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## Interpreting Codes

Bruce W. Frier

*University of Michigan Law School*, [bwfrier@umich.edu](mailto:bwfrier@umich.edu)

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# INTERPRETING CODES

Bruce W. Frier\*

On December 1, 1944, the National Conference of Commissioners on Uniform State Laws and the American Law Institute formally agreed to cosponsor the creation of a Uniform Commercial Code (UCC), with Professor Karl Llewellyn serving as its Chief Reporter and Soia Mentschikoff as Associate Chief Reporter.<sup>1</sup> Two years later, as the earliest drafts of the UCC were circulating, Dean Roscoe Pound published a general article on the character of modern law.<sup>2</sup> In this article he surveyed the modern codification movement, as well as the objections to it. He concluded:

The most serious objection to a code in a common-law jurisdiction is that we have no well developed common-law technique of developing legislative texts. Our technique of statutory interpretation is not adequate to the application of a code.<sup>3</sup>

If correct, Pound's objection is a serious one. Of course, it can be argued that the UCC is not a code at all, but rather "a big statute or a collection of statutes bound together in the same book";<sup>4</sup> and certainly the UCC is at some remove from traditional civil law codes. The UCC does not strive for completeness even within the commercial sphere, nor is it nearly so closely drafted as the traditional codes of European civil law.<sup>5</sup> More important is the UCC's status not as a national law, but as state law within numerous distinct jurisdictions; this has meant not only appreciable variations in enacted wording and in judicial interpretation, but also a complex and shifting interaction with both fed-

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\* Professor of Classics and Roman Law, University of Michigan. B.A. 1964, Trinity College; Ph.D. 1970, Princeton. — Ed.

1. For a historical reconstruction, see W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 270-301 (1973).

2. Pound, *Sources and Forms of Law*, 22 *NOTRE DAME LAW*. 1, 46-80 (1946).

3. *Id.* at 76.

4. Gilmore, *Article 9: What It Does for the Past*, 26 *LA. L. REV.* 285, 286 (1966). Gilmore believed that the UCC would not substantially displace "[t]he solid stuff of pre-Code law." *Id.* at 286. But it is doubtful that pre-Code law has much current influence in interpreting the UCC.

5. For a short description of the major European codes, see A. WATSON, *THE MAKING OF THE CIVIL LAW* 99-130 (1981). For more detail, see 1 K. ZWEIGERT & H. KOTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* (1971), especially chapters 6-10, "Der romanische Rechtskreis," (The Romanistic Legal Family) and chapters 11-15, "Der deutsche Rechtskreis" (The German Legal Family). For an English translation, see 1 K. ZWEIGERT & H. KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (T. Weir trans. 1977). For possible civil law influences on the UCC, see Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 *TUL. L. REV.* 1125 (1982).

eral and state laws and regulations.<sup>6</sup>

Still, because of its nearly universal adoption in a form and wording that approximate the model, the UCC can at least be described as "code-like" — something more, in any case, than an ordinary statute.<sup>7</sup> In this brief article, rather than tackling the exceptionally difficult question of how the UCC is (or ought to be) interpreted as a code,<sup>8</sup> I want only to point to some features of European experience in interpreting codes, and to argue that these features are not inconsistent with, and may even to some extent prefigure, emerging patterns in the interpretation of the UCC. Since these shared interpretive patterns have arisen independently, they suggest that the form of legal materials can exert considerable influence on the formation of legal cultures.

*The Salience of General Clauses.* Like the UCC, European codes contain norms that vary widely in the breadth of their formulation and in the level of their abstraction. An example is the German Civil Code (the BGB), whose articles range from the extreme specificity of section 961 ("If a swarm of bees moves out, it becomes ownerless if the owner does not immediately pursue it or if the owner gives up the pursuit")<sup>9</sup> to the sweeping breadth of section 138(1) ("A legal transaction which is against public policy is void").<sup>10</sup> "General clauses" (*General-klauseln, principes généraux*) of the latter type, with a vague but undeniable ethical content, appear in all European civil codes.

In the present century, European judges have seized upon such general clauses as a legislative derogation to them of a general "moral" authority and supervision in administering the codes; the general clauses have accordingly become a standard vehicle for achieving what is now almost universally recognized (at least in academic circles) as judicial legislation.<sup>11</sup> An outstanding example is BGB section 242,

6. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 3, at 6-9 (3d ed. 1988) (student edition).

7. On the nature of codification, see Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988). Bergel distinguishes two types: "substantive or true codification," the goal of which is "to achieve a material and systematic structure of the law," and "formal codification," aiming "only to succeed in regrouping and classifying existing texts." *Id.* at 1097. The UCC is a clear example of the former. *Id.* at 1076, 1092.

8. See, e.g., Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291 (arguing that the UCC should be interpreted as a "true code"); see also McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978).

9. THE GERMAN CIVIL CODE § 961 (I. Forrester, S. Goren & H. Ilgen trans. 1975) (English translation of *BÜRGERLICHES GESETZBUCH*, commonly known as BGB).

10. THE GERMAN CIVIL CODE, *supra* note 9, § 138(1).

11. R. DAVID, *FRENCH LAW: ITS STRUCTURES, SOURCES, AND METHODOLOGY* 194-207 (M. Kindred trans. 1972) ("Supereminent Principles"); see also O. KAHN-FREUND, C. LÉVY & B. RUDDEN, *SOURCE-BOOK ON FRENCH LAW* 176-98 (2d ed. 1979) (a thorough discussion with

providing that: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage."<sup>12</sup> Although this section was originally "confined to regulating the manner and method of the duty to perform," it has been judicially transformed into "a 'super control norm' for the whole BGB, and indeed for large parts of German law outside it. . . . a 'principle of legal ethics,' which dominates the entire legal system."<sup>13</sup> A recent exhaustive commentary on section 242 alone runs to some 1553 pages.<sup>14</sup>

In a thoughtful article, the late John Dawson tried to assess the significance of such general clauses in the development of modern German law.<sup>15</sup> On the one hand, he accepted the logic that had converted such clauses into "super control norms": "By including these clauses the draftsmen of the Code and legislature acknowledged both that the Code was incomplete and that it needed to be supplemented, primarily through judicial action, from sources outside the Code."<sup>16</sup> On the other hand, he admitted the dangers of the temptation they provided as "express licenses to judges to go out hunting anywhere and bring back their trophies, to be hung then in the living room."<sup>17</sup>

The UCC, of course, also contains general clauses of wide breadth, such as section 2-302 (on unconscionable contracts or contract clauses),<sup>18</sup> or section 1-203, providing that: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."<sup>19</sup> But as yet it can hardly be said that either section has emerged as a "super control norm."<sup>20</sup> Of course, American judges

some excellent illustrations); cf. K. LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 276-81 (5th ed. 1983).

12. THE GERMAN CIVIL CODE, *supra* note 9, § 242.

13. N. HORN, H. KÖTZ & H. LESER, *GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION* 135 (T. Weir trans. 1982) (footnote omitted) (quoting I Protokolle zum BGB 303); cf. *id.* at 135-45 ("The Principle of Good Faith: § 242 BGB;" "its function is to justify the value-judgments of the judge").

14. 2 W. WEBER, *J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESSETZBUCH, TEIL 1B: § 242* (11th ed. 1961), *cited in* 1 E. COHEN, *MANUAL OF GERMAN LAW* 101 (1968).

15. Dawson, *The General Clauses, Viewed from a Distance*, 41 *RABELS ZEITSCHRIFT* 441 (1977).

16. *Id.* at 444. In fact, this "acknowledgement" is usually a legal fiction.

17. *Id.* at 445. On the German "flight into the general clauses" during the troubled 1920s and 1930s, see J. DAWSON, *THE ORACLES OF THE LAW* 461-79 (1968). The phrase is from J. HEDEMANN, *DIE FLUCHT IN DIE GENERALKLAUSELN* (1933).

18. U.C.C. § 2-302 (1987).

19. U.C.C. § 1-203 (1987).

20. For a discussion of § 2-302 as a "supereminent provision," see Hawkland, *supra* note 8, at 305-07. It is doubtful, however, that the section has yet been used by courts more generally as a key to understanding the UCC in its entirety. On unconscionability in German and American law, see Dawson, *Unconscionable Coercion: The German Version*, 89 *HARV. L. REV.* 1041, 1042-

do not necessarily require legislative authorization for the equitable expansion of law.

More significant, perhaps, has been the fate of less grandiose general clauses such as UCC section 1-106(1), which provides for the "liberal administration" of UCC remedies with the stated goal of placing "the aggrieved party . . . in as good a position as if the other party had fully performed."<sup>21</sup> This clause has frequently been used to solve knotty problems arising out of the draftsmanship of UCC remedy clauses,<sup>22</sup> for example, in the case of defaulting sellers, the vexed issue of the interrelationship of cover with market-difference damages under sections 2-712 and 713;<sup>23</sup> or, in the case of defaulting buyers, the awkward language of section 2-708 in determining whether to award market-difference damages or lost profits.<sup>24</sup> Reasonable solutions have been located virtually in the teeth of the UCC's express wording.<sup>25</sup>

The success of section 1-106 has largely depended on the dexterity of commentators and judges in bringing it to bear on clear and specific problems, with the aim "to scale down the apparently unlimited mandate of the general clause, to restructure it into distinct subordinate norms that become intelligible and manageable through their narrowed scope and function."<sup>26</sup> The fate of still broader sections, such as section 1-203 or section 2-302, is likely to depend on whether this

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44 (1976) (stressing the narrowness of the American doctrine). This fine article raises many of the themes I am touching on.

The good faith required under the UCC is generally conceptualized fairly narrowly, as an "excluder" aimed at specific types of undesirable conduct. See Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); see also Summers, *The General Duty of Good Faith — Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (arguing that the concept of good faith in the RESTATEMENT (SECOND) OF CONTRACTS § 205, is broader than that in the U.C.C. § 1-203).

But see also the related issue of whether U.C.C. § 1-203 generates claims based upon a duty of good faith alone, apart from duties imposed by other UCC clauses: compare *Chandler v. Hunter*, 340 So. 2d 818, (Ala. App. 1976) (no) with *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9 (1st Cir. 1987) (yes, through reference to U.C.C. § 1-106).

21. U.C.C. § 1-106(1).

22. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 17 n.86 (3d ed. 1988) (practitioner edition) (cases cited).

23. The leading case is *Allied Cannery & Packers, Inc. v. Victor Packing Co.*, 162 Cal. App. 3d 905, 209 Cal. Rptr. 60, 39 U.C.C. 1567 (1984). See generally J. WHITE & R. SUMMERS, *supra* note 6, § 6-4, at 263-65.

24. J. WHITE & R. SUMMERS, *supra* note 6, §§ 7-11-7-12, at 318-24. A major case is *Nobs Chemical, USA v. Koppers Co.*, 616 F.2d 212 (5th Cir. 1980) (restricting buyer to lost profit under § 2-708(2), and not allowing a claim for market-based damages, despite the clear statutory language against such restriction); see also White, *The Decline of the Contract Market Damage Model*, 11 U. ARK. LITTLE ROCK L.J. 1 (1988-89).

25. By contrast, U.C.C. §§ 1-102(1) and (2), setting out the Code's general purposes and principles of construction, has had more limited effect. See J. WHITE & R. SUMMERS, *supra* note 6, § 4, at 14-18.

26. Dawson, *supra* note 20, at 1044.

interpretive process can be replicated for them.<sup>27</sup>

*Expansion of the Interpretive Community.* The general clauses are only the most conspicuous examples of the open draftsmanship of most European codes. This style is deliberate. As the drafters of the French Civil Code put it:

The function of the [codified] law (*loi*) is to fix, in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*consequences*), and not to descend into the details of the questions that can arise in each subject.

It is for the judge and the lawyer, embodied with the general spirit of the laws, to direct their application.<sup>28</sup>

Subsequent European codes have generally followed this highly successful style; that is to say, they deliberately envisage future legal development without trying to determine, except in a general manner, the exact course that this development will take.

In practice, legal development under the European codes has been largely accomplished through fruitful cooperation between judges and academics; or, as the French express it, between "case law" (*jurisprudence*) and academic writing (*doctrine*).<sup>29</sup> The distinction is in principle one of function: "On the one side are the [academic] writers, who examine legal problems in a detached manner, without any concern for the problems of immediate application; on the other side is the practical life in its diverse forms, which develops the solutions for concrete cases."<sup>30</sup>

What this comes down to is a partnership in which legal scholars are conceded great authority to organize and analyze the case law; indeed, judges widely understand the legal content and impact of their own decisions through the intermediary of academic writing. Particularly in areas where law is uncertain or disputed, academic writings often have decisive impact on legal change.<sup>31</sup>

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27. Dawson seems pessimistic: "We have much to learn from German law and should be willing to admire the German achievement. It does not follow that we have the means to emulate it." *Id.* at 1126.

28. A. VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* 58 (1957) (quoting 1 J. DE LOCRÉ, *LA LÉGISLATION DE LA FRANCE* 258 (1827)).

29. French judges form *jurisprudence* through their decisions because they are historical heirs of the Roman jurists (*jurisprudentes*) as law-finders. There is nothing academic or theoretical about their *jurisprudence*.

30. F. GÉNY, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* 308 (trans. 2d ed. 1954); cf. R. DAVID, *supra* note 11, at 189-90.

31. R. DAVID, *supra* note 11, at 188-93; M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 208-11 (1985); O. KAHN-FREUND, C. LÉVY & B. RUDDEN, *supra* note 11, at 166-76; Dawson, *supra* note 20, at 1122-23. But the importance of *doctrine* appears to be declining. F. LAWSON, A. ANTON & L. BROWN, AMOS AND WALTON'S *INTRODUCTION TO FRENCH LAW* 12-14 (2d ed. 1963); Glendon, *The*

To be sure, the prominence of legal academics in civil law systems is partially explicable through history; European universities have played a large role in articulating legal principles since at least the twelfth century.<sup>32</sup> But the sheer bulk and internal complexity of the great European codes have, if anything, tended to prolong academic influence, at any rate once interpretation extends beyond the bare "grammatical" meaning of a code's provisions. Of course, it is in no way surprising that universities, as centers for legal education, should concern themselves heavily with analysis and systematization of law, as well as with legal criticism. More surprising is that the resulting scholarship continues to have such marked reflexive impact on judicial practice. The existence of the codes, and the felt necessity on the part of European judges to justify legal change through reference to them,<sup>33</sup> may provide part of the explanation.

If this view is correct, then despite the enormous difference in legal cultures, one might anticipate that within the United States as well the adoption of codes such as the UCC would also lead to judges according greater weight to academic writings.<sup>34</sup> This is particularly true because one aim of the UCC is "to make uniform the law among the various jurisdictions."<sup>35</sup> If uniformity is to occur, then some form of external vigilance is required to prevent the inevitable entropy of conflicting interpretations within the states.<sup>36</sup>

This problem was, of course, foreseen. The *Master Edition* of the UCC keeps track of most cases interpreting the code; important cases also are reported at length, with brief notes, in the *UCC Reporting Service*.<sup>37</sup> The larger task of analyzing, criticizing, and integrating

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*Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 666-73 (1984) (attributing the decline in part to the rise of statutory law).

32. 1 H. COING, *HANDBUCH DER QUELLEN UND LITERATURE DER NEUEREN EUROPISCHEN PRIVATRECHTSGESCHICHTE* 41-51 (H. Coing ed. 1973); J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 56-67 (2d ed. 1985).

33. R. DAVID, *supra* note 11, at 167 ("Even in those cases where [the French judge] most clearly rewrites the statute, he sees himself applying it and interpreting it. He does not think he is making law and would be surprised to have his actions thus be characterized.")

34. For empirical evidence that academic writings have increasing weight in judicial opinions, see 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); cf. Rhein-stein, *Leader Groups in American Law*, 38 U. CHI. L. REV. 687, 693-96 (1971) (on the rising influence of American academics).

35. U.C.C. § 1-102(2)(c); see also *General Comment* to U.C.C., 1 U.L.A. xv (1988) ("Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction.")

36. This danger is real. See generally Minahan, *The Eroding Uniformity of the Uniform Commercial Code*, 65 KY. L.J. 799 (1977).

37. U.C.C., U.L.A. (in v. 1-5, 1968 & Supps. 1991) (master ed.); U.C.C. Rep. Serv. (Callaghan) (beginning in 1965).

UCC decisions has largely fallen to a small number of commercial lawyers and to academics. Not surprisingly, almost immediately following its general adoption in the mid-1960s, the UCC became the subject of specialized periodicals.<sup>38</sup> Aspects of the UCC have also been discussed in numerous academic articles, including a large number of law journal symposia devoted to it specifically.<sup>39</sup>

More significant still is the swift appearance of treatises, both long and short, intended to assist in interpreting and implementing the UCC.<sup>40</sup> Here pride of place undoubtedly goes to White and Summers, whose relatively concise treatise<sup>41</sup> has been widely hailed, since its first edition in 1972, as capturing the legal spirit of the UCC: "comprehensive, highly analytic yet readable, often practically oriented, and punctuated by flashes of humor."<sup>42</sup> During the past three decades, this treatise has been cited in more than two thousand published judicial opinions.<sup>43</sup> Although the authors often range well in advance of existing holdings, not just criticizing previous decisions but anticipating future ones, the treatise is usually treated by courts as expressing the prevailing contemporary opinion of commentators.

The influence of academic writings is, of course, difficult to assess exactly, apart from obvious examples such as Arthur Leff's largely successful effort to limit the sweep of unconscionability in UCC section 2-302.<sup>44</sup> An instructive and well-known instance is the early *Roto-Lith* decision of 1962,<sup>45</sup> a First Circuit opinion which, following

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38. See, e.g., U.C.C. L.J. (since 1986); U.C.C. L. LETTER (since 1967). *The Business Lawyer* also carries an annual critical survey of significant UCC cases; the *Commercial Law Journal* carries regularly updated bibliographies.

39. By a rough count, since 1960 law journals have published about thirty-five symposia on the UCC.

40. R. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1st ed. 1964); R. ANDERSON, UNIFORM COMMERCIAL CODE (1st ed. 1961; 3d ed. 1981); W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES (1982); T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST (1978) (with two volumes of cumulative supplement to 1989); see also UNIFORM COMMERCIAL CODE CASE DIGEST (J. Willis ed. 1976-1988); W. WILLIER & F. MART, UNIFORM COMMERCIAL CODE REPORTER-DIGEST (1965-present). A large number of treatises are also devoted to specialized subjects, particularly article 9.

41. J. WHITE & R. SUMMERS, *supra* note 6.

42. Weinberg, Book Review, 58 MINN. L. REV. 712, 714 (1974).

43. A LEXIS search conducted on August 2, 1991, revealed 2378 cases: 966 federal cases, 1412 state cases. The search was conducted under the form: "White w/10 Summers w/10 Uniform Commercial Code."

44. Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (analyzing unconscionability into substantive and procedural heads, despite the absence of support for this view in the text or comments). Leff's article is the starting point in modern applications of U.C.C. § 2-302. See, e.g., J. WHITE & R. SUMMERS, *supra* note 6, § 4-3, at 186. Contrast with Leff the far more thoughtful article of Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969), which has had little influence.

45. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

ordinary common law modes of statutory interpretation, construed UCC section 2-207 ("Additional Terms in Acceptance or Confirmation") through reliance on the traditional "mirror image" doctrine of contract formation.<sup>46</sup> The decision was greeted by a hail of adverse academic commentary,<sup>47</sup> and was also stigmatized by White and Summers.<sup>48</sup> Such criticism has sharply restricted the influence of *Roto-Lith* within other jurisdictions.<sup>49</sup> Though the First Circuit has stuck to its guns, by 1990 even its district courts were rebelling.<sup>50</sup>

Whether or not such instances can correctly be described as embodying a trend, the possible effect of increased academic influence merits reflection. Academics bear an increasingly heavy responsibility not to mislead courts.<sup>51</sup> More generally, European experience suggests that the character and quality of academic *doctrine* vary considerably from nation to nation, especially in the degree of its practicality

46. 297 F.2d at 500.

47. Student notes were almost uniformly hostile. See, e.g., Note, *Commercial Law — Offer and Acceptance — Under Uniform Commercial Code Purchaser of Goods is Bound by Disclaimer of Warranties Contained in Seller's Expression of Acceptance*, 76 HARV. L. REV. 1481 (1963); Note, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540 (1963); Note, *Sales-Offeree's Response Materially Altering an Offer Solely to Offeror's Disadvantage Is an Acceptance Conditional on Offeror's Assent to the Additional Terms Under Section 2-207 of the Uniform Commercial Code*, 111 U. PA. L. REV. 132 (1962); Note, *Sales-Uniform Commercial Code—"Acceptance" Varying Terms of Offer*, 42 B.U. L. REV. 373 (1962). But see Note, *Uniform Commercial Code: Variation Between Offer and Acceptance Under Section 2-207*, 1962 DUKE L.J. 613, 617 ("an equitable recognition of reasonable commercial expectations"). Early negative reaction also included Davenport, *How to Handle Sale of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75, 85 (1963).

The Permanent Editorial Board for the Uniform Commercial Code used a different route to promote uniform interpretation: amending the Comments. In 1966, Comment 2 to U.C.C. § 2-207 was changed to express disapproval of *Roto-Lith*. "The courts take to the comments like ducks to water, even though the legislature did not enact the comments." J. WHITE & R. SUMMERS, *supra* note 6, § 4, at 12; cf. Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962 (1990).

48. In their first edition, White and Summers described *Roto-Lith* as an "infamous case." J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 26 (1972) [hereinafter J. WHITE & R. SUMMERS, *HANDBOOK*]. Courts have often cited that phrase; in the third edition, it is softened to "well-known case." J. WHITE & R. SUMMERS, *supra* note 6, § 1-3, at 33.

49. Typical is *C. Itoh & Co. v. Jordan Intl. Co.*, 552 F.2d 1228, 1235 n.5 (7th Cir. 1977). In rejecting *Roto-Lith*, the court notes that this decision has been "subjected to severe criticism by the commentators," and then cites a general treatise, J. WHITE & R. SUMMERS, *HANDBOOK supra* note 48, at 26 ("infamous case" reference); a specialized treatise on sales, R. DUSENBERG & L. KING, *SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE* § 3.05[a][iii] (1990); and an article, Davenport, *supra* note 47, at 79, 85.

50. *Compare Teradyne, Inc. v. Mastek Corp.*, 797 F.2d 43, 55 (1st Cir. 1986) (reaffirming *Roto-Lith*) with *Polyclad Laminates, Inc. v. VITS Maschinenbau GmbH*, 749 F. Supp. 342, 344 (D. N.H. 1990) (abandoning *Roto-Lith* in the teeth of *Teradyne*).

51. White and Summers, explaining the origin of the Statute of Frauds, present a hypothetical case as fact. J. WHITE & R. SUMMERS, *supra* note 6, § 2-1, at 66-67. This "case" is recounted virtually verbatim, as history, in *Thomson Printing Mach. Co. v. B.F. Goodrich Co.*, 714 F.2d 744 (7th Cir. 1983).

and sensitivity to particular cases. At worst, as in Italy, scholars may ignore judicial decisions altogether.<sup>52</sup> Such an outcome is, of course, hardly likely in the United States; but even here courts need to be warned against too swift reliance on academic authority.<sup>53</sup>

*Expanded Concepts of Interpretation.* The salience of general clauses, coupled with the existence of a larger and more intricate interpretive community, fosters the emergence of interpretive concepts that are more venturesome than those courts traditionally apply to statutes. To be sure, European legal theory normally does not draw sharp methodological distinctions between interpreting codes and statutes.<sup>54</sup> But the comprehensive character of codes, and also their intricacy and long-term stability, have tended to encourage greater breadth of interpretation.<sup>55</sup>

Traditional European theory distinguishes four types of interpretation: (1) grammatical or literal interpretation of what a given text means or may mean; (2) logical interpretation of the text in the context of all other rules of positive law; (3) historical interpretation based upon evidence of the legislator's actual intent or purpose; and (4) teleological interpretation construing a text in the way that best represents or promotes a contemporary view of social welfare and justice.<sup>56</sup> In practice, arguments from these four types of interpretation are flexibly combined within a single, continuous interpretive process, the various types played off against one another as the exigencies of a situation demand. But it is usually conceded that, *ceteris paribus*, this list of types is hierarchical, in the sense that a clearly convincing grammatical or logical interpretation will ordinarily defeat one based on legislative intent or on a contemporary construction of purpose.<sup>57</sup>

Despite the difference in wording, much of this apparatus has its fairly clear counterpart in traditional Anglo-American statutory inter-

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52. R. DAVID, *supra* note 11, at 188-93.

53. McDonnell, *supra* note 8, at 824-28. See, e.g., J. WHITE & R. SUMMERS, *supra* note 6, § 17-2, at 717-27, largely reversing their earlier position, under U.C.C. § 4-213 and § 4-302, that a bank has no right to restitution from payee after final but erroneous payment on a check. The authors attribute their earlier view to "the ignorance of youth," *id.* at 727, and cite an impressive student note, Note, *Commercial Paper and Forgery: Broader Liability for Banks?*, 1980 U. ILL. L.F. 813, as "demonstrat[ing] our errors." J. WHITE & R. SUMMERS, *supra* note 6, § 17-2, at 722. See now the officially proposed amendment, § 3-418.

54. R. DAVID & J. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 104 (2d ed. 1978) ("When interpreted by [European] jurists, codes and statutes are treated on exactly the same basis.").

55. R. DAVID, *supra* note 11, at 159-60 (noting a tendency of French courts "to consider new statutes as abnormal appendages to the French legal system, to restrict their scope, applicability and effects," until these statutes become fully integrated into the legal system).

56. See *id.* at 157-60; K. LARENZ, *supra* note 11, at 305-25.

57. R. DAVID, *supra* note 11, at 164-67.

pretation. Although various commentators have recommended interpreting the UCC largely or solely on the basis of legislative purpose or a "rationale-oriented" approach,<sup>58</sup> it is unclear, at least to me, that traditional modes of interpretation are much disturbed by the existence of the UCC; both scholarly and judicial arguments still usually begin from the apparent meaning of the UCC's provisions, and move on to other types of interpretation only when no satisfactory answer is obtained. What has changed, of course, is the willingness of interpreters to be satisfied with quick answers based on "plain meaning." The intricacy of the UCC has encouraged judges to hold themselves open to a deeper probe of its meaning.

Nonetheless, the existence of codes, with more or less stable and therefore predictable texts,<sup>59</sup> has eventually brought about a changed attitude toward more fundamental issues of interpretation. This changed attitude is clearly illustrated in an influential passage from the German jurist Rudolph Sohm:

A rule of law may be worked out either by developing the consequences which it involves, or by developing the wider principles which it presupposes. . . . The more important of these two methods of procedure is the second, *i.e.* the method by which, from given rules of law, we ascertain the major premisses which they presuppose. For having ascertained such major premisses, we shall find that they involve, in their logical consequences, a series of other legal rules not directly contained in the sources from which we obtained our rule.<sup>60</sup>

In relationship to codes, the inductive process that Sohm recommends is expansive in two senses: first, it aims to solve problems arising *under* a code through reference to broader principles that the code may be held to embody; second, it aims to solve problems arising *outside* a code through extension of these same principles, by the application of analogy.<sup>61</sup> The general clauses of a code take on particular force in the context of such inductive reasoning.

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58. See J. WHITE & R. SUMMERS, *supra* note 6, § 4, at 18 ("rationale-oriented" approach); McDonnell, *supra* note 8, at 829-55 (legislative purpose). The authors of the UCC clearly favored such approaches. "This Act shall be liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(1); see also U.C.C. § 1-102(1) official comment 1.

59. In the case of the UCC, however, textual stability is a problem in itself. J. WHITE & R. SUMMERS, *supra* note 6, §§ 3, 7, at 7-9, 21 ("the continuing stream of 'official' amendments alone accounts for much of today's lack of uniformity in the text").

60. R. SOHM, *THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 30 (J. Ledlie trans. 3d ed. 1907 & reprint 1970).

61. On analogy, see the good discussion by K. LARENZ, *supra* note 11, at 365-75. Larenz stresses the difference between the "isolated analogy" (*Einzelanalogie*: direct extension of a rule governing *A* to a similar but unregulated *B*) and "general analogy" (*Gesamtanalogie*: recognition of a broader principle above the rule governing *A*, followed by the principle's extension to similar situations). The latter method, which is especially common in constitutional law, uses induction.

As to analogy, the drafters of the UCC expressly favored its use,<sup>62</sup> and academic commentators swiftly adopted a similar line.<sup>63</sup> In a steadily growing number of decisions, courts have been willing to extend the UCC by analogy, thereby abandoning older doctrine on narrow construction of statutes.<sup>64</sup>

More intricate is the process of solving interpretive problems that arise under the UCC. An example is UCC section 1-207, which provides that: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient."<sup>65</sup> If a debtor offers a check for less than the full amount claimed by the creditor but in "full satisfaction," and the creditor then cashes the check after writing "under protest" on it, does this section have the effect of reserving the creditor's right to then claim the balance due? Does section 1-207 therefore replace earlier common law rules on accord and satisfaction?

This vexed problem has deeply divided both commentators and courts.<sup>66</sup> The issue is very close, and reasonable persons are bound to differ. The broad language of section 1-207 fairly clearly favors its application to "full satisfaction" checks, as does the section's placement among the "General Provisions" of article 1. On the other hand, both the Official Comments to the section and its legislative history seem to argue against application, though they are not decisive. Nor do the equities of the situation seem completely clear. Final resolution of the debate will doubtless require altering the UCC,<sup>67</sup> in the

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62. *E.g.*, U.C.C. § 1-102 official comment 1 ("This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for the expansion of commercial practices."). Note how the Comment relates semi-permanence to the use of analogy.

63. See Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965). For a later example, see Rapson, *A "Home Run" Application of Established Principles of Statutory Construction: UCC Analogies*, 5 CARDOZO L. REV. 441 (1984).

64. Some examples are listed in J. WHITE & R. SUMMERS, *supra* note 6, at 18, n.88.

65. U.C.C. § 1-207.

66. As to commentators, compare, for example, J. WHITE & R. SUMMERS, *supra* note 6, § 13-24, at 607-10 (for applying § 1-207) with Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48 (1978) (against). As to courts, compare *Horn Waterproofing Corp. v. Brushwick Iron & Steel, Co.*, 66 N.Y.2d 321, 497 N.Y.S.2d 310, 488 N.E.2d 56 (1985) (for application) with *County Fire Door Corp. v. C.F. Wooding Co.*, 202 Conn. 277, 520 A.2d 1028 (1987) (against). Both are exceptionally well-reasoned cases.

67. An officially proposed amendment to § 1-207 has eliminated the section's applicability to accord and satisfaction, in conformance with the added § 3-311 ("Accord and Satisfaction by Use of Instrument"). U.C.C. Foll. § 3-605, 2 U.L.A. official comment 3, at 500-01 (West 1991).

meantime, however, it is appalling, and entirely contrary to the UCC's spirit, that different laws prevail, in jurisdictions so closely commercially linked as New York State and Connecticut, on such a common device as a "full satisfaction" check.

In the 1987 *Country Fire Door* decision,<sup>68</sup> Chief Justice Ellen Peters of Connecticut articulates what is now the majority position against applying section 1-207 to "full satisfaction" checks. She argues for the importance of reconciling this provision with those found in other articles of the UCC, including both article 3 on commercial paper including checks, and article 2 on the sale of goods. While "Article 3 provides little support for reading [section 1-207] to permit a creditor unilaterally to change the terms of a check tendered in full satisfaction of an unliquidated debt," section 1-207 "has a close and harmonious connection with article 2."<sup>69</sup> As she reasons:

Article 2 regulates ongoing conduct in the performance of contracts for the sale of goods. That article recurrently draws inferences from acquiescence in, or objection to, the performance tendered by one of the contracting parties. A course of performance "accepted or acquiesced in without objection" is relevant to a determination of the meaning of a contract of sale. [U.C.C. § 2-208.] . . . A buyer who is confronted by a defective tender of goods must make a seasonable objection or lose his right of rejection. [U.C.C. §§ 2-602(1), 2-605, 2-606(1), 2-607(2).] . . . In an installment sale, a party aggrieved by nonconformity or default that substantially impairs the value of the contract as a whole will nonetheless have reinstated the contract "if he accepts a non-conforming installment without seasonably notifying of cancellation. . . ." [U.C.C. § 2-612.] . . . A contract whose performance has become impracticable requires the buyer, after notification by the seller, to offer reasonable alternatives for the modification or the termination of the affected contract; the buyer's failure to respond, within a reasonable period of time, causes the sales contract to lapse. [U.C.C. § 2-616(1) and (2).] . . . In these and other related circumstances, article 2 urges the contracting parties to engage in a continuing dialogue about what will constitute acceptable performance of their sales contract. . . . It is entirely consistent with this article 2 policy to provide, as does [§ 1-207], a statutory methodology for the effective communication of objections. . . .

From the vantage point of article 2, it is apparent that [§ 1-207] contemplates a reservation of rights about some aspect of a possibly non-conforming tender of goods or services or payment in a situation where the aggrieved party may prefer not to terminate the underlying contract as a whole. . . . We conclude, therefore, that in circumstances like the present, when performance of a sales contract has come to an end, [§ 1-207] was not intended to empower a seller, as payee of a negotiable instrument, to alter that instrument by adding words of protest to a check

68. *County Fire Door Corp. v. C.F. Wooding Co.*, 202 Conn. 277, 520 A.2d 1028 (1987).

69. 202 Conn. at 285, 287, 520 A.2d at 1032-33.

tendered by a buyer on condition that it be accepted in full satisfaction of an unliquidated debt.<sup>70</sup>

Whether or not this argument convinces, its importance lies in its form. Justice Peters rests her case neither on the apparent meaning nor on the legislative purpose and "rationale" of section 1-207; both forms of interpretation have proved to be inconclusive.<sup>71</sup> Although her argument might be described as logical interpretation in that it implicates the context of articles 2 and 3, in reality the "logic" is gossamer thin; there is no necessary reason that a possible "close and harmonious connection with article 2" should matter much in interpreting section 1-207, which is in a different article and could as easily stand on its own legs.

Yet the numerous particular provisions that Justice Peters cites from article 2 do have the effect of establishing, through induction, one of the larger commercial principles of the UCC, that "the contracting parties [should] engage in a continuing dialogue about what will constitute acceptable performance of their sales contract."<sup>72</sup> This is an important principle, which would indeed be somewhat displaced by allowing a creditor unilaterally to convert a debtor's offer of compromise into a partial payment of a disputed debt. There is nothing improper about allowing such a principle to control interpretation of section 1-207, although other principles may conceivably point in a different direction.<sup>73</sup>

But it is the principles themselves that are potent in developing future commercial law. Their number need not be large, but they must be realized in order to be effective. For example, it bears considering whether the various article 2 provisions favoring timely dialogue between the parties to a sale are subsumed within the more general requirement of good faith in performance under section 1-203. If so, then this section should also be dispositive of the issue in section 1-207; surely a creditor cannot, in good faith, unilaterally turn to his own advantage a debtor's offer of compromise.<sup>74</sup>

What I have been suggesting is that large, systematically codified

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70. 202 Conn. at 287-90, 520 A.2d at 1033-35 (footnotes omitted).

71. Contrast the more mundane approach of *Flambeau Prod. Corp. v. Honeywell Information Sys., Inc.* 116 Wis. 2d 95, 341 N.W.2d 655 (1984) (reaching the same result). On Justice Peter's approach to commercial law, see Note, *Ellen Ash Peters and the Uniform Commercial Code*, 21 CONN. L. REV. 753 (1989).

72. 202 Conn. at 289, 520 A.2d at 1034.

73. See *Horn Waterproofing Corp. v. Brushwick Iron & Steel, Co.*, 66 N.Y.2d 321, 331, 497 N.Y.S.2d 310, 316, 488 N.E.2d 56, 62 (1985) (emphasizing simplicity, clarity, and liberalization of commercial law).

74. *Contra* J. WHITE & R. SUMMERS, *supra* note 6, § 13-24, at 609. This seems to be the real issue, and not whether "the offeror is 'master of his offer.'"

bodies of law, such as the European codes or the UCC, gradually effect, or at least encourage, a different kind of legal culture, in which, as such codes are integrated within a national legal heritage, general clauses and principles become more salient within an expanded interpretive community. Because of the open texture of their rules, codes foster an altered legal posture; ancient judicial vigilance against the intrusive legislation may give way to a new ethos of cooperation in the development of law. To be sure, it remains uncertain whether the resulting law will be, in fact, "better," or even more uniform.<sup>75</sup> In the case of the UCC, a major American experiment in codification is only a generation old. The consequence of this experiment is still unfolding.

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75. For contrasting views of the UCC, see J. WHITE & R. SUMMERS, *supra* note 6, at 20-22.