

# Contemporary Commercial Law Literature in the United States

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With the heady enthusiasm of the recently tenured I resolved several years ago to read *systematically* through all the secondary literature published in the field of commercial law in the previous decade. To obtain tenure I had, of course, written the obligatory thorough-but-narrowly-focused law review article. When relevant to my research or my teaching I had read law review articles as they were published. What I now proposed to do, however, was to read systematically and carefully through this accumulating literature. To the extent I articulated my reasons for planning this research enterprise, I hoped to place my own research in a wider context. My interest was spurred by similar attempts, on a more ambitious scale, to characterize or explain contemporary legal scholarship in other fields,<sup>1</sup> suggesting potentially fruitful comparisons with my own conclusions about the commercial law literature.

I have not yet finished this enterprise. Other research projects have intervened; new literature continues to flow across my desk, providing more and more data to be absorbed and collated. I begin to see, however, the outline of the relevant questions and in the following essay I sketch the contours of my preliminary conclusions.

The essay begins with a discussion of several initial problems that I faced when determining the scope of my study. It then turns to an inventory of contemporary commercial law literature in the United States and to a summary of its characteristics. The final section of the essay suggests some concluding thoughts, including brief speculation on how trends in commercial law scholarship may differ from developments in other legal fields.

Before turning to the substance of the essay I should stress that the essay is not intended to be a bibliographic survey citing all relevant sources or summarizing the contents of the literature. Such bibliographies may be found elsewhere.<sup>2</sup>

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I received the very important symposium issue of the *Yale Law Journal* on legal scholarship too late to do more than add some footnotes to this essay. *Symposium—Legal Scholarship: Its Nature and Purposes*, 90 *YALE L.J.* 955-1296 (1981). Much of the material in that issue requires rethinking and recasting the thoughts suggested in this essay. Perhaps, too, the warning that law professors may be the very worst persons to write essays like this one should be taken to heart. See Fiss, *The Varieties of Scholarship*, 90 *YALE L.J.* 1007, 1016 (1981).

1. G. WHITE, *TORT LAW IN AMERICA—AN INTELLECTUAL HISTORY* xi-xvi & 211-43 (1980); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *TEX. L. REV.* 1307 (1979). Professor Tushnet has since elaborated his perspective in other articles and book reviews. See Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 *YALE L.J.* 1205 (1981).

2. See M. EZER, *UNIFORM COMMERCIAL CODE BIBLIOGRAPHY* (1972 & Supp., A. Squillante 1978). Periodic bibliographies are published in the *Business Lawyer* (highly selective), the *Commercial Law Journal*

## I. SCOPE OF THE ESSAY

Soon after starting my research project I discovered that I had to make some preliminary choices as to the scope of my reading. Some difficulties were matters of terminology; others involved strategic choices. Fortunately all these difficulties could be, and were, resolved by fiat. Because these choices may affect the conclusions suggested in this essay I have set out in this first part of the essay both the difficulties encountered and their resolution.<sup>3</sup>

### A. *What Subjects Are Included in "Commercial Law"?*

The term "commercial law" is not a term of art in Anglo-American law. As Professor Bruno Greene has noted:

If pressed for a definition of "commercial law" as it appears in the system of the United States today, an American lawyer would be embarrassed for an answer, because the term does not denote to him a segment of his law, but merely a convenient denomination of transactions which he had been trained to label "commercial."<sup>4</sup>

Professional groups who claim to practice or to teach commercial law do not agree on what is the subject matter of their practice or courses.<sup>5</sup> Nor are legal bibliographies consistent in their use of the rubric "commercial law."<sup>6</sup> There is, in other words, no West "key number" system for commercial law.

The absence of a distinct body of commercial law is often cited as a characteristic that distinguishes Anglo-American law from the civil law

(semi-annual; comprehensive), the *Uniform Commercial Code Law Journal* (quarterly summary of selected law review articles), and the *Uniform Commercial Code Law Letter* (monthly; selective). Bibliographies in the field are listed under the rubric "commercial law" in the annual *Legal Bibliography Index* (Chiang & Dickson eds.) published by Louisiana State University.

3. One difficulty which I did not consider and which in retrospect perhaps I should have pondered, is the meaning of "legal literature."

When I began my research I assumed that I would consider only *secondary* literature: *i.e.*, writing about *authoritative* court opinions and legislation. The distinction is an important one because it assumes a "positivistic" model of the legal system prevalent in Anglo-American jurisprudence and because legal materials are organized to reflect the distinction. Nevertheless, for the purposes of my research, which is basically a study of legal culture, there may be advantages in grouping together authoritative and secondary texts. For a suggestive study as to degrees of authority, see Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

Given the focus of the essay, perhaps the term "legal scholarship" rather than "legal literature" should be used. (Query, though, whether scholarship must be captured in written or other tangible form.)

4. GREENE, *Commercial Law in the United States*, in L'UNITÉ DU DROIT DES OBLIGATIONS (THE UNITY OF THE LAW OF OBLIGATIONS) 159, 164 (M. Rotondi ed. 1974). See also Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 40 (1959). For the rest of the common law world, see Schmitthoff, *Commercial Law in the 19th and 20th Centuries*, in THEN AND NOW 1799-1974: COMMEMORATING 175 YEARS OF LAW BOOKSELLING AND PUBLISHING 33, 42 (1974); Ziegel, *The American Influence on the Development of Canadian Commercial Law*, 26 CASE W. RES. L. REV. 861, 861 (1976).

5. See MacLachlan, *Commercial Law as an Academic Subject*, 66 COM. L.J. 69, 69-70 (1961).

6. The *Index to Legal Periodicals* uses "commercial law" as a catch-all category, somewhat arbitrarily allocating an entry to "commercial law," or to a more specific rubric (*e.g.*, negotiable instruments, sales, secured transactions), or sometimes to both general and specific rubrics. The *Current Law Index* uses the rubric as a residual entry with a suggestion that the researcher turn to one or more of 63 more specific rubrics ranging from "current accounts" to "warranty."

systems of Europe, and the different legal histories of these two families of law suggest some reasons why "commercial law" is not used as a term of art in Anglo-American countries.<sup>7</sup> In the United States there has been no tradition of specialized legislation for merchants distinct from general civil law rules applicable to all persons.<sup>8</sup> There have been no special commercial courts; no commercial registers in which all merchants must register. Until recently, law faculty curricula have been organized around more specialized topics, such as the law of bills and notes, rather than around the law of a distinct and comprehensive code.

With the adoption of the Uniform Commercial Code in virtually all jurisdictions of the United States, however, "commercial law" has been used more and more often as a synonym for the body of law included in the Code.<sup>9</sup> Nowhere is this development of usage more pointedly illustrated than in the recent revision of the entry for "commercial law" in the latest edition of *Black's Law Dictionary*. In the 1968 edition the entry read:

A phrase used to designate the whole body of substantive jurisprudence applicable to the rights, intercourse, and relations of persons engaged in commerce, trade, or mercantile pursuits. It is not a very scientific or accurate term. As foreign commerce is carried on by means of shipping, the term has come to be used occasionally as synonymous with "maritime law;" but, in strictness, the phrase "commercial law" is wider, and includes many transactions or legal questions which have nothing to do with shipping or its incidents. . . .<sup>10</sup>

The 1979 edition streamlines this entry to read:

A phrase used to designate the whole body of substantive jurisprudence (*e.g.* Uniform Commercial Code; Truth in Lending Act) applicable to the rights, inter-

7. The trend in Europe, however, is towards eliminating the distinction between civil and commercial law. *See*, in addition to the sources cited in note 4 *supra*, Kozolchyk, *Commercialization of Civil Law and the Civilization of Commercial Law*, 40 LA. L. REV. 3 (1979). A useful, if iconoclastic, brief explanation of the civil law distinction is set out in J. MERRYMAN, *THE CIVIL LAW TRADITION* 107-08 (1969). At a superficial level it might be argued that American law has moved in the opposite direction by the introduction of the *Uniform Commercial Code* with its special rules for the merchant. *See, e.g.*, U.C.C. § 2-104. Professor Schlesinger, however, notes that the UCC merchant provisions do not have the same scope as traditional European commercial codes. Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER. AM. L. REV. 11, 40-42 (1959).

8. Legislation, especially uniform commercial law legislation, has often incorporated by reference the "law merchant," and this might seem to contradict the text. *See, e.g.*, U.C.C. § 1-103. Nevertheless, this reference has become increasingly cryptic, is relied on infrequently, and is usually only a minor factor in a decision when it is referred to. For a recent example, see *Pribus v. Bush*, 118 Cal. App. 3d 1003, 173 Cal. Rptr. 747 (1981) (prior law, including the law merchant, looked to for answer on use of alonge where the UCC did not provide an explicit answer). The relation between the law merchant and the common law, which is usually described as a process in which the common law absorbed the law merchant by the end of the 18th century, is discussed in Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMBRIDGE L.J. 295 (1979).

9. The Code covers sales, commercial paper, bank deposits and collections, letters of credit, bulk transfers, documents of title, investment securities, and secured transactions. As a matter of usage one would probably not include the law governing investment securities (Article 8) within the term "commercial law." Certainly Article 8 is usually ignored in general Code commentaries and commercial law coursebooks.

A certain arbitrariness in the subjects included in the Code should be noted. Several subjects originally considered proper for inclusion in the commercial codification were omitted in the course of preparing an official text. Professor Friedrich Kessler prepared several drafts of provisions on foreign remittances before opposition from specialists within the bar apparently forced the abandonment of the project. A proposed article on commercial agency was abandoned before work on the topic started.

10. BLACK'S LAW DICTIONARY 338 (rev. 4th ed. 1968).

course, and relations of persons engaged in commerce, trade, or mercantile pursuits. See Uniform Commercial Code.<sup>11</sup>

This change in usage is reflected to some extent in recent changes in professional organization,<sup>12</sup> law school curricula,<sup>13</sup> and bibliographies of legal materials.<sup>14</sup>

Use of the Uniform Commercial Code as an organizing principle to create a separate classification within private law was anticipated.<sup>15</sup> The Code drafters themselves suggest that their object was to bring together all rules governing the commercial transaction. The General Comment to the official text of the Code states that "[t]he concept of the present Act is that 'commercial transactions' is a single subject of the law notwithstanding its many facets. . . . This Act purports to deal with all the phases which may arise in the handling of a commercial transaction, from start to finish."<sup>16</sup> This unitary vision was quickly picked up by academic lawyers, and commercial transactions course materials reflecting the organization of the Code soon appeared.<sup>17</sup>

11. BLACK'S LAW DICTIONARY 245 (5th ed. 1979).

12. In 1962, for example, the Business, Corporation & Banking Law Section of the American Bar Association reorganized its commercial law committees under the rubrics provided by the major Code articles.

13. The Association of American Law Schools now classifies law teachers under the subject "commercial law," which includes sales and secured transactions. There is, however, a separate subject classification for "commercial paper," which includes negotiable instruments.

14. The *Index to Legal Periodicals* includes only the private law subjects governed by the Code under the rubric "commercial law." The classification of items in the *Index*, however, is not always consistent. See note 6 *supra*. In other bibliographies there has been a gradual decrease in favor of "uniform commercial code." See, e.g., *Legal Contents* (formerly *Contents of Current Legal Periodicals*), *Current Law Index*, *Current Index to Legal Periodicals*.

15. Professor Schlesinger has written:

The more systematically a code or a group of codes is arranged, the more tempting it becomes for text-writers simply to follow, or even to take for granted, the codes' system and organization. . . . [I]n jurisdictions adopting the Uniform Commercial Code it may become difficult for text-writers and law teachers to explain the law embodied in the Code without adjusting their discussion to the Code's basic system and conceptual framework. Even before the Code had been enacted in a single state, the developing project had caused considerable ferment among legal scholars and had inspired attempts to integrate the various commercial subjects under a single over-all heading such as Commercial Transaction. Widespread enactment of the Code will give strong impetus to this movement, and thus will have a marked influence upon the basic organizations and classification of future textbooks, casebooks and law school courses in the area of commercial law (including, probably, not only sales, negotiable instruments and secured transactions, but also portions of what is now taught under headings such as suretyship, contracts, restitution and equity).

Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 47 n.109 (1959); see also 5 R. POUND, JURISPRUDENCE 72-75 (1959).

16. UNIFORM COMMERCIAL CODE xvi-xvii (1978 official text). The use of the term "commercial transactions" rather than "commercial law" to describe the organizing principle has jurisprudential implications which should be noted. It is related to Karl Llewellyn's concept of "situation sense," by which the rule for resolution for a particular dispute should emanate from the factual context. See K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 121-28 (1960).

17. See, for example, the first editions of R. BRAUCHER, A. SUTHERLAND & B. WILLCOX, COMMERCIAL TRANSACTIONS: CASES AND PROBLEMS (1953) and J. HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING (1954). Professor Gilmore's perceptive reviews of these books appear at 68 HARV. L. REV. 555 (1953) and 7 J. LEGAL ED. 97 (1954), respectively.

The success of the Code as an organizing principle, however, has had unfortunate side effects.<sup>18</sup> To focus on the Code is to focus on commercial law as private law, thereby ignoring public regulatory law except where it impinges on the private law rules. The predominance of the Code discourages other ways of organizing the study of commercial transactions, such as studying together different legal devices for raising business capital (the issuance of investment securities and loans secured by an Article 9 security interest) or contrasting rules governing real estate transactions with the Code rules for personal property. This predominance of the Code has also pushed aside the study of certain legal subjects, with the result that many recent law school graduates have only hazy notions of the basic principles governing such subjects as suretyship<sup>19</sup> and personal property leases.<sup>20</sup> The Code also separates the substantive legal rules from dispute resolution procedures, such as commercial arbitration, which one must consider when evaluating the effect of Code rules.<sup>21</sup>

Notwithstanding these limitations of the Uniform Commercial Code as an organizing principle, for the purposes of this essay I have equated commercial law literature with writings about the Uniform Commercial Code. Not only does this choice conform with the tendency of legal usage, but it also makes it easier to identify the prevalent literature.<sup>22</sup> Having made this choice, however, I must concede that a very different picture about the scholarship might

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18. Dean Roscoe Pound anticipated and deplored this development. He complained: [I]t would be most unfortunate to set up a category of commercial law in a classification of common law. Such may be one effect of the Uniform Commercial Code . . . and a tendency in the law schools to set up a course on commercial law. In such a course there is likely to be consolidated what had been taught as distinct courses in one heterogeneous artificial course so as to make room in the crowded curricula for a variety of new subjects which are acquiring importance with the advent of the service state. . . .

We . . . ought not to be setting up a substantive division which will take everyday subjects of litigation out of the general setting of our law and put up a barrier setting off related subjects in separate categories of civil and commercial and creating possibilities of conflict where they overlap.

5 R. POUND, JURISPRUDENCE 73-75 (1959). The problem with such a heterogeneous course, he added, was that "[i]t cuts across many subjects in the law, with no common principal to hold the selected severed parts together." *Id.* at 74 n.

19. The common law of suretyship was codified in the RESTATEMENT OF SECURITY §§ 82-211 (1941). It was taught for many years as a separate course or as part of a secured transactions course. *See, e.g.,* J. HANNA, CASES AND MATERIALS ON SECURITY (3d ed. 1959). The latest edition of a hornbook on suretyship is now over 30 years old with no suggestion that it will be revised. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP (1950). The only modern casebook which deals systematically with the subject of suretyship is E. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 1079-1118 (3d ed. 1976).

20. Personal property leases are frequently examined to see whether the UCC should be applied by analogy or because the transactions are disguised sales or secured transactions. Very few cases or commentators address the issue of what the law is if the UCC is not found applicable. *See generally* Mooney, *Personal Property Leasing: A Challenge*, 36 BUS. LAW. 1605 (1981).

21. Karl Llewellyn's interest in arbitration is reflected in, *inter alia*, the references to him in Professor Mentschikoff's description of the Chicago Law School study of commercial arbitration. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). For the UCC's relation to arbitration, see Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317 (1979).

22. See the bibliographies of UCC literature set out in note 2 *supra*.

emerge if one included within "commercial law" such topics as antitrust, banking, bankruptcy, or real property mortgage law.

One special difficulty, however, should be noted: the problem of distinguishing writings on general contract law from writings on the Uniform Commercial Code. Discussion of remedies for breach of contract, for example, will usually consider the Code remedies for breach of the contract for sale. Recent legal scholarship in this area has been heavily influenced by economic analysis. Should one exclude these general discussions because analysis of Code provisions is limited or incidental? I have tended to include these writings, although probably not consistently.<sup>23</sup> If *all* writings on general contracts were brought within the ambit of my research, however, some of my conclusions undoubtedly would have to be amended, with greater emphasis given to theoretical discussion.<sup>24</sup>

### B. *Should All "Literature" Be Examined?*

A second initial difficulty is to determine whether I should examine all commercial law literature or only a portion selected on some principle. The sheer volume of literature urges one to be selective; the difficulty of setting out and applying a principle of selection that will satisfy other scholars urges one to avoid any limitation. In either case, a very different picture of contemporary scholarship appears depending on the choice made.<sup>25</sup>

Most other writers who have examined the intellectual history of legal scholarship choose to limit themselves to the publications of elite authors on the explicit or implicit assumption that these publications have greater "value" or impact. Professor Edward White, for example, writes:

My point of view assumes that the ideas of certain elite groups within the legal profession have had an influence disproportionate to the numbers of persons

23. I have included, for example, Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978), and Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979), although the Code provision is very open-ended (U.C.C. § 2-716(1)) and figures only incidentally in the analyses of these authors. The problem of distinguishing between writings on general contract law and those on commercial transactions is well illustrated by the collection of readings in *THE ECONOMICS OF CONTRACT LAW* (A. Kronman & R. Posner eds. 1979).

24. I do not include, for example, the writings of Professor Ian Macneil, *see, e.g.*, *THE NEW SOCIAL CONTRACT, AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980), or such important works as G. GILMORE, *THE DEATH OF CONTRACT* (1974) and P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). The recent important studies of donative promises are also excluded: J. DAWSON, *GIFTS AND PROMISES, CONTINENTAL AND AMERICAN LAW COMPARED* (1980) and Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979).

25. The difficulty outlined in the text is a well recognized problem in intellectual history. Scholars in the field of American Studies, for example, have recently debated the problem at length without coming to a widely accepted solution.

The difficulty is nicely illustrated by the foray of a leading intellectual historian into the "legal culture" of 19th century America. P. MILLER, *THE LIFE OF THE MIND IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR* (1965) (recreation of legal culture by examining the writings of elite lawyers and judges). For a criticism of this approach, see Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244 (1968).

advancing these ideas. . . . The implicit argument in this study is that, to an important extent, dominant theories of tort law can be identified with the theories of a small but influential group of persons.<sup>26</sup>

The difficulties of identifying the "elite," however, are less often discussed. Professor White looks at the writings of professors at Harvard, Columbia, Yale, and the University of Pennsylvania and at the opinions of judges from the courts of New York and California. Other authors draw up other lists or merely suggest that they have chosen "acknowledged" intellectual leaders.<sup>27</sup>

It is possible to be more objective when selecting an elite list of legal scholarship. There have been, for example, ranking lists of law schools<sup>28</sup> and law reviews<sup>29</sup> that can be combined to develop at least a preliminary screening of the literature.<sup>30</sup> If the impact of publications is to be taken into account one can turn to *Shepard's Law Review Citations* or *Lexis* to see whether the publication has been cited by other authors or by courts.

There is a certain amount of satisfaction in manipulating these criteria to form an academic "Top Ten," especially when these "objective" lists yield the names of authors or publications one already admires.<sup>31</sup> If one looks to the

26. G. WHITE, *TORT LAW IN AMERICA—AN INTELLECTUAL HISTORY* xii (1980). Professor White goes on to point out that he believes this dominance of elite ideas results primarily from the institutional context in which these ideas are put forward and that study of this phenomenon resembles the approach of the sociologist of knowledge. *Id.* at xii–xiii; see also Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1018 (1981); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 *YALE L.J.* 1205, 1207–08 (1981).

27. Some of the difficulties are suggested by Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 *YALE L.J.* 1205, 1207–08 (1981). Professor Tushnet distinguishes the law reviews of Chicago, Harvard, Stanford, and Yale from those of Columbia, California, Duke, Michigan, New York University, Pennsylvania, Texas, and Virginia because he perceives a "break in the stratification system between the two groups of schools." *Id.* But query whether one can draw such a close connection between the quality of a law school and the quality of its law review.

28. See, e.g., Kelso, *Adding up the Law Schools*, *LEARNING & L.*, Summer 1975, at 38.

29. Maru, *Measuring the Impact of Legal Periodicals*, 1976 *AM. B. FOUND. RESEARCH J.* 227.

30. Application of such criteria may have a significant impact on the amount of reading to be carried out in my research. Of the more than 1500 commercial law pieces published in law reviews from 1970 to the present, just less than 10% were published in the top group of "most cited" journals as determined by Maru, *Measuring the Impact of Legal Periodicals*, 1976 *AM. B. FOUND. RESEARCH J.* 227, at Table I (excluding publications in the *Business Lawyer*).

31. Soon after beginning this research I prepared a nonobjective list of the "Top Ten" law review articles I had found most stimulating. I include the list below (in alphabetical order) because it reveals my prejudices and may suggest a bias in my analysis.

Clark, *Abstract Rights versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 *YALE L.J.* 445 (1975);

Coogan, *The New UCC Article 9*, 86 *HARV. L. REV.* 477 (1973);

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

Goetz and Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *COLUM. L. REV.* 554 (1977);

Jackson and Kronman, *Secured Financing and Priorities Among Creditors*, 88 *YALE L.J.* 1143 (1979);

Jackson and Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 *YALE L.J.* 907 (1978);

McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 *U. PA. L. REV.* 795 (1978);

Priest, *Breach and Remedy for the Tender of Non Conforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 *HARV. L. REV.* 960 (1978);

writings of scholars at elite schools (e.g., Chicago, Harvard, Stanford and Yale), one will include the writings of Professors Peter Coogan, Vern Countryman, Edward Dauer, Grant Gilmore, Thomas Jackson, Andrew Kaufman, Anthony Kronman, Arthur Leff, Ellen Peters, and Hal Scott.<sup>32</sup> Alternatively, on the assumption that persons who publish a corpus of work in the most-read journals are the most likely to have an impact on subsequent legal scholarship, one would include on the list not only the names of Professors Coogan, Jackson, and Kronman, but also Professors John Dolan (Wayne State), Charles Goetz and Robert Scott (Virginia), and Alan Schwartz (University of Southern California).<sup>33</sup> It is interesting to note that not all the authors on this second list are connected with elite schools.<sup>34</sup>

Problems abound with such lists. What schools are the most prestigious is, of course, much debated. The list of leading law reviews may be questioned as based on obsolete data or as too inclusive.<sup>35</sup> To require a corpus of work overlooks the possibility of a single significant commercial law publication,<sup>36</sup> to look only at leading journals ignores the possibility of important articles in lesser journals.<sup>37</sup> Some authors, who published numerous articles in leading journals before 1970, are read and cited no matter where their articles are

Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979);

Scott, *The Risk Fixers*, 91 HARV. L. REV. 737 (1978).

I should stress that to find an article stimulating does not necessarily mean I agree with the author. I was provoked, for example, to comment on Danzig's article. Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote,"* 31 SW. L.J. 843 (1977).

After preparing the above list I realized I had not considered any books. I would include J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (1st ed. 1972; 2d ed. 1980).

32. The names of Professors Robert Clark and George Priest might be added. Note that the list in the text reflects the remarkable number of commercial law scholars associated with the Yale Law School in this period, the solid core of scholars at the Harvard Law School, and the apparent neglect of commercial law at Stanford and the University of Chicago. The amount of movement by these scholars between the schools should also be noted. As will be noted later, *see note 108 infra*, there is a close correlation between the number of interested faculty members and the number of articles, comments, and notes published in these law schools' law reviews.

33. The "most-read" law reviews are determined from the list of most frequently cited law reviews in Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RESEARCH J. 277, at Table I.

Determining the impact of articles by these authors is more difficult. Using *Shepard's Law Review Citations* is very depressing. Very few commercial law articles are cited 10 times or more and the "active life" for citation must be about five years, after which an article will not be cited unless extensively cited in the first five years. If the number of citations is used as criterion, the most significant of the articles by the authors cited in the text to this note is Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973) (57 citations). The only other commercial law article by these authors with more than 20 citations is Goetz and Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (21 citations).

34. Compare yet another alternative list of authors generated by examining authors who publish frequently not only in the law reviews but also in the professional journals. *See note 118 and accompanying text infra*.

35. Compare the Maru list, discussed in notes 30 and 33 *supra*, with Professor Tushnet's shorter list, discussed at note 27 *supra*.

36. An author may have a primary interest in some other field and only incidentally write a commercial law article. *See, e.g.,* Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). Alternatively, an author may write several commercial law articles, only one of which is published in a prestigious law review. *See, e.g.,* Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719*, 65 CALIF. L. REV. 28 (1977).

37. Compare the articles cited in the previous footnote with Anderson, *Failure of Essential Purpose and Essential Failure of Purpose: A Look at Section 2-719 of the Uniform Commercial Code*, 31 SW. L.J. 759 (1977); Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote,"* 31 SW. L.J. 843 (1977).



published.<sup>38</sup> More importantly, however, the focus on law review articles does not take into account other forms of literature, such as treatises, course-books, and continuing legal education materials. Professors James White and Robert Summers, for example, do not figure in the list of authors set out above, but they are co-authors of the most frequently cited commercial law handbook<sup>39</sup> and a widely adopted set of course materials,<sup>40</sup> as well as several important articles.<sup>41</sup> In addition, Professor White has prepared materials for the Practising Law Institute.<sup>42</sup>

This essay avoids these difficulties, however, by abandoning the attempt to focus only on "significant" commercial law publications. Instead, it attempts to provide a still photograph of the totality of legal scholarship. Two thoughts or rationalizations support this choice. First, the broader study may reveal important questions about the production of legal scholarship which would otherwise be missed. Second, the choice makes unnecessary, because irrelevant to the purpose of the essay, the assumption that the ideas of elite groups are the most influential in the development of legal culture. The assumption may be correct, but it can be tested only if one knows the content of nonelite scholarship and its relation to this elite scholarship.<sup>43</sup> This essay does not explore these most difficult questions but does try to lay the groundwork for future explorations.

### C. How Many Years of Commercial Law Literature?

A third initial difficulty in defining the scope of this essay is to determine how many years of literature should be examined. Again the solution is arbitrary. The essay examines law review materials indexed in volumes of the *Index of Legal Periodicals* published between September 1970 and the pre-

38. See, e.g., Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N.M.L. REV. 435 (1971); Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979); Gilmore, *Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of an Unrepentant Draftsman*, 15 GA. L. REV. 605 (1981).

39. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1st ed. 1972; 2d ed. 1980).

40. R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW (1st ed. 1969; 2d ed. 1974; 3d ed. 1981).

41. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U.L. REV. 906 (1978); White, *Allocation of Scarce Goods Under Section 2-615 of the Uniform Commercial Code: A Comparison of Some Rival Models*, 12 U. MICH. J.L. REF. 503 (1979); White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262 (1977); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503.

42. J. White, *Warranties Under the U.C.C. and the Magnusson-Moss Act*, in UPDATE '76, at 499 (1976).

43. Despite protestations to the contrary, "elite" scholars find it difficult to be other than patronizing about non-elite scholarship. See the symposium on legal scholarship, 90 YALE L.J. 955-1296 *passim* (1981); see, e.g., Posner, *The Present Situation in Legal Scholarship*, *Id.* at 1113, 1113-14 (1981). Unfortunately this means that the variety of traditional doctrinal work and the differing assumptions underlying this work remain unstudied.

As a practical matter some literature is unavailable in academic law libraries: e.g., continuing legal education materials, certain types of student aids, and bar review course materials. At the fringes one has interesting questions. Should one include within "literature" lawyers' briefs and work product? (Why not? But surely the latter documents are inaccessible as a practical matter.) What about tape recordings and videocassettes distributed by continuing legal education bodies? (Why not?) What about teachers' manuals to coursebooks (distributed only to law professors)?

sent<sup>44</sup> and other, nonlaw publications that indicate that they were published in 1970 or thereafter.<sup>45</sup> The date of 1970 was chosen because it provided sufficient data to avoid possible quirks that might appear if a shorter period was chosen and because "literature of the seventies" has a nice ring to it. That this choice of beginning date is arbitrary should be stressed. Unlike other recent essays,<sup>46</sup> this one makes no claim to put the study of contemporary legal scholarship in historical perspective.

In retrospect, after several years of research and more general reading, I suggest that if one were to put dates on significant shifts of emphasis in the commercial law literature one would choose the mid-sixties, and not 1970, as a transition point.<sup>47</sup> There appears to be at this time a shift from an emphasis on comparison of the UCC to pre-Code law, which frequently involved a healthy skepticism about the codification project and the policies or values it incorporates, to emphasis on glossing the Code, which usually involves acceptance of the Code policies. The publication in 1965 of Professor Gilmore's classic study of personal property security interests,<sup>48</sup> with its emphasis on the historical antecedents of the Code and its concern for the limitations of the codification, would in effect stand at a turning point. Subsequent authors skillfully explicate the text and the cases construing the Code provisions, but they have lost the historical perspective in the process.<sup>49</sup> Whether or not I am right on this question of turning points, however, such speculation goes beyond what this essay attempts.<sup>50</sup>

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44. Materials under the following entries of the *Index* were initially included: checks, commercial law, negotiable instruments, sales, secured transactions, and warranties. From the resulting compilations the following classes of material were excluded: foreign publications; articles on international commercial law and foreign law in which no attempt was made to compare this law with the Uniform Commercial Code; and nonprivate commercial law topics (e.g., articles on tax, securities regulation, and real property topics). For a breakdown of the number of articles involved, see note 113 *infra*.

It should be noted that the *Index* does not include articles which survey recent court opinions, with the exception of the annual general surveys in the *Business Lawyer*.

45. A list of nonlaw review materials was compiled from volumes 10 to the present volume of the *Harvard Law School Library, Annual Legal Bibliography* (1970-present). Materials from the following "Common Law" commercial law entries were included: sales, commercial paper, secured transactions. Foreign publications were then excluded.

46. See G. WHITE, *TORT LAW IN AMERICA—AN INTELLECTUAL HISTORY* (1980); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

47. A transition point placed at this earlier date coincides with several important legal events: the almost universal adoption of the Uniform Commercial Code, the beginning of work on the codification of consumer law (culminating in the Uniform Consumer Credit Code), and growing interest in bankruptcy reform to take account of, *inter alia*, the Uniform Commercial Code.

48. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

49. For later commentaries on Article 9 of the Uniform Commercial Code, see the texts cited in note 70 *infra*. It is symbolic perhaps that Professor Gilmore has not supplemented the original volumes, although I understand that there may be more mundane reasons for this omission.

50. It is possible that implicit in the following discussion is the observation that a more important transition point occurred in the mid- to late-seventies with the publication in elite reviews of a growing number of theoretical or speculative articles.

## II. INVENTORY AND SUMMARY OF CONTEMPORARY COMMERCIAL LAW LITERATURE

To describe the shelves on which I keep my commercial law materials is to suggest a Victorian novelist's idea of an academic feast: handsomely bound multivolume treatises; one-volume handbooks; rows of basic-colored casebooks; formbooks with expandable bindings (patent pending); paperbacked student aids; continuing legal education materials in three-ring or spiral bindings; law review issues; article reprints; stacks of photocopied materials taken from God knows where. For the purposes of this essay I have organized these materials by first setting out an inventory and by then classifying the legal analysis found in the scholarship.

### A. *Forms of Publication*

In setting out the following inventory I have placed the literature in three categories determined by the form of publication: books other than law school materials; coursebooks; and law reviews. Other classifications are possible. One could distinguish materials, for example, according to the class of authors (law school professors, practitioners, law school students) or according to the nature of the publisher (organized for profit or of educational purposes). Different forms of legal scholarship are associated with different markets, however, and the categories chosen reflect the hypothesis that an important factor in explaining trends in legal scholarship is the market for the scholarship. The following discussion does not prove or disprove this hypothesis but does provide figures for further speculation.<sup>51</sup>

#### 1. *Treatise, Handbooks, and Monographs*<sup>52</sup>

Although there were new editions and frequent supplementation of older treatises, no new multivolume commercial law treatise appeared in the 1970s. A new edition of *Williston on Sales* was published in 1973–1974;<sup>53</sup> a second

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51. I provide this exercise in counting notwithstanding the warning that "those who can analyze do, and those who cannot, number." J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 26 (2d ed. 1980).

52. For present purposes I use the following definitions: A "treatise" is a comprehensive and systematic exposition of the statutory provisions and case law in a particular legal field. A "handbook" is a shorter exposition which can be distinguished from the treatise by the thoroughness with which the latter explores the legal authorities and the policies underlying the authorities. A "monograph" is a discussion of a relatively narrow topic aimed primarily at an academic audience. It is distinguished from the treatise by the narrowness of its subject matter and from a handbook by the depth of its analysis.

53. *WILLISTON ON SALES* (4th ed. A. Squillante & J. Fonseca eds. 1973–1974) (four volumes). Professor Williston himself wrote and revised the earlier editions of this treatise. S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* (1st ed. 1909; 2d ed. 1924; rev. ed. 1948). Written as it was by the highly respected draftsman of the Uniform Sales Act, the treatise was treated with great respect in the courts. See note 85 and accompanying text *infra*.

This work and the companion study on the law of contracts come immediately to mind as classic examples of the treatise.

edition of Anderson's commentaries on the Uniform Commercial Code appeared in 1970.<sup>54</sup> In 1972 the Bender's *Uniform Commercial Code Service* published a new volume on commercial paper<sup>55</sup> to supplement the other textual volumes in the *Service*.<sup>56</sup> One might also argue that there has been a new edition of the secured transactions volumes in the *Service* by virtue of the extensive additions, amendments, and annotations to the text originally published in 1964.<sup>57</sup> Several widely acclaimed pre-1970 treatises, however, were not reissued or supplemented. Professor Gilmore's volumes on personal property security interests were not supplemented.<sup>58</sup> The last edition of *Brannan's Negotiable Instruments Law* remains the 7th edition published in 1948.<sup>59</sup>

Single-volume treatises and handbooks, however, proliferated in this same period. A number of publications written by law professors and designed for students appeared for the first time.<sup>60</sup> Several general introductions to the Uniform Commercial Code were published, including Professors White's and Summers' frequently cited *Handbook*, which appeared in a first and second edition.<sup>61</sup> Several more detailed studies of specific subjects also came out: *Nordstrom on Sales*<sup>62</sup> and *Henson on Secured Transactions*, which is also now out in its second edition.<sup>63</sup> Shorter works were also popular: Stone on the Uniform Commercial Code;<sup>64</sup> Weber<sup>65</sup> and Peters<sup>66</sup> on commercial paper; and Bailey on secured transactions.<sup>67</sup> Although there were several short handbooks on commercial paper, there was no longer handbook. The

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54. R. ANDERSON, *UNIFORM COMMERCIAL CODE* (1st ed. 1961; 2d ed. 1970).

55. F. HART & W. WILLIER, *COMMERCIAL PAPER UNDER THE UNIFORM COMMERCIAL CODE* (1972).

56. I-IC P. COOGAN, W. HOGAN & D. VAGTS, *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (1963); 3-3A R. DUESENBERG & L. KING, *SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE* (1966).

57. See P. COOGAN, W. HOGAN & D. VAGTS, *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (1963). The addition of new chapters by different authors and the extensive annotation have led to such a disorganized text that one could argue that the text is no longer a systematic treatise but a compendium of articles.

58. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

59. *BRANNAN'S NEGOTIABLE INSTRUMENTS LAW* (7th ed. F. Beutel 1948).

60. Several handbooks published just before the widespread adoption of the Uniform Commercial Code did not reappear in the 1970s. W. BRITTON, *HANDBOOK OF THE LAW OF BILLS AND NOTES* (2d ed. 1961); L. VOLD, *HANDBOOK OF THE LAW OF SALES* (2d ed. 1959); see also L. SIMPSON, *HANDBOOK ON THE LAW OF SURETYSHIP* (1950). The change in style from these volumes to the later student handbooks reflects a shift in emphasis from the relatively dogmatic statement of the legal rules, with extensive citation to relevant case law authority, to the more discursive discussion of the major problems, with less complete citation to court opinions.

61. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (2d ed. 1980). For thoughtful commentary on this important text, see the following book reviews: Clark, 58 *CORNELL L. REV.* 1273 (1973); Peters, 71 *MICH. L. REV.* 1487 (1973); Rohner, 22 *CATH. U.L. REV.* 859 (1973); Weinberg, 58 *MINN. L. REV.* 712 (1974).

62. R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* (1970).

63. R. HENSON, *HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (1st ed. 1973; 2d ed. 1979).

64. B. STONE, *UNIFORM COMMERCIAL CODE IN A NUTSHELL* (1975).

65. C. WEBER, *COMMERCIAL PAPER IN A NUTSHELL* (2d ed. 1975).

66. E. PETERS, *A NEGOTIABLE INSTRUMENTS PRIMER* (1st ed. 1971; 2d ed. 1974).

67. H. BAILEY, *SECURED TRANSACTIONS IN A NUTSHELL* (1976).

discussion of specialized topics, such as letters of credit and documents of title, appeared only in the general introductions to the Code. Investment securities were virtually ignored.<sup>68</sup>

Although many of these student handbooks are equally useful for practitioners, this period also saw the publication of single-volume works designed specifically for practitioners although usually written by law professors.<sup>69</sup> The favorite subject of these volumes was the law of secured transactions<sup>70</sup> but there were also volumes which dealt with the law of commercial paper<sup>71</sup> and bank credits.<sup>72</sup> General introductions<sup>73</sup> and the law of sales, with the exception of warranty law,<sup>74</sup> were relatively neglected. The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association published a series of short introductions to most of the Code Articles.<sup>75</sup> The Practising Law Institute also has published course materials which were frequently revised annually. These volumes usually consist of topic outlines and reprints of legal texts and law review articles, although there have recently been some more ambitious volumes.<sup>76</sup>

When one turns from the proliferation of handbooks to academic monographs, one finds the prospect bleak. There were virtually no monographs devoted solely to commercial law published in this period.<sup>77</sup> A reworked

68. Professors White and Summers, for example, include no treatment of Article 8. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE*, at xxi (2d. ed. 1980) ("Most lawyers can practice in relative ignorance of Article 8 without fear of a malpractice suit.").

69. For an important critique suggesting the limitations of this form of literature see Peters, *Book Review*, 2 W. NEW ENG. L. REV. 153, 158-59 (1979).

70. B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (1980) (see Winship, *Book Review*, 29 U. KAN. L. REV. 93 (1980)); W. DAVENPORT & D. MURRAY, *SECURED TRANSACTIONS* (1978) (see Peters, *Book Review*, 2 W. NEW ENG. L. REV. 153 (1979); L. DENNON, *SECURED TRANSACTIONS UNDER THE ORIGINAL AND THE REVISED UCC* (6th ed. 1974); L. LAKIN & H. BERGER, *A GUIDE TO SECURED TRANSACTIONS* (1970).

71. F. HART & W. WILLIER, *COMMERCIAL PAPER UNDER THE UNIFORM COMMERCIAL CODE* (1972); B. CLARK & A. SQUILLANTE, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* (1st ed. 1970; 2d ed. forthcoming); H. BAILEY, *U.C.C. DESKBOOK: A SHORT COURSE IN COMMERCIAL PAPER* (rev. ed. 1973); see also F. BEUTEL, *BANK OFFICER'S HANDBOOK OF COMMERCIAL BANKING LAW* (4th ed. 1974).

On electronic fund transfers, see N. PENNEY & D. BAUER, *THE LAW OF ELECTRONIC FUNDS TRANSFER SYSTEMS* (1980).

72. On bank credits and acceptances see W. WARD, *BANK CREDITS AND ACCEPTANCES* (5th ed. H. Harfield 1974).

73. But see T. QUINN, *UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* (1978).

74. But see WILLISTON ON SALES (4th ed. A. Squillante & J. Fonseca eds. 1973-74). The law of warranties, however, did attract attention. See, e.g., D. WHALEY, *WARRANTIES AND THE PRACTITIONER* (1981); C. REITZ, *CONSUMER PROTECTION UNDER THE MAGNUSSON-MOSS WARRANTY ACT* (1978).

75. H. HARFIELD, *LETTERS OF CREDIT* (1979); W. HAWKLAND, *COMMERCIAL PAPER* (2d ed. 1979); R. BRAUCHER & R. RIEGERT, *DOCUMENTS OF TITLE* (3d ed. 1978); W. HAWKLAND, *SALES AND BULK SALES* (3d ed. 1976). Although published in a different format, W. DAVENPORT & D. MURRAY, *SECURED TRANSACTIONS* (1978) is also part of this series. See also M. EXER, *UNIFORM COMMERCIAL CODE BIBLIOGRAPHY* (1972 & Supp., A. Squillante 1978); C. REITZ, *CONSUMER PROTECTION UNDER THE MAGNUSSON-MOSS WARRANTY ACT* (1978).

76. Some recent volumes have been more ambitious. See, e.g., *LEASE FINANCING—LEVERAGED LEASING* (2d ed. B. Fritch & A. Reisman eds. 1981).

77. E. FARNSWORTH, *INSTALLMENT SALES* (1973) is excluded because published abroad as part of the *International Encyclopedia of Comparative Law*.

The annotated volumes of lectures delivered by Professors Gilmore and Macneil are also excluded for the reasons set out in note 24 *supra* and accompanying text.

doctoral dissertation on the concept of unconscionability<sup>78</sup> is the only volume which deals only with a commercial law topic and even this volume might be excluded on the ground that it deals with a general contractual concept rather than a specifically commercial one. There are, however, several important monographs which include chapters on commercial law.<sup>79</sup>

The virtual nonexistence of the monograph has caused little comment, there being no tradition of legal monographs in the United States.<sup>80</sup> The purported demise of the legal treatise, on the other hand, has been much discussed in the last couple of years.<sup>81</sup> Although much of this discussion assumes the demise and proceeds to speculate on the reasons for the passing of the treatise, not all authors agree that the treatise has in fact disappeared. Justice Ellen Peters, for example, recently cast doubts on the demise, calling attention *inter alia* to the Gilmore study of personal security interests and the White and Summers handbook.<sup>82</sup> To some extent the debate, such as it is, turns on a failure to agree on definitions. Professor Simpson, for example, would exclude the White and Summers handbook on the ground that it "might be viewed as something other than a treatise because it consists of commentary on a body of statutory law rather than a set of deductions from first principles."<sup>83</sup>

In the absence of a common definition of what writings constitute a treatise the above inventory of materials cannot resolve the debate. There may indeed be a decline in multivolume studies written by a single author, but there have been an increasing number of one-volume works, some of which do attempt to provide comprehensive and systematic exposition of the statutory provisions and case law on a particular commercial law topic. What may have occurred is that these studies, which in the past would have appear-

78. S. DEUTCH, *UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY* (1977). The dearth of reviews of this book in the United States (several reviews appeared abroad in Canada and England) is more a sign of the decline in book review writing than a reflection on the quality of its contents.

79. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 140-59, 211-52 (1977); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT 170-240* (1973). See also T. FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* (1979); W. BAXTER, P. COOTNER & K. SCOTT, *RETAIL BANKING IN THE ELECTRONIC AGE* (1977).

80. The number of doctoral (J.S.D., S.J.D.) dissertations, a fruitful source of monograph material in other academic disciplines, is very small. Nor is the publication of monographs to obtain tenure and promotion an academic tradition in law schools. Some law review articles, of course, are monographs in all but name. See, e.g., Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974); Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code*, 31 ARK. L. REV. 1 (part 1), 171 (part 2) (1977), 34 ARK. L. REV. 1 (part 3) (1980) (Columbia doctoral dissertation). Very rarely these articles are subsequently issued as separate pamphlets. See D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* (1968) (collected law review articles republished by law school).

One should not forget, of course, the very limited market for academic monographs, although university presses subsidize such works in other disciplines.

81. See Simpson, *Contract: The Twitching Corpse*, 1 OXFORD J. OF LEGAL STUD. 265, 270 (1981); Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 676-79 (1981); Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1150-53 (1981); Horwitz, *Treatise Literature*, 69 LAW LIB. J. 460, 460 (1976).

82. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193, n.1 (1981).

83. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 678 n.318 (1981).

ed with lengthy quotations from court opinions and with state-by-state annotations, now appear with more selective citations to cases. This is consistent with analyses that stress the decline in the professional status to be obtained from writing treatises: fewer academic scholars, especially from elite law schools, may wish to spend a professional lifetime on this time consuming form of research and writing. These analyses, however, overlook possible changes in the needs of the market for treatises which may also account for the trends.<sup>84</sup>

Whether or not there has been a decline in the number of commercial law treatises, it should be noted that the Code draftsmen expressly hoped there would be. The official comments to the Code provisions were prepared in part to discourage the possibility that an authoritative treatise would be published. *Williston on Sales*, of course, was the target. Karl Llewellyn, for example, argued:

[I]f these comments are not given effective status as permissive guides to the courts, something else is going to acquire unofficial status in a surreptitious and, to my mind, outrageous fashion. That "something else" is going to be the "Authoritative Text on the Code" written by some of the Reporters. We know what happens when that kind of text turns up. We had that kind of text on the old Uniform Sales Act prepared by its draftsman, and the history of that has been that through the years, two times out of three, the court has not read or applied the statute.<sup>85</sup>

The danger, in other words, is that courts might take the easy way out when faced with difficult statutory language and turn to the unofficial gloss that might or might not express the true reason of the statutory provision.

## 2. *Course Materials*<sup>86</sup>

Course materials—casebooks or "cases and materials"—differ from the books discussed in the previous section by the explicitness of the audience for which they are prepared. Although for a long time they have been associated with scholars from elite schools and have set the standard for all law schools, paradoxically these course materials have been ignored as a form of legal

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84. The individual practitioner and small firm, for example, may not be able to afford a commercial law treatise, given the other demands on their funds for legal materials. Continuing legal education programs, which have proliferated in the last decade, may satisfy the needs of this segment of the legal population.

Larger or more specialized firms may consider forms of publication other than treatises to be a wiser investment. The *Uniform Commercial Code Reporting Service* and its companion *Uniform Commercial Code Case Digest* or the *Bender's U.C.C. Service* may be an easier way into the case law glosses on Code provisions. The Anderson annotations of the Code, organized section by section, may also provide quick access to case authority. R. ANDERSON, *UNIFORM COMMERCIAL CODE* (1st ed. 1961; 2d ed. 1971).

Time constraints and limited access to comprehensive law libraries may also explain why some of the treatises or handbooks for practitioners fail to cite the law review literature. See Winship, Book Review, 29 U. KAN. L. REV. 93, 96 (1980).

85. Transcript of Discussion, Joint Meeting on the Uniform Commercial Code 9-10 (ALI and NCCUSL) (1950).

86. Following convention, this inventory ignores an entire segment of coursebook publication: the business law materials prepared for business school students. This divorce between law school and business school materials has not always existed. One of Karl Llewellyn's earliest publications was a review of commercial law

scholarship.<sup>87</sup> Karl Llewellyn, who himself prepared path-breaking course materials for the law of sales,<sup>88</sup> once remarked on the illogical convention of ignoring such materials as scholarship.<sup>89</sup> In my research, I have assumed the importance of these coursebooks as creative scholarship.<sup>90</sup>

The last decade has seen some expansion in the number of commercial law coursebooks available, as well as considerable turnover. Several pre-1970 coursebooks have not survived, in virtually all cases because the authors have retired or died.<sup>91</sup> Some older coursebooks have continued in new editions with the same editors.<sup>92</sup> Most of these volumes originally appeared in the 1960s and were already organized around Code categories. New general coursebooks appeared in the early 1970s<sup>93</sup> and, more recently, coursebooks

texts prepared for business schools. Llewellyn, Book Review, 32 YALE L.J. 302 (1923). It should be noted that Llewellyn was not the only law school professor to review these books.

For a somewhat dated list of these business law texts see M. EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY 226-29 (1972 & Supp., A. Squillante, 1978).

The general contract law coursebooks designed for the first-year student are also omitted. Some of these volumes place great emphasis on the UCC. See, e.g., C. REITZ, CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW (1975).

The recent expansion of continuing legal education programs suggests that the materials prepared for these programs should be included in the discussion of coursebooks. I have not done so. *But see* notes 75 and 76 *supra*.

87. The most recent general survey of this genre that I am aware of is Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224 (1944).

88. K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930).

89. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 781-82 (1941).

90. One justification for this assumption is that course materials not only shape the students' approach to legal problems but also may influence scholar-teachers who frequently select topics to write about from problems arising during class preparation and discussion.

91. See, e.g., R. AIGLER & R. STEINHEIMER, CASES ON BILLS AND NOTES (1962); G. BOGERT, W. BRITTON & W. HAWKLAND, CASES AND MATERIALS ON SALES AND SECURITY (4th ed. 1962); R. BRAUCHER & A. SUTHERLAND, COMMERCIAL TRANSACTIONS: TEXT, CASES AND PROBLEMS (4th ed. 1968); W. BRITTON, CASES ON BILLS AND NOTES (5th ed. 1961); J. HANNA, CASES AND MATERIALS ON SECURITY (3d ed. 1959); W. MCCURDY, CASES ON SALES TRANSACTIONS (1959); R. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (3d ed. 1964); L. VOLD, CASES AND MATERIALS ON THE LAW OF SALES (3d ed. 1960). Although Professor (now Chancellor) Hawkland has recently co-authored a new coursebook on sales law the new book can hardly be considered a successor to the Bogert, Britton and Hawkland volume cited *supra*, notwithstanding advertising to the contrary. It is not the convention for new authors to be associated with a coursebook except in collaboration with surviving authors. Treatises, on the other hand, frequently are carried on by others.

92. C. CORMAN, SALES AND SALES FINANCING: CASES AND MATERIALS (1st ed. 1960; republished as COMMERCIAL LAW: CASES AND MATERIALS by another publisher in new ed. 1976); E. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW (1st ed. 1965; 2d ed. 1968; 3d ed. 1976); E. FARNSWORTH, CASES ON COMMERCIAL PAPER (1st ed. 1959; 2d ed. 1976); W. HAWKLAND, CASES ON COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS (1st ed. 1956; 2d ed. 1967); W. HOGAN & W. WARREN, COMMERCIAL AND CONSUMER TRANSACTIONS, CASES AND MATERIALS (1st ed. 1972; 2d ed. with Z. Jordan 1978); J. HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING (1st ed. 1954; 2d ed. 1962; 3d ed. 1968; 4th ed. 1976); D. KING, C. KUENZEL, T. LAUER, N. LITTLEFIELD & B. STONE, COMMERCIAL TRANSACTIONS UNDER THE U.C.C., CASES AND MATERIALS (1st ed. 1968; 2d ed. 1974; 3d ed. 1981); R. NORDSTROM & N. LATTIN, PROBLEMS AND MATERIALS ON SALES AND SECURED TRANSACTIONS (1968) (A new edition will apparently merge with J. MURRAY, COMMERCIAL LAW PROBLEMS AND MATERIALS (1972)); R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS (1st ed. 1969; 2d ed. 1974; 3d ed. 1981).

93. V. COUNTRYMAN & A. KAUFMAN, COMMERCIAL LAW, CASES AND MATERIALS (1st ed. 1971; 2d ed. with Z. Wiseman 1982); D. EPSTEIN & J. MARTIN, BASIC UNIFORM COMMERCIAL CODE TEACHING MATERIALS (1977); S. MENTSCHIKOFF, COMMERCIAL TRANSACTIONS, CASES AND MATERIALS (1970); J. MURRAY, COMMERCIAL LAW, PROBLEMS AND MATERIALS (1975); E. PETERS, COMMERCIAL TRANSACTIONS, CASES, TEXT AND PROBLEMS ON CONTRACTS DEALING WITH PERSONALTY, REALTY AND SERVICES (1971).



on subtopics, such as commercial paper, have been published.<sup>94</sup> A new generation of general coursebooks is now in preparation,<sup>95</sup> and several coursebooks will apparently be replaced.<sup>96</sup>

Several of the new coursebooks which appeared in the 1970s inspired important reassessments of the object and function of commercial law materials,<sup>97</sup> but for the most part publication of new volumes or new editions has gone unnoticed in the law reviews.

Similarities between the course materials are more apparent than differences. Measured by the number of pages devoted to them, court opinions remain predominant. The court opinions are virtually all post-Code. Few materials are taken from books or law reviews;<sup>98</sup> most of the text is written by the authors. The text includes explicit questions and problems. On particularly complex subjects the text may give business background. Some of the earlier volumes published in the last decade experimented with the scope of coverage,<sup>99</sup> but recent publications either have covered the complete commercial transaction or have dealt only with a single topic. Non-Code law is dealt with only when it impinges on matters otherwise governed by the Code: the warranty provisions of the UCC and the Magnusson-Moss Warranty Act,<sup>100</sup> the holder-in-due-course doctrine and the Federal Trade Commission regulations,<sup>101</sup> and the security interest and the Bankruptcy Reform Act.<sup>102</sup> The primary skill to be learned is statutory interpretation; some problems

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94. M. BENFIELD & W. HAWKLAND, *CASES AND MATERIALS ON SALES* (1980); R. NORDSTROM & A. CLOVIS, *PROBLEMS AND MATERIALS ON COMMERCIAL PAPER* (1972); D. WHALEY, *CASES AND MATERIALS ON COMMERCIAL PAPER* (1980); D. WHALEY, *PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS* (1982).

95. R. SCOTT & A. SCHWARTZ, *COMMERCIAL LAW: PRINCIPLES AND POLICIES* (forthcoming); J. EDDY & P. WINSHIP, *COMMERCIAL LAW COURSE MATERIALS* (in preparation); R. NORDSTROM, J. MURRAY & A. CLOVIS, *PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS* (in preparation); R. RIVERA & D. WHALEY, *PROBLEMS AND MATERIALS ON SALES* (in preparation).

96. It appears that the Corman, Mentschikoff, and Peters volumes, cited in notes 92 and 93 *supra*, are being phased out.

97. Dauer, Book Review, 13 B.C. INDUS. & COM. L. REV. 193 (1971); Wallace, Book Review, 66 NW. U.L. REV. 404 (1971). See generally Donnelly, *Materials on Commercial Transactions: Back to the Curriculum Committee*, 25 J. LEGAL ED. 94 (1973).

98. The recent publication of collections of "readings" apart from traditional coursebooks is suggestive. It may illustrate the difficulty of integrating materials into the case format; it may reflect the disinterest of the editors in real cases. That many of these readings analyze problems from a broad theoretical perspective, especially using economic analysis, may support this latter suggestion. See, e.g., *THE ECONOMICS OF CONTRACT LAW* (A. Kronman & R. Posner eds. 1979). Of course, the separate publication of readings may also be dictated by market concerns.

99. Of the general commercial transactions volumes, Countryman and Kaufman, *supra* note 93, initially omitted sales materials, but the second edition corrects this omission; Peters, *supra* note 93, combined real property and service contract materials with the personal property materials, but the volume apparently was not widely adopted; Mentschikoff, *supra* note 93, was highly selective in topics covered and also will apparently be phased out. The attempt by Hogan and Warren, *supra* note 92, to combine creditors' rights and secured transactions materials in an earlier companion volume to the more orthodox commercial law materials has also disappeared in later editions.

The growing orthodoxy in the scope of recent editions coincides with decreasing interest in pedagogical matters and growing orthodoxy among law students. See note 96 *supra*.

100. 15 U.S.C. §§ 2301-2312 (1976).

101. 16 C.F.R. §§ 433.1-433.3 (1981).

102. 11 U.S.C. §§ 101-151326 (1976 & Supp. III 1979).

attempt to develop planning or drafting skills.<sup>103</sup> There is some indication, however, that in materials to be published in the next couple of years greater emphasis will be placed on theoretical questions.<sup>104</sup>

### 3. Law Reviews

When one turns from books to the law reviews one finds that the audience to which the reviews are directed becomes much less clearly defined. There are several journals devoted to commercial law published for profit,<sup>105</sup> and several others are published by professional groups,<sup>106</sup> but the great majority of law reviews are published by student editors under the auspices of law schools. Most of these law school reviews publish articles in many different fields, although several specialize in commercial law.<sup>107</sup> Some of these general law reviews are more receptive than others to commercial law writings, usually reflecting the strength of the teaching and research faculties in this field.<sup>108</sup>

The writings published in the law reviews fall into fairly standard categories: articles, student comments and case notes, and book reviews. There are occasional symposia issues, such as the present issue, and panel discussions have occasionally been transcribed and published, but there is not a great deal of diversity in the forms materials take when published in the law

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103. As for the goals of the coursebooks, most of their authors would probably agree with the prefatory note in R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* at xiii-xiv (2d ed. 1974):

(1) some new brain grooves, conceptual recepticals, bathtubs (the legal mind having been likened to a bathtub one fills up in regard to each problem and then drains in readiness for the next), (2) some residual understanding of structure . . . , (3) some mastery of distinctive techniques required for working with complex statutory schemes . . . , (4) some basic orientations and attitudes . . . , (5) some notions of legal process in commercial and consumer matters, in judicial hands and in legislative hands . . . and (6) some of the legal information itself . . . (especially) broad principles. . .

104. Given the authors' well established interest in theoretical issues, the forthcoming coursebook prepared by Professors Alan Schwartz and Robert Scott promises to be much more theoretically oriented. A. SCHWARTZ & R. SCOTT, *COMMERCIAL LAW: PRINCIPLES AND POLICIES* (forthcoming).

105. See, e.g., *UNIFORM COMMERCIAL CODE LAW JOURNAL*; *UNIFORM COMMERCIAL CODE LAW LETTER*. See also *BANKING LAW JOURNAL*.

106. *BUSINESS LAWYER* (ABA Section of Corporation, Banking & Business Law); *COMMERCIAL LAW JOURNAL* (Commercial Law League of America, Inc.). The *Business Lawyer* is listed by Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RESEARCH J. 277, as one of the most frequently cited journals. *Id.* at Table I.

107. Until 1979 the *Boston College Law Review* was the *Boston College Industrial and Commercial Law Review*. The University of Pittsburgh School of Law has recently announced plans to publish *The Journal of Law and Commerce*.

108. A survey of the most frequently cited law reviews as listed by Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RESEARCH J. 277, at Table I, reveals that some reviews are more receptive than others to commercial law materials. In total number of pieces, student and nonstudent, the reviews at the Universities of Texas, Minnesota, and Northwestern published the most while the reviews at Chicago, New York University, George Washington, and Georgetown published the least. If one distinguishes between student and nonstudent writings, the reviews publishing the most articles include not only the Minnesota and Northwestern reviews but also those at California, Harvard, Pennsylvania, and Yale. The *Texas Law Review* published more than twice the number of student pieces than any other review in this group. There is a close correlation between this pattern and schools identified with strong commercial law teaching and research. See note 32 *supra*.

reviews.<sup>109</sup> Certain conventions place limits on this diversity.<sup>110</sup> Articles are written only by persons other than students; case notes, on the other hand, are written only by students. Law reviews, especially the more prestigious, frequently will not publish a student work, no matter how skillful, if a similar comment or case note has recently appeared in another review.<sup>111</sup> Book reviews, written only by nonstudents, have all but died out.<sup>112</sup>

The total number of commercial law pieces published by the law reviews since 1970 comes to more than 1500, of which more than four-fifths appeared in the law school reviews.<sup>113</sup> The rate of publication has increased considerably, most dramatically in the middle of the decade. In the last couple of years, however, there has been an apparent decline in the number of commercial publications.

If one breaks down by subject matter the total number of publications, writings on sales now represent about one-third of the articles published, secured transactions slightly less than one-third, commercial paper about one-fifth, with the remaining writings covering either very general topics or very specialized ones, such as documents of title. This distribution, however, has not been constant. In the early 1970s writings on sales represented only one-fourth of the articles; this number rose rapidly to almost one-half in the middle of the decade but has since declined to one-third. Secured transactions pieces represented about two-fifths of the publications in the earlier part of the decade but have declined steadily to slightly less than one-third. Commercial paper writings have increased in number but have remained fairly constant at about one-fifth of the total commercial law publications.<sup>114</sup>

109. There are occasional exceptions that do not fit any pattern. See Hawkland, *Some Uses and Misuses of a Verbal Concordance to the Uniform Commercial Code*, 1974 U. ILL. L. FORUM 1; Maggs, *A Concordance to the Uniform Commercial Code*, 1974 U. ILL. L. FORUM 7. One should always mention the fairly large number of law reviews that publish annual surveys of recent case law developments.

110. For criticism of these conventions, see Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125 (1977); Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote,"* 31 SW. L.J. 843, 843-44 (1977).

111. The survey of most frequently cited law reviews, discussed in note 108 *supra*, reveals very few student writings published by these reviews and virtually no duplication of comment topics or cases annotated.

112. But see the reviews cited in notes 61, 69 & 70 *supra*. For a general comment on the decline of the book review, see Cavers, *Book Reviews in Law Reviews: An Endangered Species*, 77 MICH. L. REV. 327 (1979).

113. The rough figures, calculated from the *Index to Legal Periodicals* as outlined above, *supra* note 44, is as follows:

1970-73 (vol. 16)	267
1973-76 (vol. 17)	486 +82%
1976-79 (vol. 18)	640 +32%
1979-80 (vol. 19)	149 [447]

The reference to the volume number is to the relevant consolidated volume of the *Index*. The bracketed figure is a projection for a three-year period based on the assumption that the rate of publication will remain constant.

As noted earlier, *see* note 44 *supra*, these figures do not include articles in issues which survey recent case law developments.

These figures must be taken with some skepticism. The *Index* has only recently included among the journals indexed some bar journals and, more importantly, the *Uniform Commercial Code Law Journal*.

114. If one turns from this general pattern for all publications to those published in the professional journals, one finds a growing percentage of articles on secured transactions and commercial paper published in the professional journals. The increase has been from two-fifths to three-fifths for secured transactions articles and from one-third to one-half for commercial paper articles. The increase can be only partially explained by the

The most popular topics, if one looks more closely at the contents, include the question of the constitutionality of UCC section 9-503 (self-help repossession), the 1972 revision of Article 9 (secured transactions), the holder-in-due-course doctrine, the secured or unsecured seller's right to reclaim goods sold, and the Magnusson-Moss Warranty Act.<sup>115</sup> These topics are obviously related to matters of current concern in the courts or in the legislatures. Less numerous, but persistently popular in the law reviews, are analyses concentrating on particular Code provisions: UCC section 2-207 (additional terms in acceptance or confirmation), section 2-302 (unconscionable contract or clause), section 2-615 (excuse by failure of presupposed conditions), section 9-103 (perfection of security interest in multiple state transactions), and section 9-504 (commercially reasonable disposition of collateral). Although these topics are also the subject of continuing litigation, their popularity in the law reviews probably is more closely related to the open-endedness of these provisions or their popularity in law school courses.<sup>116</sup>

If one calculates the ratio of writings by students to those by non-students, one finds that for most of the period since 1970 the nonstudent publications have been slightly more numerous.<sup>117</sup> The exception to this generalization is a period in the middle of the decade when student writings were more numerous on every topic. A survey of the most prestigious law reviews for this period reveals an almost 50-50 split between student and nonstudent writings. The category of nonstudent authors itself breaks down into the full-time professoriat and practitioners, with a few authors who straddle the gap. Virtually all the authors of articles in the most prestigious law reviews are full-time or adjunct law professors. Among the other law school reviews the percentage of nonprofessor authors is higher, but they still write only a minority of the articles published, and few such authors publish

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growing number of professional journals indexed. See note 113 *supra*. Another explanation would be the high value placed on novelty by professorial writers and the law school reviews. There may be fewer and fewer new ideas to express about these relatively technical commercial law institutions. At the same time, the very technicality may encourage technical explanations in journals for practitioners.

115. There is a certain arbitrariness in selecting the "most popular" topics, primarily because of the difficulty of deciding how specific a category should be. If, for example, one used the category "remedies for breach of sales contracts" instead of the more specific category of "seller's remedies" or "U.C.C. § 2-703," one would come up with a list long enough to include among those topics set out in the text.

To give some indication of the numbers involved, I include 19 journal articles and 35 student comments and notes on the question of the constitutionality of UCC § 9-503; 24 articles and 7 student works on revised Article 9; and 15 articles and 24 student works on the seller's right to reclaim goods sold. This list is a conservative one, and I do not vouch for its accuracy.

116. The popularity among student authors of sales law questions is undoubtedly related to the structure of law review promotion and their familiarity with the basic issues of sales law from their first-year contracts course. The intricate language of UCC §§ 2-207, 2-615, and 9-103 at least appears to promise a single definite answer; the open-endedness of UCC §§ 2-302 and 9-504 allows generation after generation of authors the chance to assimilate new court decisions and reinterpret the provisions without the fear of being proved "wrong," since there is unlikely to be an interpretation of these provisions that will be accepted as authoritative.

117. The subject areas in which nonstudent articles were considerably more numerous than student writing for the same period varies. From 1970-1973, nonstudent sales articles were predominant; from 1976-1979, secured transactions; from 1979-1980, commercial paper.

more than one article. The reverse is true for professional journals, in which professorial authors are in a minority, although there is a cadre of professors who write frequently for these journals.<sup>118</sup>

With few exceptions<sup>119</sup> law review articles are published under the name of one or, at most, two authors. A survey of authors' acknowledgments at the beginning of articles published in the most cited law reviews suggests, however, a growing tendency to circulate drafts among colleagues or to present them before publication to faculty workshops.<sup>120</sup> This trend coincides with the growth of theoretical or neoconceptual articles, and this correlation deserves further study. Collective responsibility for student writings, on the other hand, has been the tradition, symbolized by the anonymity of the student authors.

### III. CLASSIFICATION OF FORMS OF ANALYSIS IN COMMERCIAL LAW SCHOLARSHIP

In this part of the essay an attempt is made to classify the contents of the materials inventoried in the previous section. Three categories—doctrinal, thematic, theoretical—are suggested. As in the previous section, this part does more counting than analyzing. It does, however, lay the groundwork for further analysis.

#### A. Doctrinal Writings

The scope of the first category is suggested, if not fully captured, by the labels "doctrinal writing" or "*explications de texte*".<sup>121</sup> Materials falling into this category explain the meaning or meanings of the statutory text of the Uniform Commercial Code. They focus on a narrow topic and thoroughly canvass existing judicial and academic commentary. They assimilate new cases arising in litigation, new legislation that may impinge on the Code, and

118. One would include in this list Professors Vern Countryman, William Hawkland, Frank Kennedy, Julian McDonnell, Daniel Murray, and Alphonse Squillante. In terms of actual impact on the development of the law, the writings of these authors may have greater impact than the writings that appear only in law school reviews. It should be noted also that most of these authors are also authors or editors of handbooks and, in some cases, coursebooks.

119. See, e.g., Clarkson, Miller and Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351.

120. In the 48 law review articles in this period from the most-cited journals, see note 108 *supra*, exactly one-half had some form of acknowledgment. See, e.g., Jackson and Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1143 n.\* (1979). Most of the workshops are specifically dedicated to law and economics analyses. Since the mid-1970s the Section on Contract, Commercial and Related Law of the Association of American Law Schools has held a session for working papers at the annual meeting.

121. Professor Hal Scott has written:

We are presently prisoners of the conception that commercial law embodies the law merchant and that the Uniform Commercial Code merely furnishes businessmen with a clear statement of their rules. . . . This widely accepted "law merchant" view of commercial law has produced a body of commentary on the Code which might properly be classified within the French literary school of *explication de texte*. Commercial law has become largely the province of the adept reader of statutes, and the methodology of the Code is the skill of working out language puzzles.

Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 737-38 (1978).

changes in market behavior. The policies of Code provisions are accepted when clear, and explicated when ambiguous or inconsistent. Little attempt is made to explore the commercial context. Many conclude with a formula for analyzing a particular situation or a suggested amendment to the Code which, if adopted, would solve the problem. By far the greatest number of law review writings (especially student work), treatises, and handbooks fall within this category.<sup>122</sup>

The approach to Code problems adopted by the materials in this first category can best be summarized by the method of purposive interpretation which Professor McDonnell has argued is the method that Karl Llewellyn and other draftsmen wished to adopt for the Code.<sup>123</sup> Professor McDonnell suggests that this method involves the following four steps in analysis:

1. Start with the statutory language and read it all as it stands with an eye to the underlying purposes and the relationship between them.
2. Look for articulation of purpose in the Official Comments.
3. Explore how the present statutory text varies from earlier drafts of the Code and from the treatment of the same subject in pre-Code law.
4. After considering statutory language, Official Comments, and historic context, *in seriatim*, examine these factors in combination for a coherent interpretation.<sup>124</sup>

Most of the literature in this first category may be said to adopt, with more or less thoroughness, this approach.<sup>125</sup>

This first category can be illustrated by an article on the law of consignments,<sup>126</sup> a subject governed explicitly by several Code provisions.<sup>127</sup> The

122. The extent to which the form of publication is related to the form of analysis needs to be explored further. The time and other constraints on student authors make attractive the exegetic method of analysis that follows an established structure, *see* note 124 *infra*, and can be carried out in the library.

123. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 797-801 (1978).

124. *Id.* at 853-54. I suggest that this list is, at least within the context of the UCC, incomplete because it does not bring out the role of the general concepts, such as good faith, that underlie all the specific provisions of the Code. Some literature in this first category will make obeisance to these supereminent provisions but do not stress them.

125. Certainly this is true of studies that focus on a particular Code provision or on court opinions. It does not fully capture, however, the approach of studies of new legislation or of the impact of market patterns or technological developments (*e.g.*, evaluating the revision of Article 9 or the effect of electronic fund transfer systems on the UCC).

Professor Danzig has remarked that "[o]n its most ambitious level Article II's aim, and very possibly its achievement, may be said to have been to coerce courts into reviewing cases *in the manner* Llewellyn thought they ought to be decided." Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 632 (1975) (emphasis in original). In fact, this remark is more apt for the commentators than for the courts.

126. Winship, *The "True" Consignment Under the Uniform Commercial Code, and Related Peccadilloes*, 29 SW. L.J. 825 (1975). I hasten to add that I have chosen this article as an illustration and not to publicize it. I suspect that to place an article in this first "doctrinal" category of the literature may have pejorative connotations despite protestations to the contrary.

The best writings in this category, however, are very skillful. Of the more narrowly focused examples, I would include Benfield, *Rights of a Seller's Assignee to Reclaim Goods Under the UCC*, 53 TEX. L. REV. 1 (1974), and Steffen and John, *The After-Acquired Surety: Commercial Paper*, 59 CALIF. L. REV. 1459 (1971). I would also include within this category, however, the much broader studies of Countryman, *Buyers and Sellers in Bankruptcy*, 1 N. M. L. REV. 435 (1971), and Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973).

127. U.C.C. §§ 2-326, 2-327, 9-114, 9-408.

subject chosen has a narrow focus. It is a category taken from the law with no attempt to examine the business context in which distribution by consignment occurs, thereby avoiding such questions as why certain manufacturers choose to distribute goods by consignment rather than by functionally equivalent legal devices. There are brief references to pre-Code law and a more thorough examination of the drafting history of the Code provisions. The bulk of the article analyzes the Code language in the light of court opinions and academic commentaries. Some attempt is made to relate the interpretation of the relevant Code provisions to general Code themes relating to freedom of contract and protection of creditors and purchasers. Ambiguities are exposed and a "true" reading is suggested, with the proposal of a possible amendment to clarify the situation. The entire exercise is carried on within the confines of the Code: difficult issues arising under the law of bankruptcy and consignment are carefully sidestepped.

### B. *Thematic Writings*

A second category of writings, found almost exclusively in the law reviews, may be distinguished from those in this first category by the interest in the general themes or concepts that are said to underlie the more specific Code provisions. Included in this category of writings are the important studies that focus on particular Code concepts, such as the relation of the Code to supplementary law (UCC section 1-103),<sup>128</sup> good faith (UCC section 1-203),<sup>129</sup> usage of trade (UCC section 1-205),<sup>130</sup> and unconscionability (UCC section 2-302).<sup>131</sup> Also included are the studies that explore themes common to a number of Code articles, such as the rights of the *bona fide* purchaser,<sup>132</sup> or that find approaches to interpreting the Code implicit in its provisions and usually traceable to the jurisprudence of Karl Llewellyn.<sup>133</sup> Unlike many of the writings included in the first category, these writings tend to be timeless:

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128. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code*, 31 ARK. L. REV. 1 (part 1), 171 (part 2) (1977), 34 ARK. L. REV. 1 (part 3) (1980); Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U.L. REV. 906 (1978); see also Hillman, *Construction of the Uniform Commercial Code: UCC 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655 (1977).

129. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619.

130. Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139 (1970); Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L. FORUM 811.

131. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

132. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811 (1979); Jackson and Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978); see also Gilmore, *Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of an Unrepentant Draftsman*, 15 GA. L. REV. 605 (1981).

133. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Eddy, *On the "Essential" Purpose of Limited Remedies: The Metaphysics of UCC Section 2-719*, 65 CALIF. L. REV. 28 (1977) (emphasis on Llewellyn's notion of situation types); McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); Murray, *Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269 (1972); Winship, *Jurisprudence and Uniform Commercial Code: A "Commote"*, 31 SW. L.J. 843 (1977); see also Note, *How Appellate Courts Should Justify Decisions Made Under the U.C.C.*, 29 STAN. L. REV. 1245 (1977).

they are less likely to respond to current litigation or to questions raised in legislative debates. On some topics, especially good faith and unconscionability, the classic articles appeared before 1970 and still provide the framework for discussion.<sup>134</sup>

In a sense, despite the broader outlook of the writings in this second category they share the same fundamental characteristic of the first category: they are also *explications de texte*; they hold out to readers, including judges, the concept of the Code as a *roman à clef* to which they have the key that will explain the text. Yet, even if only implicitly, these studies tend to suggest questions that go beyond a gloss on the Code. They ask, for example, about the proper role of the judge, the form legislation should take, and the scope of party autonomy.<sup>135</sup> Thus, Professor Summers' study of the relation of equitable principles and the Code<sup>136</sup> fits in naturally with his explicitly jurisprudential studies of judicial decision making.<sup>137</sup>

A good example of this thematic category of writings is Professor John Dolan's study of the conveyancing and property principles which, he argues, underlie the Code and provide a framework for analysis.<sup>138</sup> After suggesting that failure to treat the Code as an integrated statute is the cause of many of the difficulties courts and practitioners experience with the Code, he proceeds to examine the Code "as a single construct resting on four basic property interests and three basic conveyancing principles."<sup>139</sup> After elaborating each of these interests and principles from the text of the Code, he studies the application of these interests and principles in the context of particular problems, such as the "pledging" of letters of credit and the bailment of goods, that have arisen in recent court cases. His article thus serves the dual purpose of providing both an analysis that harmonizes different parts of the Code and a framework that allows for better-decided or better-reasoned cases.<sup>140</sup>

134. On "good faith" see Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). On unconscionability see Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

135. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622, 631, 635 (1975); Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote"*, 31 SW. L.J. 843, (1977).

136. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U.L. REV. 906 (1978).

137. See, e.g., Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

138. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811 (1979).

139. *Id.* at 811. The four basic property interests are: title, special property, security interest, and lien. The three basic conveyancing principles are security of property (*i.e.*, purchaser receives interest that transferor can transfer) and two forms of estoppel. *Id.*

140. Professor Dolan writes: "Recognizing the components and the structural relationships of this framework not only enables us to harmonize the various Articles of the Code, but also allows us to resolve commercial disputes in a theoretically consistent and pragmatically sound method." *Id.* at 828.



### C. Theoretical Writings

The tendency of writings in the second "thematic" category to suggest broader questions is much more explicit in writings in a third "theoretical" category, which is found almost exclusively in the form of articles published in the most prestigious law reviews.<sup>141</sup> The writings in this third category change the agenda for scholarly research. Professor Hal Scott, for example, explicitly rejects the textual analysis he finds prevalent in Code scholarship and sets out the lines of analysis he thinks should be developed. He writes:

There is, in my view, a need to develop two lines of analysis in the field of commercial law. First, we should inquire why private contract and the common law of contract did not prove a sufficient basis on which to organize a commercial law. Here, a historical approach that tries to account for the development of statutory law is most useful. A second and related inquiry, not undertaken here, would evaluate the desirability of a particular statutory rule by assessing the rule's asserted regulatory objective—*i.e.*, to cure market imperfections or abuses—and its distributional impact on market actors.<sup>142</sup>

If Code concepts and provisions are studied, it is to test them from such theoretical perspectives as the economic analysis of law. Frequently the theoretical discussion, using hypothetical cases, precedes the analysis of the Code and court decisions.<sup>143</sup> In his study of the reification of abstract rights Professor Robert Clark, for example, divides his exposition into three parts: an analysis of the relevant Code provisions as illustrated by the application of these provisions to a paradigmatic case, a study of the statutory policy, and a concluding suggestion of a general theory that would explain the form and policy of the Code for abstract rights.<sup>144</sup>

By far the most prevalent of these theoretical perspectives is that of economic analysis.<sup>145</sup> Old questions are re-examined in the light of this anal-

141. Although few in number so far, there have been several notable student works published that would fit within this category. See Comment, *Liquidated Damages and Penalties Under the Uniform Commercial Code and Common Law: An Economic Analysis of Contract Damages*, 72 NW. U.L. REV. 1055 (1978); Comment, *A Theoretical Postscript: Microeconomics and the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973). See also Note, *Risk of Loss in Commercial Transactions: Efficiency Thrown into the Breach*, 65 VA. L. REV. 557 (1979).

142. Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 738 (1978).

143. In much of the literature in this category there is discussion not only of the Code but also of the common law position on a particular point. There appears to be an implicit assumption in at least some of this literature that the common-law rule represents an efficient solution. This assumption has been the subject of some debate. See Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Cooter and Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

144. Clark, *Abstract Rights Versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 YALE L.J. 445 (1975). Professor Clark places this study in the context of his later studies in other areas of law in Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981).

145. This is symbolized by the publication of readings in THE ECONOMICS OF CONTRACT LAW (A. Kronman & R. Posner eds., 1979).

ysis;<sup>146</sup> new questions are asked.<sup>147</sup> The study of contract remedies from this perspective, for example, has developed a substantial body of literature testing the Code's sale remedy provisions.<sup>148</sup>

A good example of the literature in this category is Professor George Priest's economic analysis of the remedy for the tender of nonconforming goods.<sup>149</sup> He begins with a theoretical discussion of when rejection of goods is more efficient than damages because it minimizes the costs of breach. He then examines the origins of the Code provisions with emphasis on the thinking of Karl Llewellyn, followed by a comparison of the Code text with the "objective" of efficiency. A final part of the article surveys the facts and outcomes of cases "to test the hypothesis" that courts apply the Code so as to minimize the costs of sales. He concludes that judges actually decide the cases consistently with the criterion of efficiency and will construe or even torture statutory language in order to arrive at this outcome. He notes:

Economic efficiency never has been recognized explicitly as a standard of Code interpretation and is seldom mentioned as a criterion of decision in judicial opinions. But the *results* of decisions interpreting the Code are consistent with minimization of long-run costs of formation of the contract, of delivery and handling of the goods, and of resolution of disputes arising under the contract.<sup>150</sup>

146. The concept of specific performance, for example, is reexamined in Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

147. The justification for security interests and for priority rules, for example, is raised in Jackson and Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979). See also Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981).

148. See especially the writings in this area by Professors Goetz and Scott, Jackson, Kronman, and Schwartz.

149. Priest, *Breach and Remedy for the Tender of Non Conforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960 (1978). For Professor Priest's views on the efficiency of the common-law system and implicit approval of a judicially created, rather than legislatively determined, body of legal rules, see Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

150. Priest, *Breach and Remedy for the Tender of Non Conforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 960 (1978) (emphasis in original); see also *id.* at 1001:

Certainly the criterion of economic efficiency is nowhere expressed as a basis of the Code in law or policy. Yet the narrow legal doctrines embodied in the Code's provisions are often responsive to an underlying concern for efficiency and are usually applied so as to minimize the costs of sales. Analysis of the costs of a given transaction thus may permit parties to predict the outcome of a judicial decision. And whenever case law diverges from the literal interpretation of the text of a statute, some method of prediction becomes essential.

There is an apparent tendency in the literature to shed some of the qualifications on the role of the standard of efficiency. See, e.g., Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515, 535 (1981): "A primary purpose of commercial law is to provide the rules that protect the stream of commerce by allowing it to function as efficiently as possible. . . . Section after section of the Code is clearly designed to make transactions less costly, thereby encouraging allocative efficiency."

Professor Jackson, on the other hand, is far more hesitant in his use of the efficiency criterion:

The Code does not expressly declare efficiency as one of its goals. But courts, even in the face of contrary Code language, have often construed the Code to reach efficient results. . . . [He cites Priest *supra*]. Where the Code language is unclear, it seems sensible to inquire whether attention to efficiency can help interpret that language. The close textual reading of inconsistent statutory language is perhaps a useful, but ultimately a limited, approach in developing a workable understanding of Article 2. . . . In light of the Code's unclear intent in dealing with anticipatory repudiation, it seems fruitful to reach for efficient results.

Jackson, "Anticipatory Repudiation" and the Temporal Element of Contract Law: *An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69, 72 n.12 (1978) (emphasis added).

The language and policies of the Code, in other words, are to be tested by an extra-Code standard—a standard that has legitimacy not only because it is implicit in many Code provisions but also because it explains what courts do in practice.

Although a few studies from the period since 1970 use theoretical perspectives other than that of law and economics,<sup>151</sup> it is more remarkable that several potentially fruitful perspectives are neglected. Despite the studies of Professors Robert Clark and Hal Scott<sup>152</sup> and the tantalizing suggestions of Professor Gilmore,<sup>153</sup> the historical perspective remains relatively untapped.<sup>154</sup> There is also a dearth of comparative law studies,<sup>155</sup> and published

151. See, e.g., Clark, *Abstract Rights Versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 YALE L.J. 445 (1975), and Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981) (evolution of legal institutions); Scott, *The Risk Fixers*, 91 HARV. L. REV. 737 (1978) (historical study of origins of bank collection legislation).

152. See the articles cited in note 151 *supra*.

153. See the articles by Professor Gilmore cited in note 38 *supra*.

154. Since 1970 there have been a few historical studies by law professors of commercial law or commercial institutions. See, e.g., McGovern, *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective*, 74 NW. U.L. REV. 141 (1979); Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the Swift Doctrine*, 27 EMORY L.J. 45 (1978); McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973). See also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977). Several historians have also worked in this area. See, e.g., Bakken, *Contract Law in the Rockies: 1850-1912*, 18 AM. J. LEGAL HIST. 33 (1974); Freyer, *Negotiable Instruments and Federal Courts in Antebellum American Business*, 33 BUS. HIST. REV. 435 (1976).

A distinct "historical perspective" does not necessarily entail specialized studies. In a suggestive aside Professor Gilmore has protested against use of the term "legal history":

The only legal materials that are or ever have been or ever will be available are historical—cases that have already been decided, statutes that have already been enacted, and so on. There is absolutely no point in setting up a separate category of legal writing (or law teaching) to be known as 'legal history.' To the extent that we segregate the study of our legal past from the study of our legal present, we become not historians but antiquarians.

G. GILMORE, *THE AGES OF AMERICAN LAW* 103-04 (1977). Professor Gilmore implicitly suggests that all analysis should be sensitive to the transient nature of legal institutions.

155. There have been very few comparative commercial law studies published in the United States since 1970. One would include Farnsworth, *The Uniform Commercial Code and the Global Unification of International Trade Law*, in *INTERNATIONAL ECONOMIC AND TRADE LAW, UNIVERSAL AND REGIONAL INTEGRATION* 97 (C. Schmitthoff & K. Simmonds eds. 1976); Fox, *Comparative Commercial Law Legislation of the Republics of Lebanon, West Germany and the United States*, 7 LEX ET SCIENTIA 74 (1970); Murray, *Delivery Order in American and English Commercial Law*, 82 COM. L.J. 205 (1977); Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code*, 31 ARK. L. REV. 1 (part 1), 171 (part 2) (1977), 34 ARK. L. REV. 1 (part 3) (1980); Ricks, *A Comparison of the Scope of Contract Damages in the United States and Japan*, 12 INT'L LAW. 105 (1978); Comment, *Convention on the Uniform Law of International Bills of Exchange and International Promissory Notes: A Comparison to the Uniform Commercial Code*, 5 GA. J. INT'L & COMP. L. 216 (1975); see also E. FARNSWORTH, *INSTALLMENT SALES* (published as part of the *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 1973).

There also have been several foreign law studies which make little or no attempt to compare the foreign system with the Uniform Commercial Code. See Munger, *Rights and Priorities of Secured Creditors of Personality in Mexico*, 16 ARIZ. L. REV. 767 (1974); Comment, *Product Liability and the English Implied Terms Bill: Transatlantic Variations on a Theme*, 49 NOTRE DAME LAW. 185 (1973); see also Reynolds, *Foreign Commercial Legislation in English*, 69 L. LIB. J. 41 (1976).

Important developments abroad have gone virtually unnoticed in American law journals. Even within English-speaking countries there have been remarkable developments, many of which show the influence of the Uniform Commercial Code. See, e.g., Ontario Law Reform Commission, *Report on Sale of Goods* (1979); Ziegel, *The American Influence on the Development of Canadian Commercial Law*, 26 CASE W. RES. L. REV. 861 (1976). There have, however, been some references to Canadian developments. See Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1052 & 1054 n.156 (1978); Henson, *Book Review*, 12 OTTAWA L. REV. 514 (1980). It is perhaps significant that American commentary on the important English case of

empirical research is minimal.<sup>156</sup> Nor have members of the Conference on Critical Legal Studies contributed insights into specifically commercial institutions.<sup>157</sup>

#### IV. COMMENTS

As is appropriate for a work in progress, this final section ends this essay with concluding comments rather than firm conclusions.

1. A systematic inventory of the commercial law literature serves several useful, if limited, purposes. It forces one to define and to classify. It may bring to one's attention materials that would otherwise go unnoticed. It may confirm points concluded from casual reading or, occasionally, it may bring out unsuspected trends. The beginning of such an inventory for the period since 1970 is set out in part II of this essay. What is needed now, however, is to tease out the implications of the numbers given. Why, for example, have single-volume commercial law texts for practitioners proliferated recently? Can trends in the choice of law review article topics be explained by the high value placed on novelty in law schools? No doubt a more complete explanation of these and other questions requires supplementing the inventory figures with additional information about the incentive structure for the production of legal scholarship, the economic constraints on publishers, and the nature of the audience or markets for the various forms of publication.<sup>158</sup>

*Aluminium Industrie Vaasen BV v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676, should appear in an English journal. Murray, *The Unpaid Seller's Reservation of Title Under the Romalpa Clause Is Not Effective in America*, 1981 LLOYD'S MAR. & COM. L.Q. 278.

156. See generally Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC'Y REV. 507 (1977); Schuchman, *Empirical Studies in Commercial Law*, 23 J. LEGAL ED. 181 (1970). Professor Cavers' discussion of the problems related to empirical research in law schools is still relevant. Cavers, *Science, Research, and the Law: Beutel's "Experimental Jurisprudence,"* 10 J. LEGAL ED. 162 (1957).

Most of the empirical studies published since 1970 involve surveys or questionnaires with little attempt to develop or test hypotheses. See, e.g., Dauer and Stern, *UCC § 9-301(4) [1972] vs. IRC § 6323(c)(1)(A)(ii) [1966]*, 8 U. TOL. L. REV. 51 (1976); Krahmer, *Creditors, Consumers and Article 9 of the Uniform Commercial Code*, 5 U. TOL. L. REV. 1 (1973); Murray, *Price v. Neal in the Electronic Age: An Empirical Survey*, 87 BANKING L.J. 686 (1970); Comment, *An Empirical Study of the Magnusson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979).

The debate over the constitutionality of UCC § 9-503 encouraged the development and critical analysis of data. See Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973); Dauer and Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973); Johnson, *A Response to Dauer & Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151 (1973); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503; see also Shuchman, *Condition and Value of Repossessed Automobiles*, 21 WM. & MARY L. REV. 15 (1979); Comment, *Business As Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511 (1971); Note, *I Can Get It for You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081 (1975).

For an interesting study using Lexis, see White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262 (1977).

Despite a call for studies conducted by faculty at business schools, there have been no empirical studies published in the law reviews. Donnell, *Empirical Research: A Key to the Kingdom for the Business Law Instructor*, 8 AM. BUS. L.J. 287 (1971).

157. But see Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN LAW & SOC. 25 (1980).

158. For analyses that focus on the incentives and constraints that academic legal scholars face see Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131, 1132-48 (1981); Tushnet, *supra* note 1, *Truth*,

2. Classification of "forms of analysis" is far more problematic. The three categories suggested in part III of this essay may have to be revised after further reading. No matter what categories are ultimately adopted, however, what is needed next is an explanation of why one form of analysis is adopted rather than another. To what extent, for example, do the constraints of different types of publications shape the form of analysis adopted? Are forms of analysis related to particular value-systems or ideologies of the authors?<sup>159</sup> Again, supplemental information about authors, publishers, and audiences may provide for a fuller explanation.

3. The impact or diffusion of the commercial law literature needs attention.<sup>160</sup> If one extends the time period examined, one might be able to test the hypothesis that the forms of analysis adopted by "elite" authors shape the analytic framework subsequently adopted by other scholars and the courts. One might compare the impact of this elite scholarship with that of doctrinal writings. Techniques used in recent studies of citation patterns in courts<sup>161</sup> might be adapted to the study of such patterns in the secondary literature. Insights from the extensive studies of communication networks in scientific communities might also be relevant.<sup>162</sup>

4. Comparing trends in commercial law scholarship with those in other areas of legal scholarship may also provide useful insights. One might test the hypothesis that for any particular period of time, trends in forms of legal analysis are the same in all legal fields. In a study of contemporary tort law scholarship Professor Edward White, for example, observes that this scholarship is unified by a "regular interest in stating and advancing a theoretical perspective,"<sup>163</sup> but he suggests a much greater diversity in these perspec-

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*Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1334-39 (1979).

What may be needed is a thorough review of the role of law reviews in the United States. To what extent has the quality of legal scholarship suffered because the great number of journals permits one to publish almost anything somewhere? Have law faculties abdicated editorial responsibilities to student-run journals? A recent review of legal publishing in England suggests a model for such an inquiry. SOCIETY OF PUBLIC TEACHERS OF LAW WORKING PARTY ON LAW PUBLISHING, FINAL REPORT ON LAW PUBLISHING AND LEGAL SCHOLARSHIP (1977).

159. See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1334-39 (1979).

160. I made a beginning of such a study using *Shepard's Law Review Citations*. See Note 33 *supra*. Use of this primitive method of measuring impact suggests how very infrequently most law review articles are cited by other scholars and especially by courts. Articles dealing with constitutional issues or matters likely to be litigated in federal courts are more likely to be cited than other articles. Articles by certain authors who write for both academics and practitioners (e.g., Professors Peter Coogan, Vern Countryman, and Frank Kennedy) are very likely to be cited frequently no matter where published.

161. Friedman, Kagan, Cartwright, and Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977); see also Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 59 STAN. L. REV. 613 (1954).

162. See, e.g., D. CRANE, *INVISIBLE COLLEGES* (1972); A. MEADOWS, *COMMUNICATION IN SCIENCE* (1974).

163. G. WHITE, *TORT LAW IN AMERICA—AN INTELLECTUAL HISTORY* 212-13 (1980).

tives than is found in commercial law scholarship.<sup>164</sup> Comparison with Professor Tushnet's studies of trends in constitutional law scholarship<sup>165</sup> suggests that constitutional and commercial law literature share a common concern for rationalizing cases but that commercial law scholarship much less frequently discusses the values implicit in their studies. One might seek explanations for differences in the form the legal rules take (widely adopted codification as opposed to a mixture of common law and statutes or open-ended constitutional provisions), possible differences in the backgrounds of persons interested in commercial law, or perhaps some other reason. Until these studies are carried out, however, one must be wary of generalizations about trends in contemporary legal scholarship.

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164. Compare PERSPECTIVES ON TORT LAW (R. Rabin ed. 1976) with THE ECONOMICS OF BASIC CONTRACT LAW (A. Kronman & R. Posner eds. 1979).

165. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).