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Fred H. Miller

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# IS KARL'S KODE KAPUT?

*Fred H. Miller\**

## I. INTRODUCTION

The theme of this Symposium is: "Is the UCC Dead, or Alive and Well?" It might seem odd to ask that question about a statute enacted in all fifty states, which has been termed "the most spectacular success story in the history of American law."<sup>1</sup> However, it may be that all is not as well as the record suggests.

First, while the Code is widely enacted, it is less than fully uniform. After twenty years, Vermont still has not updated its version of Article 9.<sup>2</sup> More than a decade after the 1977 amendments to Article 8, two states, Alabama and Vermont, have not yet enacted the amendments.<sup>3</sup> Even current Code efforts are not uniform. Thus, while forty-four jurisdictions have enacted new Article 4A basically without amendment,<sup>4</sup> new Article 2A, five years after its promulgation, is law in only thirty-one jurisdictions;<sup>5</sup> four of those still abide by the original version as it read before it was amended in 1990 to accommodate non-official amendments that California and other states enacted when they embarked on a program of non-uniform amendments to the original text.<sup>6</sup> Moreover, even the text of Article 2A, as enacted in the remaining twenty-seven jurisdictions with the official 1990 amendments, is not uniform, principally but not solely because of what may be termed "consumer related" amendments.<sup>7</sup>

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\* Kenneth McAfee Centennial Professor, George Lynn Cross Research Professor, and Professor of Law, University of Oklahoma. Professor Miller is Executive Director of the National Conference of Commissioners on Uniform State Laws (NCCUSL), one of the two sponsors of the Uniform Commercial Code. He is a member of the American Law Institute (ALI), the other Code sponsor, and serves on the Permanent Editorial Board (PEB) for the Code.

1. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 5 (3d ed. 1988). The Code, in whole or in part, governs in all 50 states, the District of Columbia and the U.S. Virgin Islands. 1 *id.* at 1, 5. All citations are to the 1990 Official Text of the Code unless otherwise noted.

2. 1 *id.* at 1 n.1.

3. 1 *id.* at 1 nn.1-2.

4. See [State UCC Variations] U.C.C. Rep. Serv. (Callaghan) xvii-xviii (1992).

5. See *id.* at xiii-xiv.

6. See *id.*

7. See, e.g., COLO. REV. STAT. § 4-2.5-101-533 (1992); MINN. STAT. § 336.2A-101-529 (Supp. 1993). Interestingly, the consumer-related amendments are not all consumer protective. For example, the California amendments, for reasons best known to their drafters, seem

Even where the text of the Code appears uniform, it may not be. For example, a significant number of non-uniform laws outside the Code, particularly consumer protection statutes or regulations, may change the results reached under the UCC provisions. Even where the UCC recognizes this, so that "amendment" outside the UCC is not misleading, the end results still may not be uniform from jurisdiction to jurisdiction.<sup>8</sup>

Worst of all, however, the UCC may be increasingly less relevant in providing the applicable rule in commercial contexts. For example, although originally driven by consumer-type considerations concerning funds availability, the UCC's provisions regarding check collection have been substantially preempted by Regulation CC,<sup>9</sup> the implementing regulation under the Expedited Funds Availability Act.<sup>10</sup> This is a significant inroad,<sup>11</sup> and federal preemption is not limited to this one area.<sup>12</sup> Also conventions and model laws, which become the paramount law of the land if adopted by the United States, increasingly internationalize commercial law. As a result, the Code becomes less relevant to an increasing number of transactions which, absent the federal rule, it might otherwise have governed.<sup>13</sup>

Thus, a close look suggests that the Code, if not dead, may be mortifying. The theme of this Article, however, is that, upon an even more careful examination, the Code is alive and very well. Nonetheless, to

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to cut both ways. To illustrate, California's version of § 2A-104 broadly permits consumer law outside Article 2A to override the 2A provisions, but California's version of § 2A-106 reduces the protection of consumer lessees against choice-of-forum clauses in leases. CAL. COM. CODE §§ 10104, 10106 (West 1990 & Supp. 1993). On reflection, one may surmise this merely represents the legislative process, which seldom is one-sided and often candidly involves some "horse trades." A uniform law, ultimately destined to be legislation, is often crafted no differently. Indeed, NCCUSL policy on criteria for uniform acts includes consideration of whether the act will be enacted by a substantial number of jurisdictions. See NCCUSL, REFERENCE BOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 97 (1992-1993 ed.) (Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts (Aug. 2, 1988)).

8. To illustrate, to the extent that U.C.C. § 3-302 refers to and defers to the Federal Trade Commission Holder Rule, 16 C.F.R. § 433 (1992), uniformity of the rule, albeit outside the UCC, is achieved. However, state consumer protection rules, such as UNIF. CONSUMER CREDIT CODE § 3.204 (1974), also take precedence over other UCC sections, such as § 3-602. To that extent, because the Uniform Consumer Credit Code is not the law in every state and state consumer law is not uniform, the end results are not uniform from state to state.

9. 12 C.F.R. pt. 229 (1992).

10. 12 U.S.C. §§ 4001-4010 (1988 & Supp. III 1991).

11. Numerous comments to UCC Article 4 refer to the extent of preemption by Regulation CC and its impact on Article 4.

12. There always has been a federal presence in commercial law, such as the Federal Bills of Lading Act, 49 U.S.C. §§ 81-124 (1988). But of late the presence seems to be rapidly growing. See, e.g., Barkley Clark, *Secured Transactions*, 42 BUS. LAW. 1333, 1333-95 (1989).

13. See, e.g., U.C.C. § 1-105 (1990).

maintain its health, some precautionary medicine must be administered. This Article discusses the probable prescription.

## II. IS THERE AN ALTERNATIVE TO THE CODE?

The UCC is unique: It is a uniform law enacted in every state and covers a broad range of both simple and complex transactions of tremendous legal, social and economic significance. In addition to its commercial importance, the UCC is one of the best examples of the viability of state government. It demonstrates that the federal system continues to make sense by evidencing that state legislatures, and cooperating groups like the NCCUSL and the ALI, can do a competent, indeed an outstanding, job of crafting and updating state law. Nonetheless, one may reasonably ask: Would it not be more rational, especially given the current degree of federal preemption and internationalization, to replace state action with action by Congress?

There are good reasons to conclude that this alternative is not desirable.<sup>14</sup> First, Congress is seldom able to act responsibly, particularly on a matter as broad and complex as commercial law—at least as Congress is presently structured. Members of Congress rarely study, formulate the details of, or draft legislation themselves. Those tasks are largely delegated to their staffs, who serve the members of Congress directly, or work indirectly on the staffs of the various committees.<sup>15</sup> While the staff for the most part is composed of bright and hard working people, they tend to be young, of short tenure and have very limited real experience. Their knowledge of and experience with economics, institutions, the realities of how commerce functions and its legal processes, comes largely from books. As one consequence perhaps, a continuous lack of realistic rules emanate from Congress. For example, many bankers believe the availability times of the Expedited Funds Availability Act are a cause of serious fraud losses for financial institutions.<sup>16</sup> The discretion and detail many federal laws leave to a regulatory agency also shows Congress's

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14. For a similar discussion of the undesirability of relying on Congress, see Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 *MERCER L. REV.* 799, 801-02 (1992).

15. See CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 482 (3d ed. 1982) ("Staff . . . is given responsibility for much of the legislative decision-making . . . . [They] develop ideas, initiate proposals for bills, and drum up support.").

16. See, e.g., AMERICAN BANKERS ASS'N, ABA CHECK FRAUD SURVEY 1992, at 24 (1992) (opinion mixed as to whether exposure to check fraud losses increased due to implementation of Regulation CC: 45.4% believed exposure increased, 37% experienced no change, and 17.5% had inadequate basis to judge).

lack of a detailed grasp of the problems engendered by the legislation.<sup>17</sup> Another example of Congress's inability to competently legislate detail is demonstrated in the Food Security Act: "Although even the most pejorative hyperbole is inadequate to fully express what section 1324 [the Food Security Act] deserves, the following is a frail attempt: Section 1324 is internally inconsistent, unintelligible, and unworkable. . . . It is a disaster."<sup>18</sup>

Second, most observers would also acknowledge that special interests significantly shape, and perhaps even corrupt, the congressional law-making process. The legislative hearing process often appears more devoted to establishing a record for reelection than to sorting out facts to frame a solid product. This process often produces an amalgamation of independent provisions derived from the proposals of various groups, which are not always synthesized, rather than an integrated, thoughtfully drafted statute.

Third, the congressional process is usually slow as well as imperfect. The problems referenced above may result in stalemate on a given subject. In other cases, they may prolong focus on a subject that prevents action on other subjects.

A final, but no less important reason for questioning the wisdom of encouraging federal legislation, is more philosophical; it is reflected in the Tenth Amendment to the Constitution and the underlying principles upon which the United States was founded.<sup>19</sup>

### III. CODE REALISM

If comprehensive congressional action is not an acceptable solution, is the Code bound for a slow death as it descends into selective irrelevance and a posture of increasing non-uniformity as revisions to it or new articles are promulgated? Such revisions and articles always will be necessary for reasons similar to those driving the present decade-long Code

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17. For example, 12 U.S.C. § 4008(c)(1) (1988) states: "In order to carry out the provisions of this chapter, the Board of Governors of the Federal Reserve System shall have the responsibility to regulate (A) any aspect of the payment system . . . ; and (B) any related function of the payment system . . ." *Id.* Talk about blank checks!

18. Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 *BUS. LAW.* 1343, 1352 (1986); see also *Fed Reluctantly Passes Consumer Benefit Rules*, *DAILY OKLAHOMAN*, Sept. 11, 1992, at 18 (reporting Federal Reserve Board members' consternation over regulations mandated by Truth in Savings Act). "The net result of the massive costs of this regulation will be to reduce savings yields." *Id.* (quoting Federal Board Member John P. LaWare). "This is a sledgehammer approach" to some abuses. *Id.* (quoting Board Vice-Chairman David W. Mullins).

19. See U.S. CONST. amend. X.

revision process. These reasons include: (1) technological developments (presently electronic funds transfers; electronic data interchange; automated check processing and truncation); (2) developments in business and other practices (presently the advent of leasing as an important commercial alternative, variable rate notes; uncertificated securities and the holding of securities in accounts without certificate issuance; the advent of floating liens, informational services and better procedural devices that render bulk sales legislation outdated or inefficient); (3) divisions of authority because of statutory ambiguities or changed policy perspectives; (4) the need to modernize language and to increase uniformity by including previously excluded areas that have developed in importance; and (5) accommodation of changes in other law that relates to the Code (as presently in the cases of the Expedited Funds Availability Act and the Bankruptcy Code).

To address this question, one must first assess what a realistic goal for the Code includes. That goal does not include, and probably never included, rigid uniformity. Indeed, one virtue of approaching the goal of uniformity in commercial law through the vehicle of state law, as opposed to federal legislation, is that local differences may be accommodated as long as they do not involve core issues. The Code itself accomplishes some of this.<sup>20</sup> More importantly, local differences are recognized, but variances often are compromised out in preparing current Code revisions.<sup>21</sup> Beyond that a limited number of non-uniform variations can be tolerated, as long as uniformity on basic issues is maintained.<sup>22</sup>

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20. For example, U.C.C. § 4-106 on "payable at bank" instruments and § 9-401 on "place of filing" recognize regional differences and choices, on which reasonable minds may differ. This can, if overlooked, give a misleading impression. Thus, Professor Friedman states: "The Code, however, was ruthless in its attitude toward regionalism. The notion that any state in the Union might conceivably have an economic or social interest which called for an exception to the Code was considered heresy, and in fact not tolerated." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 675-76 (2d ed. 1985).

21. See *infra* notes 23-25 and accompanying text.

22. For example, see 1 WHITE & SUMMERS, *supra* note 1, at 20-22, which states:

If one puts himself in the position of a lawyer who is attempting to resolve a commercial law problem for a client in 1938 on the one hand and in 1988 on the other, would anyone doubt that the lawyer in 1988 would find the law more uniform, more certain, more precise and more sensible?

1 *Id.* at 21. This Article agrees that core uniformity is a realistic goal of the Code. Non-uniformity from consumer law adjustments can for the most part be classified as falling within this guideline, for seldom does consumer law impinge on a basic issue in the "commercial" Code. Thus, comment 3 to U.C.C. § 4-101 suggests that consumer concerns should be addressed separately. Where consumer-oriented proposals of a more major nature are advocated, they are customarily rejected in favor of more modest methods to address the perceived issues in the Code. For example, Professor Rubin's arguments to radically alter the allocation bal-

What of the past history of slowness in enactment and other basic non-uniformity? The record of several new articles suggests that prior enactment experience is no longer an accurate guide under the newer emphasis on this process in the NCCUSL.<sup>23</sup> Significant non-uniformity beyond consumer provisions, however, may remain a problem that requires additional prescriptive medicine. To explore this matter, consider the action of the California Bar Committee that studied the original version of Article 2A. The committee recognized that the goal of uniformity must be given considerable weight and should prevail over the tendency of any state group that studies a product, nationally derived through the efforts of the NCCUSL and the ALI, to rephrase it. Justifiably, the committee feared destruction of the consensus reached in the national formulation process. The goal of uniformity should also prevail because, given enough time and effort, it is always possible to "improve" any Code article, or any other proposal. Perfection, however, is an illusory goal.

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ance on losses from forgery and alteration (stated in revised Articles 3 and 4), so that the balance is more in favor of consumers, have been rejected after careful consideration, and much less drastic adjustments have been adopted. Compare Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 592 (1991) ("The revisions of Articles 3 and 4 are superbly drafted . . . however, they are deeply flawed. . . . [T]hey generate excessive social costs by imposing unnecessary losses on consumers and providing too few protections.") with CAL. COM. CODE §§ 3101-4504 (West Supp. 1993) (UCC Articles 3 and 4 as adopted in California).

Of course, if a particular consumer (or other) issue has gone beyond being a matter of only local focus, the Code itself must accommodate it in order to maintain broad uniformity with respect to basic issues. For example, the UCC accommodated the widespread denial of the holder-in-due-course doctrine in consumer transactions involving negotiable instruments, by specifically recognizing well-developed legislation and other regulations outside the Code. See U.C.C. § 3-302(g) & cmt. 7. Where an issue is equally clear, but outside law is not perceived to have developed to a high degree of uniformity, the Code may be amended to include or recognize a specialized rule instead. To illustrate, the UCC has imposed limitations on boiler-plate choice-of-law and choice-of-forum clauses in § 2A-106, and has recognized the policy allowing the assertion of possible reasons for nonpayment in relation to consumer lessees in consumer finance leases in § 2A-407. Compare UNIF. CONSUMER CREDIT CODE § 3.404 (protecting consumer lessees) with FTC Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. pt. 433 (1992) (which does not apply to consumer leases).

As Articles 2 and 9 are revised, the challenge in the consumer context will be to identify similar policy issues and try to reach consensus on them. Two such issues appear to be: (1) limitations on disclaimers and limitations of remedy in consumer transactions; and (2) an adequate remedy for secured party misbehavior in enforcing a security interest against a consumer debtor. Both issues are more than local, and are of a basic nature. Today the law is not uniform; any revision should be uniform on these issues in order to succeed.

23. Article 4A was enacted in 44 jurisdictions in three legislative years; revised Articles 3 and 4 were adopted in 19 jurisdictions in two legislative years; and Article 2A, since the 1990 amendments, has been enacted in more than twice the number of original enacting jurisdictions. [State UCC Variations] U.C.C. Rep. Serv., *supra* note 4, at xiii-xix.

Nonetheless, the California Bar Committee concluded that certain non-uniform amendments of more than a local nature should be made before Article 2A could be accepted for enactment in California. Those amendments were made. What the committee did not appreciate, however, was that adopting those amendments would largely destroy their earlier adherence to the goal of uniformity, because amendments in important states such as California are likely to be seriously considered elsewhere, which indeed they were. Moreover, the existence of non-uniform amendments in any state inevitably tempts other states to adopt non-uniform amendments. Perhaps this temptation led to what happened with Article 2A—the remaining states were reluctant to act and thus postponed action until the choice between competing provisions was resolved. In contrast, the California Bar group is participating in the revision of Article 5 on letters of credit prior to its promulgation so that their views can be factored into a uniform product. It is likely that the Article 2A experience will not be repeated, because Articles 3, 4 and 4A, which also involved earlier California participation, did not incur the same problems as Article 2A.

But not all bar or legislative study groups or law revision commissions have the ability to so directly participate during the drafting stage. While they should consider the product and advise the commissioners and ALI members from their state, they often do not. Thus, if their study comes after promulgation, and if they are to later forego “improving” the end product, practical questions remain: What should the function of a legislative or bar study committee or a law revision commission be with respect to a uniform law? What about any real defects that do appear? And what of the idea that the states are experimental laboratories?

To answer the latter two queries first, the slogan of the NCCUSL suggests one response: “diversity of thought, uniformity of law.”<sup>24</sup> States must realize that each uniform law is not drafted in isolation, but is shaped by input from various sources. Participating sources include NCCUSL commissioners and ALI members from each state, participants from state bars or law revision commissions, observers and advisors from groups interested in the legislation, and the American Bar Association. These sources share experiences with the legal subject under the diverse state laws. In short, experimentation has largely occurred before a uniform law is formulated, and the best results from that experimentation go into the uniform product.

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24. See Miller, *supra* note 14, at 819.



To the extent that the end product nonetheless is perceived to have serious defects, as was the case with the original text of new Article 2A, study and revision commissions should bring such problems to the attention of the existing NCCUSL/ALI committee for the article, or to the PEB and to the NCCUSL's Uniform Commercial Code Committee. Such an approach is preferable to individual cures, which are unlikely to be uniformly accepted in other places and are likely to lead to more non-uniformity. Indeed, this process was used by some state groups in connection with Article 2A, and it produced amendments to that article in 1990, beyond those generated by California, thus better facilitating uniform enactment of Article 2A, rather than a state-by-state series of diverse non-uniform amendments.

In the future, moreover, it is unlikely that there will be twenty- to thirty-year cycles for Code amendments. Such long periods lead to statutes that are increasingly out-of-step with technology and commercial practices, thereby inviting non-uniform amendments. Future uniform amendments to the UCC are likely to be proposed as needed for enactment in smaller packages at more frequent intervals. This will decrease the pressure for state-by-state, non-uniform amendments.

Nonetheless, after experience under a uniform law, new issues are certain to arise that call for legislative redress. While problems necessitating possible amendment of the UCC should be brought to the attention of the PEB and NCCUSL's Uniform Commercial Code Committee for national action, some non-uniform experimentation at this stage may be desirable, which is best accomplished by bar study groups and organizations like law revision commissions. Without that experimentation, any later uniform amendment addressing the issue will be based on little experience and, thus, will be less likely to work well.

Even with such experimentation, what can be termed "core uniformity" will almost always still exist. The problem arises because the present law does not address new technology or practices, and thus contains no uniform rule to be impaired. The problem may also arise because the unamended law does not address the perceived issue. In that case, the ambiguous law may be interpreted in accord with any reasonable solution provided by a non-uniform amendment. Thus, the non-uniform amendments may even advance uniformity.<sup>25</sup> Even when

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25. Another vehicle developed to reduce non-uniformity arising from Code ambiguity is the Commentary process of the PEB. See *PEB Resolution on Purposes, Standards and Procedures for PEB Commentary to the UCC*, [PEB Commentaries] U.C.C. Rep. Serv. (Callaghan) vii (Mar. 14, 1987). Commentaries are well-reasoned positions, rather like updated comments to the Code, that point the way to proper court interpretation of the Code. See *id.* To date,

neither of these situations exists, if the problem arises because the law outside the UCC is unclear and the non-uniform amendment brings the transaction under the Code in an attempt to provide clarity, uniformity is not harmed and experimentation is served. Ultimately, the results of this experimentation can be used by the NCCUSL and the ALI to produce a uniform amendment to the UCC.

Turning to the key inquiry: What should a legislative or bar study committee or a law revision commission do if it does not initially participate in drafting, and if it refrains from reviewing a Code amendment for style or substantive improvement? To enact any statute, a legislature must be furnished with persuasive answers to three matters: (1) What does the statute do? (2) Why is it needed? and (3) How would it change present law? While any amendment to the UCC often addresses the first two matters in a prefatory note, the comments or contemporary law review articles, only a local group can address the second matter and the third matter in context. Thus, this is one necessary function that a legislative or other study group may perform. A second necessary function that such a group may perform is to appropriately select any necessary options, which may require considerable analysis to be done properly, and to determine how the UCC amendment comports with the local jurisprudence for purposes of repeals and integration. A final function that a legislative or other study group is well-suited to perform is to examine how other local law relates to the new law.<sup>26</sup> If these tasks are compe-

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the PEB has issued nine commentaries resolving significant actual or potential splits of authority. See *PEB Commentary* Nos. 1-7, [PEB Commentaries] U.C.C. Rep. Serv. (Callaghan) (Mar. 10, 1990); *PEB Commentary* No. 8, [PEB Commentaries] U.C.C. Rep. Serv. (Callaghan) (Dec. 10, 1991); *PEB Commentary* No. 9, [PEB Commentaries] U.C.C. Rep. Serv. (Callaghan) (June 25, 1992). Their effect is already being felt. See, e.g., *Utility Contracts Fin. Servs. v. Amsouth Bank (In re Joe Morgan, Inc.)*, 130 B.R. 331, 334 (Bankr. S.D. Ala. 1991) (citing Permanent Editorial Board Commentary on U.C.C. § 9-309 in relation to secured party priority disputes in receivables). In addition, one state bar study considered recommending certain non-uniform amendments to address perceived ambiguities in the suretyship rules under revised Article 3. However, a new PEB Commentary to address the ambiguities should alleviate the need for the amendments.

26. An important function of law review commentary should be to address these types of matters. See, e.g., Fred H. Miller et al., *Leases of Goods in Oklahoma: The New Rules*, 41 OKLA. L. REV. 417 (1988).

Unfortunately, the academic world often perceives that it is more fashionable and profitable to criticize the substance of the Code revision effort. A classic piece in this genre is David A. Rice, *Lessons About the Realities of Contract for U.C.C. Article 2 Revision and a Future Software Contract Statute*, 18 RUTGERS COMPUTER & TECH. L.J. 499 (1992). With all due respect, some "realities" asserted by Professor Rice, which hardly are conclusively established and seem derived more from perception than empirical evidence, are not the only "realities" that need to be considered in the Code revision process. Indeed, to assert the former without recognizing a second set of realities constituting what it is possible to negotiate in the process

tently performed, they will more than occupy the time of the study group performing them, and will return greater dividends than a review of the style or substance of the uniform law which, almost inevitably, will result in non-uniform changes that destroy the national consensus reached through the NCCUSL and the ALI process.

Finally, what of federal preemption and internationalization in the commercial law context? Preemption can be viewed as a result of the failure of the state law system, rather than a sought-after consequence. Thus, it seems clear that the Expedited Funds Availability Act would not have been passed but for the failure of the commercial law system to accomplish the reforms needed to address the issues through revision of

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of formulating a Code revision, may potentially harm the Code and its uniformity. It is a contribution to have Professor Rice's views early, as opposed to after the product is finished—as has too often been the case. See, e.g., Michael J. Herbert, *A Draft Too Soon: Article 2A of the Uniform Commercial Code*, 93 COM. L.J. 413 (1988). It would be better, however, if these views were expressed through the various avenues for participation in the evolution of the statute, such as through membership in the UCC Committee of the American Bar Association, which examines and comments on each UCC draft. If that route were taken, the resulting tempering of the views might result in a compromise (as all legislation is), and thus in one perspective a less than "ideal" product, but it would also produce a product that would be the best draft obtainable under the circumstances. This is the other "reality," and that reality needs recognition, explanation and support in the literature.

A related harm that can arise from failure to appreciate the actual considerations that go into a statutory provision is evidenced in a student note by Robert M. Lewis, Note, *Allocation of Loss Due to Fraudulent Wholesale Wire Transfers: Is There a Negligence Action Against a Beneficiary's Bank After Article 4A of the Uniform Commercial Code?*, 90 MICH. L. REV. 2565, 2579-80 (1992). The Note does not advocate rejection or amendment of the statute, but—ignoring the careful balance crafted into Article 4A among the parties that participated in its preparation and the policy goals that the deliberately chosen rules effectuate—advocates an interpretation of Article 4A that in certain respects explicitly was sought to be avoided, as explained in the comment to U.C.C. § 4A-102. To knowingly advocate such an interpretation is disingenuous or irresponsible, and promotes a short-term view at the expense of a long-term goal. This is a poor bargain, especially when several different rules might have been reasonably chosen, even though the one preferred and now advocated was not.

The ultimate result of these untempered critical approaches can be well illustrated by the decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993). In *Greenwood* the court upheld, under a federal statute, the ability of a state-chartered bank to export Delaware law on late fees into Massachusetts, which does not allow such fees. *Id.* at 827. The decision, while correct, represents what one might expect would be the conclusion to the type of process this Article argues against—a process that derailed the attempt of the Uniform Consumer Credit Code to establish a uniform and reasonable rule for state consumer credit legislation. Under this sort of conclusion in the context of the *Greenwood* litigation, instead of a reasonable but perhaps less than "perfect" result, consumers are powerless to prevent the law of the least common denominator state from eroding greater local protection. On the other side, even though the battle in *Greenwood* was won after much cost and uncertainty, creditors have many more battles to wage before the precise terms of the law are clear. Is it sensible to accept such poor policy, uncertainty and costs because the alternative represents a rule not to the complete liking of all? In the context of the UCC, is the failure to comprehend this risk by far the greatest danger the Code faces?

UCC Articles 3 and 4. The truth of this conclusion can be supported by a number of collateral observations. First, instead of writing its own rules for funds transfers in Regulation J, the Federal Reserve Board largely adopted the consensus product worked out in Article 4A, governing funds transfers involving Fedwire in Regulation J.<sup>27</sup> Second, even though federal law gave the Securities and Exchange Commission (SEC) broad preemptive power to regulate transfers of investment securities and thus the ability to supersede much of Articles 8 and 9 as to this type of property,<sup>28</sup> the SEC has instead chosen to participate in the state law reform effort to revise Articles 8 and 9, at least as long as that effort is making progress.<sup>29</sup>

Of course, the Code will always govern a large number of domestic transactions, no matter what increase occurs in international law and trade. However, to the extent that cross-border transactions are now more significant, the Code may be harmonized with international rules, or vice versa. For example, current Code revision efforts, like those for Articles 2 and 5, focus on minimizing differences between domestic and international governing laws.<sup>30</sup> And, going the other way, the Model Law on International Credit Transfers<sup>31</sup> certainly would have been much different if many of the participants who prepared Article 4A had not also participated in negotiating the outcome of that international effort.<sup>32</sup>

#### IV. CONCLUSION

Karl Llewellyn's Code is still working. Perhaps it is not working exactly as he envisioned,<sup>33</sup> but nonetheless it is working successfully, and beyond what might have been reasonably expected at its inception. In

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27. 12 C.F.R. § 210.25(b) (1992) (incorporating U.C.C. art. 4A into Regulation J).

28. See Robert C. Mendelson, *Investment Securities Review*, 46 BUS. LAW. 1697, 1703-09 (1991).

29. See U.C.C. rev. art. 8 reporter's prefatory note (Tent. Draft May 1, 1992).

30. See Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991); Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT'L BUS. L. 227 (1992).

31. See *Report of the United Nations Commission on International Trade Law*, U.N. GAOR, 47th Sess., Supp. No. 17, Annex 1, at 48, U.N. Doc. A/47/17 (1992) (UNCITRAL Model Law on International Credit Transfers as adopted May 15, 1992).

32. See FRED H. MILLER & ALVIN C. HARRELL, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* 10-57 (2d ed. 1992).

33. In 1967 Llewellyn wrote that the Code "has already been mutilated by conditions and by the ignorance of the bar, and will take a quarter-century to come into dominant force." WALTER P. ARMSTRONG, JR., *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 77 (1991). Certainly the latter statement has proven true. Hopefully, the first will not become true.

objective measure, the UCC is a living, vital document of more direct and indirect relevance today than when it was initially promulgated. It is likely to remain so, as long as people of dedication and goodwill contribute their energy to improving and promoting it, rather than to questioning reasonable results arrived at through a participatory and open process. In short, the extent of the Code's well-being is up to each of us.