The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC

Corinne Cooper

Recommended Citation

Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC*, 26 Loy. L.A. L. Rev. 563 (1993).
Available at: <https://digitalcommons.lmu.edu/lr/vol26/iss3/4>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**THE MADONNAS PLAY TUG OF WAR
WITH THE WHORES
OR
WHO IS SAVING THE UCC?**

*Corinne Cooper**

I suppose that this Essay should be a tribute to Fred Miller,¹ but Fred is too young for such a tribute. When, if ever, he gets around to retiring, I'll just recycle this piece. It might as well be a tribute to Fairfax Leary,² recently departed and still strongly missed. The last time I saw Fax, shortly before his death, he was still ribbing me about the misinterpretation of some Code provision he thought a court had made, which I had the audacity to defend.³ These two wise scholars, and countless

* Corinne Cooper is an Associate Professor of Law at the University of Missouri-Kansas City School of Law. She has spent the last eleven years of her life trying to make the UCC interesting for her students, as well as exploring its more esoteric points in her spare time. A graduate of the University of Arizona with a B.A. in 1975 and a J.D. in 1978, she practiced law in Phoenix, Arizona, before entering teaching.

1. Fred, for those of you not among the cognoscenti, is the George L. Cross Research Professor and Kenneth McAfee Centennial Professor of Law at the University of Oklahoma School of Law. In 1992, Fred became the Executive Director of the National Conference of Commissioners on Uniform State Laws. Fred is the guardian angel of uniformity.

2. Fairfax Leary was one of the drafters of Article 9, an associate reporter for Article 3 and a principle reporter for Article 4 of the UCC. A professor throughout much of his life, he retired as the Distinguished Visiting Professor of Law, The Delaware Law School of Widener University. He received his A.B. in 1932 from Princeton University, and his J.D. in 1935 from Harvard Law School. For a delightful commentary on his involvement in the original Code, see Fairfax Leary, *Reflections of a Drafter*, 43 OHIO ST. L.J. 557 (1982). For a summary of his distinguished career, see Patricia B. Fry, *Dedication to Fairfax Leary*, 42 ALA. L. REV. 351 (1991); Homer Kripke, *Dedication to Fairfax Leary, Jr.*, 42 ALA. L. REV. 356 (1991); and Anthony J. Santaro et al., *Tribute to Professor Fairfax Leary, Jr.*, 12 DEL. J. CORP. L. 823 (1987).

3. The research for this Essay led me across the argument again, this time in print. See Leary, *supra* note 2, at 562 n.18.

others before them, stretching back to Karl Llewellyn⁴ and Soia Mentschikoff,⁵ are the heroes of this story.

The morality play I am about to expose is an epic struggle. Madonnas? Whores?⁶ Surely these words are too strong. But they serve to identify the two essential opponents who struggle for control of the UCC—those of us who write, argue, lobby, and fight over the language of the Code.⁷

Like all good morality plays, this one represents a struggle between good and evil, and like all morality plays, good is supposed to win.

4. Karl Llewellyn can accurately be described as the father of the Uniform Commercial Code. He was the Chief Reporter for the Uniform Commercial Code of the Conference of Uniform State Laws and the American Law Institute, beginning in 1943. He was a member of the New York Commission on Uniform State Laws from 1926 through 1951. He was the Reporter for the Uniform Revised Sales Act, and a life member of the Conference of Uniform State Laws. For an interesting study of his life, with particular attention to his role as a founding member of the philosophy of legal realism, see WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1985). Professor Llewellyn died in 1962, but his impact on commercial law was so profound and the reach of his vision so powerful that even today it is not unfair to refer to the UCC as the "lex Llewellyn." See Eugene F. Mooney, *Old Contract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 221 n.13 (1966). This phrase was first used in Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951).

5. Soia Mentschikoff was a leading legal educator and scholar. If Karl Llewellyn was the father of the Code, Soia was surely its mother. She began working with Llewellyn as his research assistant at Columbia, and continued working, becoming the Associate Chief Reporter for the Code. They were married in 1947. She became the first woman to teach at Harvard Law School, and later the first to teach at the University of Chicago. She was the first woman dean, becoming Dean of the University of Miami School of Law. She retired in 1982, and died in 1984 at the age of 69. For information on her involvement in the drafting of the UCC, see TWINING, *supra* note 4. For her delightful reflections on the experience, see Soia Mentschikoff, *Reflections of a Drafter*, 43 OHIO ST. L.J. 537 (1982). For a summary of her career, see Warren E. Burger, *Tribute to Dean Soia Mentschikoff*, 37 U. MIAMI L. REV. ix (1983); Richard A. Hausler, *In Honor of Dean Soia Mentschikoff*, 37 U. MIAMI L. REV. xi (1983); and Irwin P. Stotzky, *Soia's Way: Toiling in the Common Law Tradition*, 38 U. MIAMI L. REV. 373 (1984).

6. I am not unaware of the criticism that will result from my use of female archetypes as the terminals of the good-evil continuum. Because the group to whom I am applying them is largely male (that is, most of them are men), I feel that the use is not sexist. And while I have yet to encounter a male madonna, see, e.g., MADONNA, SEX (1992), "whore" has become a suitably generic word.

And anyway, I'm just a UCC professor. What could I know about feminist jurisprudence? I could have used the Federation and the Klingons, but it's too cute.

7. My lawyer demands that I include the following disclaimer: The "madonna" and "whore" terminology is not intended to refer to any individual or group. No person or organization identified or referred to in any way is intended to be branded with either title. This is satire. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). If you see yourself in either role, that is your problem.

Therefore let there be no mistake at the outset: I am on the side of the madonnas. What are we fighting?

There is a cadre of lawyers who attend ABA meetings, ALI meetings, drafting committee meetings, study committee meetings, NCCUSL meetings, and finally, who whine, dine, and cajole state legislators, in the paid pursuit of a legislative conclusion favorable to their clients. Some of them are private practitioners, some of them may be lawyers for government agencies, and more than a few are lawyer-lobbyists for industry organizations. They wear good suits, stay in good hotels, and know their way around a wrestling ring. They pursue the honorable goal that is the zenith of the advocate's profession: They zealously represent the interests of their clients within the bounds of the law.⁸ And, when need and opportunity coincide, they prod and push, dig in and grip, and yank the law where they judge, in their biased but self-righteous way, it ought to go. These are the interest-group representatives ("the whores").

Then there is the group that attends these same meetings, sometimes staying at the Motel 6, eating at the cocktail receptions (and even at the table of the whores, should the opportunity arise) who pursue a far different goal. They want the law to make sense. They want progress, yes, and goodness knows they all want law that works (we were listening, Karl, when you taught this class). They want to refine the language and fill the holes, to bring the law into line with twenty-first century practices and ideas. But their polestars are uniformity, consistency, clarity, and a basis for judging, in the unstated case, which way the result ought to go.⁹ These are the law reform junkies ("the madonnas").

8. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Although this sentiment has been watered down under the ABA Model Rules to: "A lawyer shall act with reasonable diligence and promptness in representing a client," MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1992), the comment to that provision echoes the original emphasis: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* Rule 1.3 cmt. It is interesting to me that 10 years after the Model Code was superseded, the language of Canon 7 is the phrase most easily recalled by both practicing lawyers and law students as embodying the lawyer's role.

If you read the word "zealous" to mean "earnest" or "fervent," then I believe that both the madonnas and the whores qualify. But if the word engenders blindness, single-mindedness, or fanaticism, then it is more appropriately applied to the mission of the whores. I imagine that it was the latter sense of the word that led the drafters of the Model Rules to de-emphasize its importance, as in practice it was called upon to justify a multitude of excesses.

9. This ability to predict the outcome of an unstated case I would characterize as the "channeling function," an expanded usage from Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). Although the UCC is filled with terms that admit in the abstract an almost infinite variety of conduct ("unconscionability," "reasonable," or "good faith") it seems to satisfy the channeling function remarkably well. I have discovered in 10 years of teaching that students have general unanimity when asked to determine, between two

Whether the UCC survives, and whether it can withstand the assault of special interests that would co-opt it for their own purposes, will ultimately depend upon which group is stronger: the madonnas or the whores.¹⁰

given choices, whether a particular act is unconscionable or not, reasonable or not, in good or bad faith.

Predictability, clarity, and elegance were of paramount importance to Karl Llewellyn. In his primary work on this subject, he said:

Beauty in things of law has been slighted as if by law; and where not slighted, has been seen off-center and in spiraled distortion. . . . Such is a common run of thinking among those who have meditated upon law as being thus a matter of words: an ill-advantaged distant cousin of belles lettres, too doltish, for the most part, to be hungry for improvement.

Karl Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 227 (1942). Llewellyn went on to say: "Structured beauty becomes thus the esthetic goal—an intellectual architecture, clean, rigorous; above all, carried through in sharp chiseling to body out the predetermined plan, in every vault, in each line, into each angle." *Id.* at 228. He stressed that elegance was not simply beauty, but the beauty of functioning, each part and as a whole:

As a result, or as a means, a logical clarity is present, too. But the prime test of its legal beauty remains the functional test. Structural harmony, structural grandeur, are good to have, they add, they enrich; but they are subsidiary. So is ornament. Legal esthetics are in first essence functional esthetics.

Id. at 229. In sum, he states:

If its Beauty be a Beauty for the Eye only, or of the Mind only, if it be not in first instance a *working* Beauty . . . then it is false. . . . But a Structure of legal Rules, howsoever fair of Face, must function well or be an active Evil to the Men and Work it houses.

Id. at 230.

This real-world perspective, which admits change over time, and which allows the parties (and later the judge or jury) to determine what is the right thing to do, represents legal realism at its finest. But it does one thing more: It prevented Karl Llewellyn (or any of the drafters) from imposing his vision of right or wrong upon future participants in commercial transactions. The individual participants, their industries, their communities, and ultimately, their generation's social consciousness, would control the outcome. To my mind, regardless of any pro-business, pro-bank bias that might have affected Llewellyn's perspective, this willingness to let future generations decide for themselves keeps Llewellyn firmly in the camp of the madonnas.

10. For purposes of this Essay, I am ignoring the equally interesting question of whether federalization of the UCC will lead to its demise. I leave that Essay to David Goldstein, who has been fighting this battle longer than I. See David B. Goldstein, *Federal Versus State Adoption of Article 4A*, 45 BUS. LAW. 1513 (1990). I only pause here to note that the whores are not limited to stalking the halls of state houses. They have been seen, I hear, in Congress as well.

Karl Llewellyn also confronted the issue of federalization. He thought that he could make the necessary changes in the sales law and achieve uniformity by moving in Congress. Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 479, 483-86 (1987). Ultimately, he worked both in Congress and before the National Conference. *Id.* at 484-85.

Federalization of commercial law only addresses the issue of uniformity. Whether clarity and elegance can also survive in the federal system is much up to chance. I recall a meeting in the basement of a bad hotel (was it Houston?) where discussion on this topic became un-

When I went to my first meeting of the UCC Committee of the Business Section of the American Bar Association ("the Coliseum"), in 1982 in God knows what forgotten city, sitting in a hotel conference room which is not distinguishable in my memory from any other, I sat in fascination as the discussion proceeded around the table. One well-dressed lawyer, and then another, spoke to the issue at hand: Should we write a code of conduct for wire transfers? Was it needed at this point? The comments seemed to break down clearly into three camps: (1) We needed it desperately now; (2) we didn't need one at all; and (3) there was a growing need for consistency which suggested a code was in order. At one point, a lawyer took the microphone to say, in studied tones, that the Code (which became Article 4A of the UCC) was not needed. This lawyer said, with simple grace: "We resolve these issues with contracts."

Contracts? I thought. They make contracts with everyone who sends a wire transfer, with everyone who receives one, with EVERY-ONE? Would this lawyer argue that we didn't need Article 4 (these were the olden days, remember, before Reg CC took over our lives¹¹), that check collection could be handled with contracts? I was dumbfounded. But, being new at this table, I figured I had misunderstood. So I leaned over to the gentleman next to me (I think it was Egon Guttman) and said, "Why did she say that? What does she mean?" And he replied (if it was Egon, in a knowing tone), "That's the lawyer for the New York Clearinghouse Association."

I understood perfectly then the lesson that I impart today: You cannot tell the players without a program. I understood at that pivotal moment of beginning that you could not interpret the meaning of any statement made about the law, *or what it ought to be*, without knowing whether the speaker was advancing an agenda for a specific client, bringing a general sense of experience to the table, or merely listening in to learn about the proposals.

I pause here to make an important point: No one of us is actually a madonna. There are none. And, if I were being honest, I would admit that there are no total whores. The terms are useful because they identifiably represent absolutes on a familiar continuum. And the continuum analogy is instructive because it admits the infinite admixture of these

characteristically heated. Someone actually rose from the table to defend the honor of the feds (in actual fact, the Fed). I am sympathetic to the argument that the Great White Father in Washington can take care of these issues and fix everything for us so we do not worry our pretty little heads about this any more. I would like to believe it. It would save me a lot of travel to Jeff City. Forgive me if I have my doubts. These are the folks who brought us the Food Security Act

11. 12 C.F.R. pt. 229 (1992).

two qualities. Each of us brings to the table personal experiences, whether representing clients or advancing theories, which make us less than perfectly objective, which inevitably bias our perspectives on the resolution. And all of us, frail humans that we are, invest our positions with a pride of authorship or advocacy that imbues it with a beauty and innocence which we will defend if we find it under attack. On occasion I have found myself advancing a position with a fervor and zeal which belied the fact that I just thought of it the moment before. We all have a measure of the whore within us. Consumer advocates are whores for their constituency, and represent it just as effectively as the bank whores (although they don't often dine as well).

The question this Essay presents is this: How great a percentage of input from the whores can the UCC take and still serve its wider purpose?

I would never suggest (and will not accept criticism for having argued) that all practitioners are whores, and all law professors are saints.¹² The facts show otherwise. I have known too many insightful, even brilliant practicing lawyers, in private practice and government service, who have been as thoughtful and sincere in their desire for an elegant and just bit of statutory language to say otherwise. I might even recall a time or two (but no more) when I wondered if one of my academic colleagues was secretly on the dole, so clearly were they advancing a pawn here, a rook there.¹³ But for the most part, I have observed lawyers who have as their main goal to advance the cause of clarity, uniformity, and elegance (CUE) in commercial law and damn the special interest oxen which are gored in the process. They are the keepers of the precious flame that is the UCC, and without their persistence, their vigilance, their almost religious dedication, the UCC would be nothing but a patchwork quilt of

12. In my research for this Essay I discovered for the first time how powerfully influential law professors had been in the original drafting of the Code. As they do today, law professors brought not only their time and scholarship to the drafting process, but also their valuable independence from the special interests which might otherwise have skewed the drafting of the Code. See William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1968), which states:

Even today, there is a very small minority of seemingly uninformed persons who refer to the Code as the work of "the law professors," intending this to indicate that the Code as promulgated was not a body of law prepared by practical lawyers in the light of reality. Nothing could be less justified than this type of sniping criticism.

Id. at 1. Actually, the criticism is probably valid in one sense: The drafting was largely done by law professors, although the supervision and comment came from practitioners, and from representatives of the industries covered by its terms. See Mentschikoff, *supra* note 5; Soia Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A. J. 419 (1950).

13. Watch for new suits.

special interest provisions cobbled together by the guys¹⁴ in the blue suits making more for each and every hour of their participation than my mortgage payment.

This is not to say that there is unanimity among the madonnas. As in all things, when there are two lawyers at the table, there are three opinions. There has been considerable and even bitter disagreement within the ranks of the madonnas throughout the long law reform process. I cite an example from my own experience.

Missouri was one of the last states to adopt the 1972 amendments to Article 9,¹⁵ and I traveled more than a few times to Jeff City to push for the change. During the process, I remember a long debate I had with my colleague, Professor Ray Warner, about a little bit of non-uniformity he wished to include in the Missouri version of section 9-403.¹⁶ Ray is a bankruptcy expert, and the amendment addressed the problem of bankruptcy and the term of a financing statement. Ray argued that the filing officer should be free to purge the system of financing statements which appeared to have expired, unless someone notified her that a bankruptcy had stayed the expiration of the filing. Ray argued for the change because it provided needed notice to the filing officer, and the representative of the Secretary of State backed him up. It seemed like a good change, and I fought it mainly because I believe that uniformity is a valuable aspect of the UCC, and the amendment was non-uniform. Finally I gave in, and no dire consequences have resulted. Neither of us operated as whores in this interaction. I was arguing as a representative of the commercial law bar, and Ray was representing the interests of the bankruptcy bar. Compromise was not difficult to achieve.

14. Where I come from, "guys" is a generic term including scoundrels of both sexes.

15. Act of June 16, 1988, § A, 1988 Mo. Laws 895 (codified in scattered sections within MO. ANN. STAT. §§ 400.9-101 to -507 (Vernon Supp. 1992)).

16. MO. ANN. STAT. § 400.9-403(2) (Vernon Supp. 1992).

If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against a debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty days or until expiration of the five-year period, whichever occurs later. *If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the secured party shall give the filing officer written notice of insolvency proceedings, and failing such notice, the filing officer may act as though insolvency proceedings have not been commenced. Without regard to the secured party's compliance with this notice requirement, the security interest remains perfected until the termination of the insolvency proceedings and thereafter for a period of sixty days, or until the financing statement would otherwise have expired, whichever occurs later.*

Upon lapse, the security interest becomes unperfected, unless it is perfected without filing.

Id. (emphasis added (identifying non-uniform language)). On the CUE scale, this amendment lacks uniformity and elegance, but its import is pretty clear, and it is located where one might naturally look for such a provision.

But there was another debate during the Senate hearings that was a little less high-minded. A representative of the banking industry argued for the removal of the words "buyer of farm products in the ordinary course" from the priority rules of section 9-301.¹⁷ I tried to explain in my calmest voice that this change would result in a BIOC of farm products coming in behind even an unperfected secured creditor. Because the Food Security Act¹⁸ had come into effect, and Missouri had done nothing (and has still done nothing) to provide a system of centralized notice, I was worried about the effect that this language might have on BIOCs of farm products in Missouri.¹⁹ The banker was unmoved and unmoving. By deleting this language, he achieved a beneficial result for his clients.²⁰ Finally, the chair of the committee recessed the hearing and walked out with me into the hall.

"Little lady," he said with his charming Ozark lilt, "do ya'll want unifohmity or ya'll want lahw?" I took the point and caved. Sixty days later, the Article 9 amendments were enacted.

What I understood from that exchange was the same lesson I learned on my first political campaign. This banker was in Jeff City with

17. See MO. ANN. STAT. § 400.9-301(1)(c) (Vernon Supp. 1992).

18. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C.).

19. The problem is this: The Food Security Act (FSA) provides a means for a secured creditor in farm products to notify potential buyers and commission merchants of its interest in the goods. 7 U.S.C. § 1631 (1988). If notice is provided as required by the statute and regulations, and the buyer does not comply with the demand of the creditor to receive payment, the secured creditor's interest remains. *Id.* Nothing in the Act addresses the question whether the secured creditor must be *perfected* under state law in order to prevail over a noncomplying buyer. Rather, it defines "effective financing statement" as one which complies with the requirements of the Act without reference to its status under state law. *Id.* § 1631(c)(4). Further, it defines "security interest" as "an interest in farm products that secures payment or performance of an obligation." *Id.* § 1631(c)(7). There is no reference to perfection here, either. Presumably the FSA was not intended to preempt and reorder all priorities between BIOCs of farm products and secured creditors. More likely, it was intended to preempt the priority of the uniform version of § 9-307(1) and § 9-301(1)(c) that a BIOC of farm products loses to a perfected secured creditor. This conclusion is bolstered by the language of the preamble, which states that state law "permits a secured lender to enforce liens against a purchaser of farm products even if the purchaser does not know that the sale of the products violates the lender's security interest in the products." 7 U.S.C. § 1631(a)(1). Because this protection is limited to *perfected* secured creditors, presumably only that priority is the evil which the FSA intends to redress.

If the FSA does not preempt all priorities, but only the priority found in § 9-307(1) and § 9-301(1)(c) for perfected secured creditors versus BIOCs of farm products, then in all states but Missouri, an unperfected secured creditor should lose to a BIOC even if the BIOC receives the notice and ignores it. In Missouri, whether the FSA preempts all state priority rules or not, the absence of language in § 9-301 as adopted in Missouri implies that a BIOC of farm products loses to all secured creditors, perfected or not.

20. See *supra* note 19.

a mission. He could afford to come back again and again. The legislators knew him. I'm sure he bought tickets to their fundraisers. His needs, legislatively, were more important than mine. The legislators were not selling out their constituents. Who, after all, in the counties and towns that these gentlemen represented, really cared about a relative priority fight which had been largely preempted by federal law? If there was a real problem, the whores representing the buyers of farm products would arrive in droves.

The point isn't that the banker was evil. It is that clarity, uniformity, and elegance did not have a representative in the Missouri legislature. I was there representing the madonnas, and the madonnas do not make campaign contributions, they do not hold fundraisers, they don't even write irate letters. There is no constituency for uniform, national commercial law reform.

How is this any different than the debate among interest groups which has always swirled around the UCC? Have I imagined the original UCC too purely? Undoubtedly, I have. I am not unaware of the criticisms aimed at Article 4 that it was a wholesale "sell-out" to bankers.²¹ And there are clearly provisions of the Code that were concessions to special interests.²² But in large part, the process has been described, and the product has arrived, largely free of the influence, either directly in the drafting process, or indirectly, through the adoption of special interests pursuing merely their own selfish ends.²³ I see that process as fundamentally different (in degree, if not in kind) from the wholesale co-opting of the Code that is going on today.

21. See, e.g., Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952). Professor Beutel referred to Article 4 of the proposed Code as "a piece of vicious class legislation" perpetrated by bankers on their unwary customers. *Id.* at 357. Although he commends the work of Fairfax Leary, who initially attempted to draft an entirely new collection code, which would allocate risks between banks and customers more equitably, he argues that Fax was overrun by the "unanimous opposition of the American Banker's Association and counsel and lobbyists who were constantly in attendance." *Id.* at 359. This is not so different from Fax's own recollections. In her essay on the drafting of the Code, Soia Mentschikoff had recalled the process as remarkably free of outside influence. See Mentschikoff, *supra* note 5, at 542. Reluctantly, Fax remembered his experience quite differently: "There were a couple of points [Soia] made about the lack of special interest pressures and I just have to differ the least little bit. . . . But there was pressure, at least indirectly, to develop a Code that could be adopted. That meant one special interests would not block." Leary, *supra* note 2, at 557. He goes on to detail the specific provisions that were included to appease interest groups and avoid organized opposition: "Finally, there's no way you can have a Bank Collection Code and exempt banks. Hence that part of the Code had to be drafted so as not to produce united opposition." *Id.* at 558.

22. Leary, *supra* note 2, at 558.

23. See Mentschikoff, *supra* note 5, at 542; Mentschikoff, *supra* note 12, at 420.

You may think my comments too harsh, and my dedication to the innocents smarmy, but I've been through a lot this year. I have been reminded (and it is still fresh in my mind) about the value of intellectual independence, of the freedom to come to conclusions that satisfy me, and to write about them, hoping to convince the uncommitted reader to understand, and even agree with my views. It's gotten awfully interesting to be a law professor lately. Twice in the past year alone, I've been told by the hardball players that it might not be good for me to write what I had in mind to write, because their clients would not be happy.

The first occasion was the time I learned that a certain group of bankers in a certain midwestern state had decided they would "satisfy" the provisions of federal law (a little piece of legislative pestilence called the Food Security Act) by publishing a newspaper among themselves to list their various farm products liens. Hearing of this endeavor, and being pretty curious about how they imagined that this might satisfy the requirements of the law, I called the representative of this group of bankers (who shall remain nameless because I know that he would never read this sort of Essay, and no one will tell him about it unless I call him by name) to see how it came about. Once I got him on the phone and identified my purpose, I asked him point blank if he had advised his organization, or if someone else had advised his client banks, that this little newspaper was sufficient compliance with the notice provisions of the Food Security Act.

In a nanosecond, I was on the speaker phone. Others (nameless to me) were called into the room to hear the conversation. And he said to me, in a tone reminiscent of *The Godfather*, that I ought not delve into this matter, that it wouldn't be good for me to pursue it. They had very carefully researched the issue, they had devised this solution, they had agreed among themselves that this would suffice, and *they didn't want any smart law professor mucking up the works!* The tone suggested everything but, "You wouldn't want to mess up a pretty face over this." I had a colleague, fortuitously, in the office with me at the time. I don't have a speaker phone, so I just repeated what I was hearing. The gentlemen in the room seemed not to notice, assuming I suppose that I was repeating it in order to make sure I got it right. When I hung up the phone I looked at her in amazement. "Did you hear that?" I asked. "Did you hear what I heard?" And she nodded.

I was speechless. I was awestruck to imagine that anything I, a lowly professor at an obscure state school, could write or say, or even think, could elicit this kind of response. Someone was not only going to

read what I wrote but object to it strenuously? Not because it was stupid but because it was *dangerous*? I was thrilled beyond reason.

Well, the fact is that I've been too busy to write the damned article, but I do tell all of my secured transactions students about this whenever we cover the Food Security Act. I describe this little exchange so they will understand the requirements of the statute, so they will not delude their clients into believing that this system is sufficient (although its institutional mantle makes it seem legitimate), so they will think that it is sometimes exciting to be a UCC lawyer, and particularly, in case my Jeep blows up one day, so they will press the police to look for a timer.²⁴

I thought that this was an anomaly of the first order, unprecedented as it was in my lifetime. And it thrilled me beyond words to imagine the importance of my work, which most of the time strikes me as appallingly narrow and obscure.²⁵ But the adrenaline had hardly worn off when it happened again.

I was in the last few weeks of writing a chapter for a book about the UCC. I was buried in a piece of minutiae, a question that seems to have taken over my entire academic career. In the course of writing about cases that were likely to arise in upcoming years, I contacted a couple of industry lawyers to inquire about their views on this issue.

The first of them spoke to me at length about his role, suggesting that while he encouraged state legislatures to enact statutes approving of the practices engaged in by his clients²⁶ (a well-known and widely vilified group²⁷), he also encouraged his clients to take positions and to adopt practices which decreased the likelihood that they would come under attack. "We can work with legislators to enact statutes which regulate our clients' conduct," he said, "or we can wait until they act on their own to put us out of business." To me, this lawyer represents the best of a bad breed. He was candid about his role. When bad judicial gloss has affected his clients' activities, he was not above amending the Code to

24. This is a joke. Let me state for the record that I understand I am more likely to die at the hands of an irate student or a drunk driver than I am from the retribution of a lobbyist, even after this little poison pen letter reaches print.

25. Have you ever tried to explain to your nonlawyer friends, or your family what you do for a living? I have finally hit upon a tangible example of my work which I now use. "You know that little line on the back of your checks?" I inquire. When they nod in agreement, I say, "I did that." With apologies to Bob Ballen and the Federal Reserve, this is as close as I can come to explaining to anyone what I do as a scholar.

26. See, e.g., IOWA CODE ANN. § 537.3601 (West Supp. 1992) (Consumer Rental Purchase Agreement Act).

27. The "Rent-to-Own" industry is an interest group which has kept an entire generation of assistant attorneys general, legal aid lawyers, and consumer advocates busy at the bar.

"fix" things.²⁸ But for the most part, the industry has been willing to live within the strictures of the uniform UCC.

My next encounter was with another lawyer who viewed his job even more directly as the zealous defender of special interests. An industry representative, this lawyer had taken the position in several articles that the absence of damning language in the amendment to section 1-201(37)²⁹ was intended as an imprimatur for the activities of his clients. Specifically, he had argued that terminal rent adjustment clause (TRAC)³⁰ leases were true leases under the amended definition.³¹ When I called to question him about this position, he responded with alacrity.

"Are you going to write something against our interests?" he bristled over the phone. "Please let me see a copy of your article before it goes to print, so that we may correct any misconceptions you have." Fat chance of that. "If you attack our position, we will have to react strongly." Again, I felt that thrill racing through my veins. Someone was going to read what I wrote. I must be on the right track if I'm getting this kind of reaction.

What I decided to do is to find out exactly how the lobbyists operated. I contacted members of the UCC drafting committee that had put together Article 2A. I asked them what their memories were: Did the absence of language about TRAC leases suggest an imprimatur? Everyone remembered a debate about TRAC leases. No language approving TRAC leases was ever included in a draft. Several remember that a private compromise was reached which deleted language from the comments damning TRAC leases.³² As a result, there are two possible interpretations: The absence of a comment disapproving of TRAC leases was intended as an implicit approval, or the absence of a comment was a compromise not intended to approve of the practice. The lobbyist took the former position, and I took the latter.

28. See, e.g., NEB. REV. STAT. § 1-201(37) (Supp. 1990). " 'Security interest' does not include a consumer rental purchase agreement as defined in the Consumer Rental Purchase Agreement Act." *Id.*

29. U.C.C. § 1-201(37) (1987).

30. TRAC leases are transactions in which the rent is retroactively adjusted based on the proceeds received upon disposition of the collateral at the end of the lease. For more than you ever wanted to read about this particular issue, see Corinne Cooper, *Identifying a True Lease Under UCC § 1-201(37)*, in EQUIPMENT LEASING (forthcoming 1993).

31. The TRAC leasing industry takes the position that they are, and I take the position that they are not. *Id.*

32. Let me clarify. Nothing in the amended § 1-201(37) or Article 2A prohibits any of the practices of the TRAC leasing industry. The issue is exclusively whether TRAC leases are true leases, governed by Article 2A, or disguised security interests, governed by Article 9. See *supra* notes 30-31.

Except for the tone, there was nothing particularly noteworthy about our exchange. But in the course of researching this issue, I discovered an act that exemplifies my opposition to the piecemeal destruction of the UCC by lobbyists. The TRAC leasing industry, having failed to gain explicit approval of TRAC leases under section 1-201(37), not being content to argue for its approval from the absence of a comment on the topic, went one step further. They have lobbied state by state for a non-uniform amendment which states expressly that TRAC leases are true leases.³³ In many cases, instead of amending section 1-201(37), they have cleverly hidden the amendment in other motor vehicle legislation, so that only TRAC leasing lawyers know that it is there. For example, in Missouri, the statute resides between the provision granting purple heart recipients special license plates and the one defining "boat dealer."³⁴ On the CUE scale, this one ranks in negative numbers.

I am painfully sensitive to this particular issue because I have spent several years of my life studying section 1-201(37), and I happen to think that, with all its flaws, it scores high on the CUE scale. I admit that I have a bias in favor of my interpretation of the statute—that on this issue, I qualify as a whore. I am offended because this amendment directly contradicts the intent of section 1-201(37). But I am also offended by this provision, foisted on the Missouri Legislature, because it so despicably hides the ball. Would a reasonable lawyer assume that such a provision might naturally be an amendment to section 1-201(37)? I believe so, and in some states it is.³⁵ But in most states it is well-hidden.³⁶ In Mis-

33. *See, e.g.*, MO. ANN. STAT. § 301.452 (Vernon Supp. 1992). It provides:

In the case of motor vehicles or trailers as those terms are defined in section 301.010, RSMo, notwithstanding any other law to the contrary, a transaction does not create a sale or security interest merely because it provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon sale or other disposition of the motor vehicle or trailer.

Id.

34. *See id.* §§ 301.451-.455 (Vernon Supp. 1992).

35. The amendment is located in § 1-201(37) in North Dakota. *See* N.D. CENT. CODE § 41-01-11(37) (Supp. 1991).

36. The TRAC leasing lobby has obtained enactment of this language in some form in at least 16 states. The states are: Alabama, ALA. CODE § 32-8-60.1 (Supp. 1992); Arizona, ARIZ. REV. STAT. ANN. § 44-287(b) (Supp. 1992); Florida, FLA. STAT. ANN. § 319.271 (West Supp. 1993); Illinois, ILL. ANN. STAT. ch. 95 section, para. 3-201.1 (Smith-Hurd Supp. 1992); Michigan, MICH. STAT. ANN. § 19.2A110 (Callaghan Supp. 1993); Minnesota, MINN. STAT. ANN. § 168A.17(1a) (West Supp. 1993); Missouri, MO. ANN. STAT. § 301.452; New Jersey, 1992 N.J. Sess. Law Serv. 128 (West); New York, N.Y. VEH. & TRAF. LAW § 397-B (McKinney Supp. 1993); North Dakota, N.D. CENT. CODE § 41-01-11(37); Ohio, 1992 Ohio Laws 235 (amending OHIO REV. CODE ANN. § 4505.13(c)); Oklahoma, OKLA. STAT. tit. 47, § 1110(F) (Supp. 1993); Rhode Island, R.I. GEN. LAWS § 31-3.1-27 (Supp. 1992); Texas, TEX. REV.

souri, one must scour the motor vehicle code to find it. It was not listed in the Missouri Legislative Service as a commercial law provision, and the people who might have opposed it (like me) missed it entirely.

Ultimately, this provision will be adopted in all fifty states, and then, I suppose, it will meet the requirement of uniformity. But elegance? Never! It's like those abysmal tax code provisions that only benefit one family,³⁷ or the ridiculous new provision in the Bankruptcy Code designed specifically to wrest the airport gates out of the TWA bankruptcy.³⁸

The National Conference of Commissioners on Uniform State Laws has made a decision not to oppose this amendment,³⁹ although it also has made clear that this acquiescence is not intended as an expression of approval for the treatment of all TRAC leases as true leases.⁴⁰ I think that this is a mistake, but I understand that they are an organization with limited resources, and a well-financed group like the TRAC lease lobby could stop the adoption of Article 2A dead in the water.⁴¹

And that's the rub. Lobbyists may come to the drafting committee meetings, and if they lose there, take it to the floor of the ALI or NCCUSL. And if they lose there, they can go to the individual state legislatures. Indeed, some lobbyists no longer bother with drafting committee meetings because they know that they can stop the process in the

CIV. STAT. ANN. art. 6687-1(c) (West Supp. 1993); Virginia, VA. CODE ANN. § 46.2-640.1 (Michie Supp. 1992); and Wisconsin, WIS. STAT. § 342.03 (Supp. 1992).

37. See, e.g., I.R.C. § 6166 (1988); see also Andrew Pollack, *Another Coup for the Fighting Gallos*, N.Y. TIMES, July 6, 1986, § 3, at 1 (referring to cited change in federal estate tax law as "Gallo Amendments").

38. Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 19, 106 Stat. 972, 982-85 (1992) (to be codified at 11 U.S.C. § 365). For a discussion of the intent of the statute, see Patricia Miller, *City Seeks to Buy TWA Gate Leases*, ST. LOUIS BUS. J., Sept. 14, 1992, at 1 (referring to legislation sponsored by Missouri Senator John Danforth intended to benefit St. Louis).

39. See Letter from John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws, to Edwin H. [sic] Huddleson, III (Aug. 16, 1990) (on file with author).

40. *Id.* It is the position of the staff that the quoted language does not shortcut the analysis required of a court in its interpretation of § 1-201(37). In other words, the adoption of the provision does not convert all TRAC leases into true leases under the Code. Instead, a court confronted with a TRAC lease provision should go through the same analysis of the lease that it would go through for a lease that contains one of the provisions specifically approved by the amendment. Telephone Interview with John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws (Sept. 23, 1992). Of course, the inclusion of a single approved provision does not make the transaction a true lease.

41. In fact, the TRAC leasing industry has been of assistance in obtaining passage of Article 2A because the compromise was reached on its special interest language. But the threat was very real that they would stop 2A if the drafters insisted on classifying TRAC leases as security interests.

legislatures. And if they lose this year, they can come back next year. Or the next.

And meanwhile the madonnas have gone on to other projects, or they are changing the oil in the Volkswagen Beetle that has 200,000 miles on it, or they cannot make another trip to the state capitol to fight. And when the fight goes out of the madonnas, the UCC will be nothing but a patchwork quilt of special interest legislation, and we will wistfully remember when the Code was the Code that Karl gave us, a singular thing of beauty.

