Tacit Exclusion: Defining Code Terms Using Extraneous Referents

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TACIT EXCLUSION: DEFINING CODE TERMS
USING EXTRANEOUS REFERENTS*

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INTRODUCTION

A question of continuing practical and theoretical interest both to those seeking and those providing secured financing is what kinds of transactions and items of collateral are within the scope of Article 9 of the Uniform Commercial Code and so governed by its provisions.¹ The beginning point, of course, is always section 9-102(1)(a) which instructs that Article 9 applies to any transaction intended to create a security interest in personal property.² Preliminarily, it is worth noting that generous, not grudging, application is the order of the day.³ Exclusion, expressly provided for in a specific and limited list in section 9-104, is the exception.⁴

* I would like to thank Professor Robert M. Lloyd of the University of Tennessee College of Law who, in reading a draft of this Article, recognized in it an analytic approach closely akin to narrow issue reasoning, the technique brilliantly employed by Karl Llewellyn in his articles on sales in the 1930's (see Gilmore, In Memoriam, Karl Llewellyn, 71 YALE L.J. 813, 814 (1962)), and passed along to his students and others who fell under his influence. See Dunham, Karl Llewellyn, 29 U. Chi. L. Sch. Rec. 10, 11 (Spring 1983). Simply put, narrow issue thinking rejects formalistic reasoning in favor of context-sensitive application of legal rules and precepts. As Professor Lloyd has described it, narrow issue thinking calls for the application of a rule to a new standard only to the extent that it is functional in the new context. See Lloyd, Refinancing Purchase Money Security Interests, 53 TENN. L. REV. 1, 90 (1985). The conceptual proximity of the method of narrow issue thinking to the approach taken in the present Article will be immediately evident to the reader.

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1. Article 9 applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also . . . to any sale of accounts or chattel paper." U.C.C. § 9-102(1). All citations hereinafter are to the Uniform Commercial Code 1978 Official Text unless otherwise noted.

2. See id.

3. Professor Gilmore remarks, "[t]he first thing to be noticed about Article 9 is its comprehensiveness: it is all-embracing, all-devouring; it covers everything." 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 295 (1965). There are, of course, exceptions. See infra note 4.

4. See U.C.C. § 9-104. This section provides a list of transactions excluded from Article
But are there additional items or transactions tacitly excluded from Article 9 but intended to be, and apparently within, section 9-102(1)(a)? Each term in this section of Article 9 is susceptible of interpretation and such interpretation involves a consideration of inclusion or tacit exclusion. The general strategy of an inclusive reading of section 9-102(1)(a) is a necessary part of interpretation, but it does not provide a decision-making procedure or set of criteria to guide it.

This Article seeks to fill that gap. The vehicle for inquiry is the interpretation of the word “property” in section 9-102(1)(a) as a device of tacit exclusion. The example to guide discussion is the question of the scope of Article 9 as applied to secured transactions involving the liquor license; namely, is the liquor license “personal property” in which a security interest can be created and perfected?

The Article first develops the factual context in which to explore the concrete effects on commercial reality resulting from interpreting the term “property” in a manner that tacitly excludes the liquor license from section 9-102(1)(a). Next, the Article considers and evaluates the analytic techniques employed by courts in deciding whether a liquor license can be hypothecated. This critique offers important lessons in the use of extra-Code sources in aid of interpreting a term within the Code. Finally, the Article proposes a two-step, teleological approach that provides a sensible analytical framework within which to resolve the liquor license debate, and a tentative algorithm for all questions of inclusion or exclusion.

I. Code Policies and Tacit Exclusion

Adoption of Article 9 is the adoption of the perception that secured credit is beneficial for commerce. It follows that whatever

9. See id. Some of these are already the subject of a received body of law to which Article 9 defers (see, e.g., U.C.C. § 9-104(g) excluding the transfer of an interest in an insurance policy and U.C.C. § 9-104(d) excluding transfers or interests in wages), while others involve interests not customarily used as collateral in the commercial market. See, e.g., U.C.C. § 9-104(k) (transfer of a tort claim).
5. See infra notes 19-70 and accompanying text.
6. See infra notes 71-127 and accompanying text.
7. See infra notes 128-57 and accompanying text.
8. The reality of this proposition, however, is frequently debated. See generally infra note 11.
is good for secured credit—that is to say, whatever facilitates secured credit—is worthwhile.

Two features of Article 9 are quite beneficial for secured credit: uniformity,9 and the capacity to expand and embrace new transactions and collateral as they irresistibly evolve out of the agreements, customs and trade practices of a dynamic marketplace.10 Secured credit is measurably advanced by uniformity because with uniformity comes the legal predictability to quell anxiety among risk-averse lenders.11 Uniformity is both reflected in and attained by the broad scope of subject matter covered by Article 9. Section 9-102 captures all transactions intended to create a security interest regardless of how a particular transaction may have been denominated by the transacting parties.12 In this way,

9. A fundamental purpose of the Code is "to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2)(c). As it is used here, uniformity refers to uniform treatment of transactions within the scope of Article 9. The official comment to section 9-101 states that Article 9 "sets out a comprehensive scheme for the regulation of security interests in personal property . . . ." U.C.C. § 9-101 comment. The stated purpose of the broad statement of scope is "to bring all consensual security interests in personal property and fixtures under this Article, except for certain types of transactions excluded by Section 9-104." Id. § 9-102 comment, purposes. In brief, "Article 9 . . . proposes to integrate, under a single system of legal propositions and a single system of terminology, the entire range of transactions in which money debts are secured by personal property." Gilmore, The Secured Transactions Article of the Commercial Code, 16 LAW AND CONTEMP. PROBS. 27 (1951). See generally 1 G. GILMORE, supra note 3, at 290-97 (discussion of history of Code drafting and the notion of a unitary security device).

10. "The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions . . . ." U.C.C. § 9-101 comment. "[C]ontinued expansion of commercial practices through custom, usage and agreement of the parties" is an underlying purpose of the Code as a whole. Id. § 1-102(2)(b). It is also worth mentioning in this regard that there is much freedom given to contracting parties to a secured transaction. See id. § 9-201. Evolution, however, must occur mainly within the parameters of Article 9 because its adoption in large part forecloses the proliferation of forms necessitating the development of sympathetic systems to govern them. See 1 G. GILMORE, supra note 3, at 296; see also Coogan, Kripke & Weiss, The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements, 79 HARV. L. REV. 229 (1965).


12. See U.C.C. § 9-102. Thus, for example, pre-Code security devices (e.g., pledge, assignment, chattel mortgage, conditional sale) are brought within the scope of Article 9. See id. comment.
all the institutionalized devices, formerly covered by a complex and befuddled system of statutes in a bewildering array, are re-cast in the die of a unitary security device—the Article 9 security interest. In other words, all former devices are made to yield to the single new rule of law which treats them as members of a single species. The dynamic or expansive component of Article 9 promotes secured credit quite directly by encouraging the evolution of new forms of secured financing. Presumably, the more forms that are available, including the addition of new assets with value that may serve as collateral, the more opportunities there are for secured lending. At the same time, the expansive component insures continuing uniformity, for it is clear that new forms will emerge, even against resistance, with the genius of unthinking things driven by immutable forces. If section 9-102 is not there to embrace them, the prospect that non-uniform rules will emerge to accommodate new transactions and assets looms large.

The cost to secured credit of disallowing the use of an asset as collateral within, or arguably within Article 9, can therefore be measured by the concomitant failure to fulfill the overarching Code policy of facilitating secured lending. Exclusion of an item from the universe of assets otherwise available to creditors and borrowers is a constraint on opportunity. It is not that the cost (i.e., the lost opportunity) is never justifiable on extra-Code policy grounds; it is only that it cannot be forgotten that there is a cost,

13. For a brief but enlightening discussion of the pre-Code statutes, see U.C.C. § 9-101 comment. Professor Gilmore discusses the fragmentation of the law to accommodate the proliferation of burgeoning forms and devices beginning in the nineteenth century and culminating with synthesis in Article 9. See 1 G. GILMORE, supra note 3, at 288-90.

14. The idea of an all-encompassing unitary security device was arrived at simultaneously by Professors Gilmore, Dunham and Llewellyn. See id. at 290 n.2. For a straightforward and informative compendium discussing the origins of the Code, something of its contributors, drafting history and other background matters of general interest, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (3d ed. 1988).

15. Professor Gilmore discusses, for example, the pressure in the nineteenth century for an expanded universe of collateral beyond that which was pledgeable under the old rules of security. See 1 G. GILMORE, supra note 3, at 288.

16. "[T]he prohibition of new devices to meet new needs would be a doubtful and dangerous procedure if Article 9 were ... a restrictive or straight-jacketing statute ... . The 'independent security devices' came into existence as methods to escape from rules ... which had come to be regarded as unduly restrictive." Id. at 296; see also infra note 70. But see infra note 69.

17. See, e.g., U.C.C. § 9-104. Of course, some of the transactions are excluded at no cost
and exclusion is not to be undertaken lightly.

With the cost of asset-exclusion freshly in mind, it is appropriate to add that those costs, as well as others, are incurred when an asset is indirectly excluded. First, however, the reader may fairly ask how a secured transaction in an asset within, or apparently within, section 9-102(1)(a) and not expressly excluded under section 9-104 can be excluded from Article 9? The answer is that it is entirely possible to exclude from Article 9 coverage a transaction that was clearly intended to be governed by Article 9 through a process which might be called deliberate noninclusion or tacit exclusion. The manner of tacit exclusion (or noninclusion) and the reasons for it necessarily vary with the transaction under study, but the manner of its accomplishment is a miserly or fussy reading of section 9-102(1)(a).

II. THE FACTUAL CONTEXT

Further discussion of these principles profits by illustration, and this illustration is necessary before considering the additional costs to security imposed by tacit exclusion. For example, suppose Debtor wishes to go into business for himself and decides on a corner tavern in his neighborhood. This will mean finding a going business already licensed to sell alcoholic beverages on the premises because in Debtor’s state the number of liquor licenses is limited based on a quota system,19 and all licenses available in his area are issued and outstanding. Debtor discusses the matter with a loan officer at Local Bank from whom he learns of a tavern for sale in the area of his interest. Debtor approaches the tavern’s owner and the two come to terms. The assets of the business include a lease on the premises with an attractive renewal option, tables, chairs, and stools, other equipment and fixtures, the goodwill of the business and the owner’s on-premises liquor license. The total value of

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18. The intent of the parties is vital in deciding whether a security interest has been created. See U.C.C. § 9-102(1)(a).

19. Most license states limit the number of on-premises licenses issued by either imposing a quota based on state, county, or city population, or by granting authority to limit the number of licenses to the commission, board, or agency whose task it is to administer the licensing statute. See MONTANA LEGISLATIVE COUNCIL, MONTANA'S LIQUOR LICENSE QUOTA SYSTEM, A REPORT TO THE 47TH LEGISLATURE 35 (1980) [hereinafter MONTANA REPORT].
the assets of the tavern is $125,000, of which $100,000 is attributable to the liquor license.\textsuperscript{20}

Inasmuch as Debtor has only $10,000 to invest, he returns to Local Bank to finance the balance. Local Bank agrees to finance the purchase but insists that Debtor sign a security agreement creating a purchase money security interest\textsuperscript{21} in the assets purchased, including the liquor license.\textsuperscript{22} Debtor complies and executes the security agreement\textsuperscript{23} and a financing statement\textsuperscript{24} which Local Bank promptly files to perfect its interest in accordance with Article 9.\textsuperscript{25} Meanwhile, Debtor applies to the local Liquor Control Board (LCB)\textsuperscript{26} for transfer of owner's liquor license to his name.\textsuperscript{27} Several months later his application is approved and the deal goes to closing where the owner is paid and all details of the transaction settled.

There is no statutory provision in the state's liquor control act (Control Act) nor any regulation promulgated by the LCB authorizing\textsuperscript{28} or prohibiting\textsuperscript{29} security transfers of a state-issued liquor license. With respect to transfers in general, the statute expressly acknowledges the right of the spouse of a deceased licensee to ap-

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\textsuperscript{20.} See id. at 35-36, 51.
\textsuperscript{21.} See U.C.C. § 9-107.
\textsuperscript{22.} A security interest is an interest in personal property or fixtures that secures repayment of performance of an obligation. See id. § 1-201(37).
\textsuperscript{23.} A security agreement "creates or provides for a security interest." See id. § 9-105(f)(1).
\textsuperscript{24.} See id. § 9-402(1) (contains formal requirements for a financing statement).
\textsuperscript{26.} See supra note 19.
\textsuperscript{27.} All states limiting licenses according to a population quota allow transfer in some form. See MONTANA REPORT, supra note 19, at 21.
\textsuperscript{28.} Some states' statutes specifically authorize the creation of a security interest in a liquor license. See, e.g., MASS. GEN. LAWS ANN. ch. 138, § 23 (West 1974 & Supp. 1988); MONT. CODE ANN. § 16-4-205 (1987).
\textsuperscript{29.} Kentucky and California both prohibit the use of the liquor license as security for a loan by language in the applicable statute. See CAL. BUS. & PROF. CODE § 24076 (West 1985); KY. REV. STAT. ANN. § 243.660 (Baldwin 1981).
ply for transfer of the license,\(^30\) but it expressly prohibits the attachment of a judgment lien to the license.\(^31\) The statute further states that "[a] license issued by the LCB pursuant to this Act is a personal privilege and confers no property upon its holder."\(^32\)

Debtor proves to have neither the ability nor the expertise of his predecessor and soon finds himself in serious financial difficulty. His trade creditors have obtained judgments\(^33\) against him and threaten to force him into involuntary bankruptcy. Debtor is in arrears in his rent, and his landlord threatens to seize Debtor's business assets pursuant to distraint.\(^34\)

Finally, Debtor defaults on his loan to Local Bank which promptly seeks to foreclose its security interest. The trade creditors make good their threat and petition for Debtor's involuntary bankruptcy. A trustee is appointed and promptly sells all the assets of the tavern, including the liquor license, to the highest bidder subject to the approval of the LCB. The proceeds from the sale of equipment and fixtures amounts to $10,000, which the trustee surrenders to Local Bank in acknowledgment of its perfected security interest in those assets.\(^35\) The trustee refuses, however, to surrender the $90,000 received on sale of the license,\(^36\) on grounds

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33. See supra note 31.


35. As the holder of a perfected security interest, Local Bank is prior to the trustee in its claim to the assets. See U.C.C. § 9-301(1)(b), (2).

36. See In re Kluchman, 59 Bankr. 13 (Bankr. W.D. Pa. 1985). While the debtor's liquor license was not itself property, rights incident to the license (e.g., right to transfer) are proprietary and a security interest may attach to proceeds arising out of the sale of the license. See id.
that Local Bank had no security interest in the license from the outset because the license, in accordance with the Control Act, was not property,\(^\text{37}\) and according to Uniform Commercial Code section 9-102(1)(a) there can be no security interest in a privilege, only in personal property.\(^\text{38}\)

Does Local Bank have a security interest at all? What is the import of the phrase in the Control Act that Debtor's liquor license is a mere privilege and not property? Is the statutory non-property characterization determinative of or even relevant to the question of what is meant by the term personal property in section 9-102(1)(a), a term which is central to deciding if a security interest can be created in an asset, but which is nowhere defined in the Code? Of what significance to the inquiry is the fact that the license represents the most valuable asset of Debtor's business? Does the fact that the licensee has some rights of transfer associated with it mean that it is property, or is the fact that there are only limited transfer rights (and these restricted to LCB approval) render the license something less than property?

One thing is clear; the transaction is not expressly excluded by section 9-104 with its list of transactions which, for one reason or another, were left to other law to govern.\(^\text{39}\) It is also clear that Code policy will suffer if the license is determined not to be personal property. Removal of the license from the universe of assets against which a risk-averse creditor might be induced to lend reduces the opportunity for, and thus, fails to facilitate, secured lending. Moreover, a nascent transaction is foreclosed from evolving. This runs counter to the view of Article 9 as a dynamic or evolving statute.\(^\text{40}\) The liquor license ceases to be an asset with which an enterprise can be capitalized and becomes no more than a permit to conduct a business which would be unlawful without it.\(^\text{41}\)

\(^{37}\) See supra note 32; see also infra notes 71-76 and accompanying text.

\(^{38}\) See U.C.C. § 9-102(1)(a).

\(^{39}\) See supra note 4.

\(^{40}\) See supra note 10.

\(^{41}\) Such is the case in Nebraska, where the licensing statute reduces the license to a mere permit that is personal to the holder. A license shall be purely a personal privilege . . . and shall not constitute property, nor shall it be subject to attachment, garnishment, or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated. Such license shall not descend by the laws of testate or
This is not to suggest that the exclusion of an item of potential collateral is to be bemoaned such that it can never be tolerated. Indeed, there may well be transactions that should flatly be prohibited for sound policy reasons that have nothing to do with Code policies but which are just as weighty.42 A proposal for appropriate exclusion analysis is, in fact, offered later in this treatment. It is suggested, however, that purposive exclusion analysis is called for because in light of the previously discussed fundamental Code policies which are at stake, and given others yet to be discussed, exclusion should not be taken lightly.

Bringing to light the direct costs of exclusion of a transaction or asset is worthwhile, but of equal concern are the additional, indirect costs. These costs work a further erosion of the Article 9 policy of inclusion designed to encourage secured credit. They are occasioned by tacit exclusion based on the definition of the word "property." The more invidious costs will be exposed and elaborated upon presently in the factual context of the hypothetical, but this must await some preliminary discussion of the business of liquor licensing.

That there can be a debate43 over what is or is not property

intestate devolution, but it shall cease upon the death of the licensee; except, that executors or administrators of the estate of any deceased licensee . . . may continue the business . . . after the death of such decedent . . . until the expiration of such license . . .


42. See infra note 128 and accompanying text. For example, a security interest retained in a transplanted kidney would be invalidated on public policy grounds outside Article 9.

43. That there is a debate is evident from sharply conflicting decisions among different jurisdictions. Compare Gibson v. Alaska Alcoholic Beverage Control Bd., 377 F. Supp. 151 (D. Alaska 1974) (liquor license is property in which a security interest can be created notwithstanding that the license may be a privilege in other regards) and Bogus v. American Nat'l Bank, 401 F.2d 458 (10th Cir. 1968) (liquor license is property for purposes of Article 9 notwithstanding language in Wyoming statute describing it as a privilege) with In re Revocation of Liquor License No. R-2193 (A.R.F. Bar, Inc.), 35 U.C.C. Rep. Serv. (Callaghan) 949 (Pa. Commw. Ct. 1983) (liquor license is a privilege according to Pennsylvania statute and cannot be subject to security interest) and In re Eagle's Nest, Inc., 57 Bankr. 337 (Bankr. N.D. Ind. 1986) (although liquor license has value it is a privilege and cannot be collateral for an Article 9 security interest). There is likewise debate within particular jurisdictions. Compare In re Branding Iron, Inc., 7 Bankr. 729 (Bankr. E.D. Pa. 1980) (Pennsylvania liquor license is property that can be collateral for a security interest) with In re Revocation of Liquor License No. R-2193 (A.R.F. Bar, Inc.), 35 U.C.C. Rep. Serv. (Callaghan) 949 (Pa. Commw. Ct. 1983) (expressly rejecting Branding Iron). But see In re Kluchman, 59 Bankr. 13 (Bankr. W.D. Pa. 1985). The last word from Pennsylvania case law is that because of statutory language declaring the liquor license a privilege, it cannot be
where the liquor license is concerned, is attributable to the nature of liquor licenses. By virtue of the statutes to which they owe their existence, liquor licenses have some characteristics common to what is traditionally considered property, including some limited rights of transfer. Besides this, the liquor license has great value, value frequently far in excess of the license origination or renewal fee. At the same time, liquor licenses have the appearance of what sometimes has been characterized as a privilege or mere permit, issued out of governmental largess and which, therefore, collateral for a security interest. See 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354 (3d Cir. 1986). But see infra note 56.

44. Following the repeal of prohibition, each of the then 48 states enacted liquor control laws with diverse requirements. The laws were influenced by the findings of the Liquor Study Committee, which were released in 1933, and programs instituted in Europe and Canada. See Levine, The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness, 12 CONTEMP. DRUG PROBS. 63, 83-95 (1985). All the states established a board or committee to oversee liquor control within the state’s jurisdiction, although the authority, makeup and tenure varied from state to state. See Joint Committee of the States to Study Alcoholic Beverage Control, Administration, Licensing, Enforcement, Statutory Statement of Basic Purpose of Alcoholic Beverage Laws 1, 9-18 (1973) [hereinafter Joint Committee of the States]. The majority of the post-prohibition liquor control statutes’ stated purpose is the protection of “the public health, welfare, safety, and morals.” Id. at 1.

For a discussion of the forces leading to the repeal of prohibition and the establishment of the post-prohibition regulatory systems, see Levine, supra, at 63. It is interesting to note that proponents of repeal did not reject the purposes and goals of prohibition, but objected to the disregard for the law that noncompliance fostered. See id.

45. See W. RAUSHENBUSH, BROWN ON PERSONAL PROPERTY 6-7 (3d ed. 1975) (discussing the conventional notion of property as a bundle of rights including the right to possess, transfer inter vivos and dispose of the res at death). In United States v. General Motors Corp., the Court noted that property is a term describing the “group of rights inhering in the citizen’s relation to the physical thing.” 323 U.S. 373, 377-78 (1945); see also Note, Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation, 32 EMORY L.J. 1199 (1983) (author proposes that the varying degree of judicial due process protection a license receives from one state to the next can be accounted for by the number of traditional property characteristics it enjoys under the statute creating it). The more property qualities conferred on the license, the more judicial protection it is apt to receive. See Note, supra, at 1199.

46. See supra note 27.

47. See supra note 20. The fact that the license has value is frequently acknowledged in the cases, even in those which find it to be a privilege. See, e.g., 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354, 357-58 (3d Cir. 1986); In re Eagle’s Nest, Inc., 57 Bankr. 337 (Bankr. N.D. Ind. 1986). Cases holding a liquor license to be property subject to a security interest routinely discuss its value in the marketplace. See infra note 103 and accompanying text.

48. See supra note 32; see also In re M.J.’s, Inc., 49 Bankr. 492 (Bankr. W.D. Pa. 1985) (Pennsylvania liquor license is a mere privilege to conduct a certain kind of business).
may be restricted, regulated, and even revoked within the limits of regulatory, statutory, and constitutional principles.\footnote{See Shuchman, The Rights and Remedies of Financing Creditors in Liquor Licenses, 18 Western Res. L. Rev. 414, 417 (1967). This thorough treatment discusses mainly non-Code rights and remedies of creditors and the diverse treatment they have received at the hands of the courts. See id. Professor Shuchman believed the term “general intangibles” in section 9-106 would include liquor licenses. See id. at 442.}

Whatever the qualities conferred upon the license, where the numbers in which it is issued are limited, a license can acquire great value\footnote{See supra note 19; see also supra note 47.} provided that it has some element of transferability.\footnote{See 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 345, 358-59 (3d Cir. 1986); In re O'Neill’s Shannon Village, 39 U.C.C. Rep. Serv. (Callaghan) 1781, 1786 (8th Cir. 1984); see also Rushmore State Bank v. Kurylas, 424 N.W.2d 649, 654 (S.D. 1988).} Value, together with transferability, makes the liquor license a candidate for hypothecation in the form of an Article 9 security interest.\footnote{This is the commercial reality. See generally Rushmore State Bank, 424 N.W.2d at 652.} This invests the license with all it needs to be treated as property in the marketplace, whatever characterization it might have received at the hands of the licensing statute.\footnote{Liquor licenses acquire market value without regard for the statutory designation. See Montana Report, supra note 19, at 51.} The liquor license under these circumstances might thus be said to have acquired a market definition as property.

While a liquor license may acquire a market definition as property, the fact remains that the liquor control acts of nearly every quota state refer to the license as a privilege, frequently in terms not unlike those in the hypothetical.\footnote{See, e.g., Pa. Stat. Ann. tit. 47, § 4-468(B) (Purdon Supp. 1987). The Pennsylvania Code was recently amended to state that, as between the licensee and third parties, the liquor license is property. See id. § 4-468(D).} The road to tacit exclusion is clearly paved in such jurisdictions; a license is perceived as property according to the market definition and hypothecated, but it is regarded otherwise by the liquor licensing statute, or at least as the statute might be construed.\footnote{See infra notes 71-76 and accompanying text.} The Code, as already noted, does not define “personal property,” nor, for that matter, does it define the word “property.”

This brings us back to the hypothetical and the matter of
costs to secured credit, as well as the costs of exclusion generally, that result from tacit exclusion of Debtor's liquor license by classifying it as something other than of property. These tacit exclusion costs are levied against the two vehicles through which the fundamental policy to encourage secured credit is advanced, namely, uniformity, and the expansive or adaptive component of Article 9.

To see how these principles are compromised by tacit exclusion in the hypothetical, consider Local Bank's reaction when next approached by a debtor who either cannot convince Local Bank to lend money unsecured, or who prefers not to pay the higher interest rate for unsecured credit. Assume this debtor has a valuable right in the form of a clamming license which has recognized value far in excess of the fee paid to get it because it is issued in limited numbers. The license is transferrable on sale of a business with approval of the issuing agency. By market definition, the clamming license is property. Is Local Bank likely to lend on the strength of the clamming license unless its counsel finds law specifically recognizing it to be property? What about the endless number of other intangible rights that are bound to emerge in the natural evolution of commercial events?

The expanded hypothetical instantly reveals the chilling impact of tacit exclusion on the adaptive component of Article 9. The impact is not limited to the adaptive component but is felt by the uniformity objective as well. Of course, the two are quite closely connected. If an untested asset or interest is perceived to be prop-

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58. See supra note 9 and accompanying text.
59. See supra note 10 and accompanying text.
60. The efficiency justification for security is based in part on the assumption that secured credit is available at lower rates than unsecured credit. See Jackson & Kronman, Secured Financing and Priorities Among Creditors, 88 YALE L.J. 1143, 1148-53 (1979); see also supra note 11.
61. See First Pa. Bank v. Wildwood Claim Co., 535 F. Supp. 266 (E.D. Pa. 1982) (holding that a clamming license was a general intangible under both Pennsylvania and New Jersey law). It is interesting to note that the court reaches this conclusion in part by analogizing the clamming license to the Pennsylvania liquor license which it likewise regards to be property for Article 9 purposes. See id. at 268.
62. See MONTANA REPORT, supra note 19, at 52. Many quota states allow transfers between the licensee and the buyer of his or her business subject to approval of the licensing authority, and provided that the buyer meets the statutory requirements. See id.; see, e.g., MASS. GEN. LAWS ANN. ch. 138, § 23 (West 1974 & Supp. 1988); R.I. GEN. LAWS § 3-5-19 (1987).
63. See generally supra note 10.
erty by market definition, those who would transact with reference to it can only look to similar but proven assets for a comparison of characteristics. Sufficient correspondence reasonably implies the asset should be brought into the fold of personal property interests subject to hypothecation. Noncorrespondence implies otherwise, but it is difficult to imagine an interest or right earning a definition as property in the market absent some minimal value and transferability.

Be that as it may, where an interest is endowed with value and transferability so as to be regarded as property by the market definition, but is not legally recognized to be property (like the liquor license in the hypothetical), similarly novel interests fall under a cloud of doubt. Predictability engendered by otherwise uniform treatment of like items is reduced with a corresponding elevation in anxiety among the risk-averse.

As if these things are not enough to earn odium for tacit exclusion, it threatens uniformity more immediately when the excluded item is uniquely important or valuable in a particular market, and this, as has been observed, is indeed the case with the liquor license. The license is often the most valuable, and sometimes the only truly valuable asset of a bar business. Given this fact and given a continuing right of transferability (to whatever extent allowed), the market struggle to utilize the license will continue and may in some times and places prevail. It will prevail outside the scope of Article 9 if necessary, perhaps as a common law assignment, a power to transfer or some form of equitable lien, not-

64. See generally supra note 61.
65. See supra note 47. See generally infra notes 103-08 and accompanying text.
66. That is to say, it becomes difficult to determine whether one is secured or not because there are doubts about the item hypothecated.
68. See, e.g., infra note 69.
69. See, e.g., In re Beefeaters, Inc., 35 U.C.C. Rep. Serv. (Callaghan) 1620 (Bankr. W.D. Mich. 1983); In re Gullifor, 40 U.C.C. Rep. Serv. (Callaghan) 1044 (Bankr. E.D. Mich. 1985). The Gullifor court, in an astonishing decision, held that the debtor’s liquor license was not property and, therefore, was outside the scope of Article 9. Nevertheless, the court found the secured party had an equitable lien, enforceable in bankruptcy. The decision is ironic in that had the court found that it was possible to create a security interest in the debtor’s Michigan liquor license, the secured creditor, whose financing statement had lapsed, would have lost priority to the trust under section 9-301(1)(b) of the Code. The case is criticized in In re Moisson, 51 Bankr. 227 (Bankr. E.D. Mich. 1985). See generally infra note 70.
withstanding that what is intended is a security interest. Avoiding proliferation of devices of this ilk was perhaps the most important driving motivation for the drafters of Article 9 to create a unitary security device.\textsuperscript{70}

If exclusion in any form is erosive of important Code policies, and should be done only with caution, then tacit exclusion, which is more erosive, calls for even greater caution. Accordingly, particularly forceful arguments are required to justify tacit exclusion of an item, or transaction, from the ambit of Article 9. Unfortunately, courts have often directed such exclusions based on arguments which are anything but forceful.

Once again, the liquor license example is instructive. The following sections explore the approaches that courts have used in determining that a liquor license falls outside section 9-102(1)(a) on the rationale that it is not property.

III. The Cases: Extra-Code and Code Approaches

Cases characterizing liquor licenses can be grouped according to those which seem to define personal property according to Code policies and purposes, and those which seek to define the word entirely by reference to the property-or-privilege distinction drawn in a liquor licensing statute. It would, perhaps, be more appropriate to speak of each group merely as having a different orientation, but the reality is that cases taking the latter approach hold, without exception, that the liquor license is not property, while many of the cases adopting the former conclude the license is property.

A. The Extra-Code Approach

Cases employing the "what does the statute mean by property" view, in other words the extra-Code approach, may be subdivided into two groups: those nearly devoid of analytic support, and those offering some degree of analysis to support the conclusion that a liquor license is not property. It cannot be assumed, how-

\textsuperscript{70}. See 1 G. Gilmore, \textit{supra} note 3, at 297.

The prohibition of new devices [resulting from the broad language of section 9-102(1)(a)] has the great merit of keeping everything within the Article 9 filing system; perhaps the most objectionable feature of pre-Code law was that the successful invention of a new device meant that... the transactions covered by the new device escaped the filing system [of existing statutory schemes].

\textit{Id.}
ever, that cases which populate the second subcategory are necessarily any more convincing than those populating the first. Each is considered in turn.

A number of cases taking the extra-Code approach simply offer a polite nod in the direction of the liquor control act under scrutiny with its declaration that the license is a privilege, and that is the end of the matter.\(^7\) Such courts then point out that there can be no such thing as a security interest in a privilege.\(^2\) These cases are uncluttered by analysis and untroubled by nagging doubts about what an enacting legislature might have intended by calling a license a privilege, conferring no property rights on the holder. Occasionally, in cases of this type, the refreshing idea is raised that the license might be a privilege in some respects, but property in others,\(^7\) or that privilege might be intended to describe only the relationship between the licensee and the issuing entity.\(^7\) Usually, the possibility is promptly rejected out of hand.\(^7\)

Implicit in these cases is the view that the object in question is property or privilege, but cannot share features of both. To adopt this view, it is necessary to adopt as well the position that the license per se should be compared, point-by-point, with platonic models of property and privilege. A close correspondence to one or the other model decides the question, although the use of the word privilege may be conclusive of the question.\(^7\)

There is little about our received body of property law, how-


\(^72\) See supra note 71.


\(^75\) See, e.g., supra note 73.

\(^76\) There is nothing wrong with this notion to the extent to which courts carry it. The idea of a central case definition of property—a model—against which a thing can be compared is successfully developed in Terrell, "Property," "Due Process" and the Distinction Between Definition and Theory in Legal Analysis, 70 Geo. L.J. 861, 865-74 (1982). Reasoning from the notion of a property model derived from the central case definition, one commentator proposes that the closer the resemblance an item bears to the model, the more likely it is to be labeled property. See Note, supra note 45, at 1203. From this it is concluded that the more property features conferred on a liquor license by a licensing statute, the more due process protection it is likely to receive in the courts. See id.
ever, to suggest the conclusion of the extra-Code approach or the model-comparison method upon which the conclusion seems to rest. It is clear that property is not regarded in American jurisprudence as a thing that is owned. Rather, it is generally agreed that property is a term describing the natural or legal rights that a person has in an object. To put it more directly, the object of property is not to be confused with the rights one may have in it, namely, property rights. Property rights are usually said to include the right to exclusive possession (use and enjoyment) of the res, descendability, the right to devise or bequeath, and the right to alienate by inter vivos transfer. Each right is property in traditional property parlance. To have complete ownership is to claim all the property rights listed. Property rights, of course, do not have to reside in one owner to retain their identity as property rights. Thus, for instance, possession and the right to possess a thing may belong to one, while the right to alienate it may belong to another. The divisibility of proprietary interests, which permits the distribution of property, is central to our system of ownership. It is the recognition of the principle that allows, for example, the creation of nonpossessory security interests.

The capacity to disunite property rights is an important part of the traditional idea of property and offers no support to the vaguely felt notion that all or even many such rights must simultaneously reside in a thing in order that it retain its capacity to be subject to hypothecation. In other words, the fact that a liquor license is only a privilege as against the issuer, does not mean that it lacks other rights which constitute property. Indeed, the traditional notion of property as a set of disjoinable rights contradicts the idea that some particular quantum of property rights is necessary to call a liquor license property. The problem, then, is not

78. See W. Raushenbush, supra note 45, at 6-7.
80. See id. See generally Honoré, Ownership, in Oxford Essays and Jurisprudence 107, 113-28 (A. Guest ed. 1961).
81. See W. Raushenbush, supra note 45, at 7; R. Cunningham, W. Stoeck & D. Whitman, supra note 77, at 6, 7; Grey, The Disintegration of Property, in Property 69 (J. Pennock & J. Capman eds. 1980).
82. Bailment is an example of dividing title from the right to possess. See W. Raushenbush, supra note 45, at 7.
83. Without the principle, only possessory security would be possible.
whether the license is privilege or property, but whether the limited set of property rights inhering in the license should include the right of the holder to hypothecate it.

Beyond this, the extra-Code approach with its faultless sequitur (i.e., security interests can be created only in property and the liquor control act says the license is a privilege) never reveals what the licensing statute intended by calling the license a privilege. This might seem extraordinary given the orientation of the approach. In point of fact, it becomes unremarkable in light of the fact that there is little or no legislative history or comment surrounding the adoption of the term by most statutes in which it is found. It is perhaps this shortcoming that forces courts to track the words “property” and “privilege” to other lairs. These, unfortunately, may be strongholds of definitions premised on policies and concerns altogether unrelated either to the licensing statute or to Article 9. To put it simply, the extra-Code approach does nothing to elucidate the policies and purposes behind the privilege-not-property distinction drawn by licensing statutes, and, therefore, has little to recommend it.

The result under the extra-Code approach, on the other hand, is clear enough and quite to the point. In the hypothetical, for example, the Control Act permits only limited transfer, and because it contains language stating that the license is a personal privilege and not property, the relegation of Debtor’s license to the status of non-property is a fait accompli. The result is reached mainly in ignorance of the statutory purposes underlying the characterization, whatever that might be.

Apart from the failure of the extra-Code approach to account for the privilege-property distinction in licensing statutes, the approach has led to an eccentric reordering of priorities among com-

84. The focus is on the statutory use of the term “privilege” as it bears on the Code term “personal property” in section 9-102(1)(a).
85. It is not at all difficult to find the general purposes and objectives of the licensing statutes which are stated with more or less specificity depending on the jurisdiction. See infra notes 131-35 and accompanying text. What is missing is the rationale connecting those generalities to the use of the word “privilege.” In the extra-Code cases, it is apparently assumed that the choice of the word was intended to prevent hypothecation. See, e.g., supra note 10. It is the rare case that ever bothers with an explanation of how the policies of the licensing statute were advanced through prohibition of security interests. But see infra note 156.
86. See supra notes 71-75 and accompanying text.
87. See generally supra note 85.
peting claims to the liquor license. For example, a liquor license has been held to be a mere privilege because it is so characterized in the pertinent statute, yet held to be property for purposes of a federal tax lien. Similarly, courts have invalidated security interests on the grounds that the license is not property, while at the same time holding that the proceeds from the sale of the license become "property" of a bankrupt debtor's estate. The facial contradiction in these cases, however, creates no real problem. In fact, recognizing that the license may be property for some purposes but not others is a step forward in analysis. What mars the analysis is that much effort is routinely expended in showing how similar the license is to property for federal law purposes. For example, little or no analysis is spent in deciding the question for Article 9 purposes and other state law purposes. Mainly, the approach is to point to the use of the term "privilege" as dispositive of the question. The result is a reordering of priorities because, in most of these cases, the license has been found to be property for state law purposes, and therefore, collateral for the hapless security interest. As a result, the secured creditor is given priority over the trustee or Internal Revenue Service under state and federal law.

88. See, e.g., 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354 (3d Cir. 1986) (Pennsylvania liquor license a privilege for state purposes, i.e., security interest, but not for federal purposes, i.e., attaching federal tax lien).
90. The court in 21 West Lancaster noted:
[to be sure, the result we reach in this case is not an altogether satisfactory one either. It leads to the anomalous conclusion that although a liquor license is not property for purposes of a security interest under Pennsylvania state law, it is property for purposes of a federal tax lien. Of greater concern to the parties, our analysis means that the assignee of a creditor who has taken what were reasonably believed to be the steps necessary to perfect its interest in the license as security will nonetheless be defeated by a subsequent tax claim. This would seem to be harsh treatment of the creditor. As the situation now stands, however, the ability to alter such a result rests with the Pennsylvania legislature, which may choose to redefine the nature of a liquor license under state law.
21 West Lancaster, 790 F.2d at 359.
91. See id. at 357 (with approval of the Board, license will pass to surviving spouse on death of holder, but license may also be revoked arbitrarily).
92. See id.
93. See id.; see, e.g., M.J.'s, Inc., 41 U.C.C. Rep. Serv. (Callaghan) at 591.
94. Under section 9-301(3) of Article 9, and under section 544(a) of the Bankruptcy Code.

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law. Whatever was intended by a legislature in denominating a license as a privilege, it is difficult to imagine that this reordering of priorities was ever considered. Interestingly enough, this latter group of extra-Code cases is frequently a source of support for what is discussed below as the Code approach.

B. The Code Approach

Cases utilizing this approach are so labeled because implicit in the analysis upon which the approach rests is that a Code term is being defined. To this extent, the approach has much to offer. After all, the question is whether a security interest can be created in a liquor license, and a security interest is an interest in "personal property," an Article 9 term.

The Code approach cases rely on Code policies to invariably decide that a liquor license is property for purposes of section 9-102(1)(a). Discussion usually centers around the Code policy of embracing all manner of secured transactions in personality and a

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95. The Internal Revenue Code permits priority of an existing perfected security interest over a federal tax lien when the conditions of section 6323(c) are met. See 26 U.S.C. § 6323(c) (1982).

96. See supra note 32.

97. See generally infra notes 115-20 and accompanying text.

98. These cases directly inquire into the term "personal property" in section 9-102(1)(a) and emphasize Code principles and policies in defining it. See generally infra notes 104-06 and accompanying text.

99. See U.C.C. § 1-201(37).

wide array of interests and assets that can be collateral.\textsuperscript{101} This represents an important step forward in analysis in contrast to the extra-Code approach. In other words, the Code approach transfers the focus of the inquiry. These cases seem to define "personal property," a Code term in section 9-102(1)(a), whereas the extra-Code cases seem to define the word "property" (or distinguishing it from privilege) as a term in the licensing statute, and then use that definition to interpret the Code term.\textsuperscript{102}

A second important advance implicit in the Code approach is the equation, or partial equation, of the market definition of "property" with "personal property" in section 9-102(1)(a). The Code approach cases recognize value-plus-transferability as of central importance in the marketplace where a thing is deemed property or not based on function rather than form.\textsuperscript{103} The incorporation of this commercial reality into the defining process is significant and a matter worthy of elaboration here.\textsuperscript{104}

Where any article in the Code uses a term but fails to define it, it is proper and necessary to search other articles for a definition. Where the term is nowhere defined in the Code, it is necessary to search elsewhere.\textsuperscript{105} The search should always be made, however, with the Code in mind to avoid reliance on extra-Code definitions and concepts of a term that are unrelated to Code policies and purposes. "Property," or "personal property," may well be such terms, that is, terms which profit little by recourse to definitions from non-Code contexts.\textsuperscript{106}

The fault, it might be alleged, should then be laid at the feet of Article 9 itself for its failure to include a definition of the term "personal property." That is the deficiency that drives courts

\textsuperscript{101.} See, e.g., Bogus v. American Nat'l Bank, 401 F.2d 458, 460 (10th Cir. 1968); O'Neill's Shannon Village, 39 U.C.C. Rep. Serv. (Callaghan) at 1785; accord Eagle's Nest, 1 U.C.C. Rep. Serv. 2d (Callaghan) at 219.

\textsuperscript{102.} See supra notes 71-75 and accompanying text.


\textsuperscript{104.} See infra notes 138-39 and accompanying text.

\textsuperscript{105.} See U.C.C. § 1-103. Rushmore State Bank v. Kurylas, Inc. is one of the few liquor license cases expressly mentioning this step in the analysis. See 424 N.W.2d 649, 652 (S.D. 1988).

\textsuperscript{106.} See infra notes 123-24 and accompanying text.
outside the Article to chase after definitions. To put it in other (less accusatory) terms, Article 9 provides no mechanism by which an undefined term, like “personal property” in section 9-102(1)(a), can be defined in a way to insure the fulfillment of Code policies. How, then, can general policies be implemented through a term that is left undefined?

Although there is no definitive answer to this question, the policies of Article 9 themselves guide the defining process in the context of the liquor license and other intangibles. The position proposed here is that the term “personal property,” so far as Article 9 is concerned, has no substantive content independent of those policies and purposes. In defense of this proposition, consider that the fundamental notion underlying Article 9 is the presumed efficiency and beneficial effects of secured credit. Recall that uniformity, predictability and adaptability are important vehicles to encourage and facilitate secured lending. It is only reasonable that these notions be factored into any calculus aimed at discovering whether a liquor license, or anything else, is personal property capable of hypothecation. In fact, it is unreasonable to suppose otherwise.

What then is meant in section 9-102(1)(a) by “personal property”? Given the policy of expansion (the adaptive component of Article 9), and given the purpose to encourage secured lending, personal property should mean no more and no less than the market definition. After all, the market definition is a strict function of what the marketplace determines to be useful or worthy of attention as collateral. In short, if someone will lend against an item, it is property, or rather “personal property,” for section 9-102(1)(a) purposes. Beyond this, it is further suggested here that “personal property” serves no other function, has no meaning or

107. See supra notes 9, 10.
108. See generally supra note 11 and accompanying text.
109. See supra notes 9-11 and accompanying text.
110. See supra notes 98-100 and accompanying text. See generally Rushmore State Bank, 424 N.W.2d at 655.
111. See supra note 10 and accompanying text. For a case expressly recognizing this component, see O'Neill's Shannon Village, 39 U.C.C. Rep. Serv. (Callaghan) at 1785; see also supra notes 16, 70.
112. See generally supra notes 8-14 and accompanying text.
113. See supra notes 102-06 and accompanying text; see also infra notes 140-42 and accompanying text.
substantive content except insofar as it distinguishes and excludes real property from the scope of the Article.

Perhaps because they do not carry the matter of the market definition so far as it has been carried here, courts using the Code approach commonly feel obligated to fortify their conclusion by reference to other contexts in which a liquor license has been found to be property. It will sometimes be observed, for instance, that the license is property of a bankrupt’s estate, is subject to a federal tax lien and a judgment lien, or that the license is entitled to some measure of due process protection as property. This listing or recital, offered after the intoning of Code policies, is ordinarily enough to carry the day for the secured creditor. Against this compiled evidence, and absent a clear expression of legislative policy underlying the statutory characterization of the license as privilege and not property, the statutory designation fails. If it is regarded as doing anything, the designation is dismissed as a description of the relationship of the license holder to the issuing entity.

114. Section 9-104(j) expressly excludes security transfers of interests in real estate except for fixtures. See U.C.C. § 9-104(j); see also supra note 4. But see 1 G. Gilmore, supra note 3, at 311 (discussing the extent to which section 9-104 may be undercut by section 9-102(3), specifically discussing how an obligation secured by an interest in real estate may itself secure a transaction within Article 9).

115. These cases do recognize the significance of value-plus-transferability as key features of the license, but do not directly equate them with the “personal property” term of section 9-102(1)(a). See, e.g., supra note 103.


118. See, e.g., Bennett, 1 U.C.C. Rep. Serv. 2d (Callaghan) at 224. Massachusetts, unlike many states, permits the attachment of a judgment lien to a liquor license. See id. See generally supra note 31.


120. In an early discussion of the privilege or property distinction with respect to the liquor license, Professor Shuchman states that because only the issuing state can revoke the license, as between the holder and third parties, it is property. See Shuchman, supra note 49, at 418; see also Gibson v. Alaska Alcoholic Beverage Control Bd., 377 F. Supp. 151, 154 (D. Alaska 1974); Rushmore State Bank, 424 N.W.2d at 653. But see 1412 Spruce v. Pa. Liquor Control Bd., 70 Pa. Commw. 501, 505, 453 A.2d 382, 383 (Pa. Commw. Ct. 1982),
The view that the term “privilege” may describe merely the relationship of the licensee to his issuer—that it is not an attempt to define (or distinguish) a thing as not property for all times and places—is an enlightened one. Above all, it opens the way for two important ideas. First, if privilege defines that relationship, the folly of treating it as an extra-Code referent for defining personal property in section 9-102(1)(a) is instantly apparent, for the choice of the word could not have been guided by Article 9 objectives. Second, it opens the way for forthright analysis of the issue, which is not whether the license is property within section 9-102, but whether a security interest in the license should be prohibited for reasons having nothing to do with Article 9. The Code approach cases never arrive at this step in the analysis.

Beyond this, the approach is flawed in other respects. First, reliance on cases that decide whether a liquor license is property in other contexts (e.g., attachment of a federal tax lien, inclusion within the estate of a bankrupt debtor, determining whether some measure of due process protection is required in order to revoke) is misplaced. The purposes and policies fulfilled by labeling the license property on those occasions are not in the furtherance Code policies and their value in defining personal property for section 9-102(1)(a) is doubtful. The effect of relying on such cases diminishes the advances made by the Code approach cases in transferring the emphasis of inquiry to Code purposes and policies. Beyond this, to note that the license is property of the debtor’s estate in bankruptcy or subject to the attachment of judgment liens is not to list characteristics of property. Instead, these are consequences that follow after deciding that the license is property.

aff’d, 504 Pa. 394, 474 A.2d 280 (Pa. 1984) (court apparently unimpressed with the distinction).

121. See also infra note 149 and accompanying text.
122. See infra note 128 and accompanying text.
123. See supra notes 116-19 and accompanying text.
124. See, e.g., 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354, 358 (3d Cir. 1986). Acknowledging that the question of the nature of a Pennsylvania liquor license was initially one of state law, this case held that, for federal tax law purposes, the statutory characterization of the license was not binding. See id. In deciding that the liquor license was property for federal purposes, the court emphasized its value and transferability. See id. at 357; see also In re Miller, 68 Bankr. 385, 387 (Bankr. W.D. Pa. 1986) (Pennsylvania liquor license is property of bankrupt debtor’s estate however it might be characterized by the licensing statute).
125. See supra note 123.
More important than these methodological flaws appearing in some of the cases is the lack of attention given to purposes and policies underlying the liquor control statutes by the Code approach cases. This is not to retreat from the position taken earlier as to the place of the statutory designation in defining an Article 9 term. The contribution the licensing statute has to make on this score is negligible, but its lack of useful application to that part of the analysis does not indicate the licensing statute can or should be disregarded or ignored altogether.

That this occurs in the Code approach is attributable to a missing step in analysis. Cases which correctly identify a liquor license to be property for Article 9 purposes, rejecting the statutory privilege-not-property jargon in favor of the market definition, but which do no more, still fall short of the mark. After that first step, it remains to be decided whether a security interest in a liquor license should be prohibited notwithstanding that the license is found to be property.

IV. Two-Step Analysis: Balancing Code and Control Act Policies

The Code approach cases are helpful to the extent to which their analysis is carried. They point the way back to Code policies in defining and applying the Code term “personal property” to the liquor license. Deciding whether a creditor should be able to take a security interest in the license, however, requires more than a definition of property for section 9-102 purposes. This is only half of the analysis. The other half involves a determination as to why a statute describes the license as a privilege and if the use of the word imports some important policy that should override the purposes and policies of Article 9.

Unfortunately, review of some of the statutes calling the license a privilege is not particularly rewarding. The mere choice of the word is largely meaningless, however superficially suggestive

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126. See supra notes 71-75 and accompanying text. The position here taken is that a statutory designation has no real contribution to make in deciding what is “personal property” as that term is used in section 9-102(1)(a).

127. See generally infra note 156 and accompanying text.

128. See supra note 85 and accompanying text; see also infra note 132 and accompanying text.
it may appear. The mischief done by the choice of the term has been discussed in reference to the extra-Code approach to defining property. Leaving this misuse out of the analysis, the statutory designation of the liquor license as privilege and not property serves only to arouse suspicion of a potential conflict between Code and other policies.

Suspicion, however, is enough or should be enough to prompt further inquiry into the objects of the licensing statute under scrutiny. It is necessary at this juncture to review some of the purposes and objectives of licensing statutes. Although statutory licensing schemes vary enormously in their approach, their stated objects and ends are strikingly similar. It is not a simple matter to identify whether a legislature intended to preempt security interests in some kinds of personal property from a general statutory objective. Nevertheless, it is senseless to purport to do any balancing of Code and liquor control interests without the statutory objectives as a beginning point.

Nearly every statute for liquor control in the licensing states declares its objective to be the protection of the public health, welfare, safety, peace and morals. Licensing furthers this end insofar as it enables the states to restrict participation in the business of selling alcoholic beverages to honest and qualified persons. There is frequently language in the statutes indicating that temperance and moderation are objectives, or perhaps the means to protecting public welfare where alcoholic beverages are concerned. If the number of licenses is restricted, there will be fewer places where liquor might be purchased. On the theory that availability is a factor in consumption, it follows that to limit the local-

129. As noted earlier, this has been sufficient in several cases. See supra note 71.
130. See supra notes 64-70 and accompanying text.
131. The various regulations follow no general trend and variations across states are numerous. See Joint Committee of the States, supra note 44, at 1.
132. The most often stated objective of the individual states' liquor control laws is the protection of "the public health, welfare, safety, peace, and morals." See id. at 8.
133. See id.
134. See id. at 1. In Montana, for example, neither the licensee nor any member of his immediate family can have an interest in another liquor license, nor may the licensee obtain financing from a manufacturer, bottler, or distributor of alcoholic beverages. See Montana Report, supra note 19, at 14 (Table 2). For a listing by state of statutory criteria for liquor licenses, see id. at 82 (Table 17).
135. See Joint Committee of the States, supra note 44, at 50-51.
136. See id.
tions where liquor may be purchased is to induce temperance.137

How are these general notions advanced by the ringing declaration that a license holder has no property but only a privilege? It is almost impossible to say with anything approaching conviction. Fortunately, the analysis to be proposed looks to the statutory characterization of the license only as a signal giving rise to some suspicion that prohibition might have been intended, so that there is no real effort expended on this point.

Instead, the analysis first treats the question whether the liquor license is property for Article 9 purposes. The analysis then considers whether there are countervailing liquor statute objectives that warrant trumping Code policies. The former has been discussed nearly to conclusion under the Code approach,138 and will receive rather brief attention here. The latter question requires discovering a genuine conflict139 between Code and license statute policies. This, in turn, requires discovery of license statute policies of sufficient import to support the notion that a legislature intended to prohibit the creation and perfection of a security interest in a liquor license issued under the auspices of the statute.

Turning momentarily to the first step in the analysis, it is only necessary to remind the reader of the earlier elaboration on the market definition as the functional referent for section 9-102(1)(a).140 Against that background it is reiterated here that “personal property” as used in the provision may intend no limitation at all except the emphatic exclusion from Article 9 of most every transaction relating to real estate.141 Thus, for present purposes, the first step is taken with the conclusion that there is nothing in Article 9 to indicate that the liquor license should be cast outside of the personal property category within section 9-102(1)(a).142

137. The effectiveness of restricting the number of licenses issued in achieving these goals was previously questioned. See Levin, Economic and Regulatory Aspects of Liquor Licensing, 112 U. Pa. L. Rev. 785 (1964) (discussing the effectiveness of New York’s alcoholic beverage control regulations policies in reducing alcohol consumption and achieving other statutory goals by limiting the number of liquor licenses).

138. See supra notes 103-06 and accompanying text.

139. Unless some important policy to be promoted by the licensing statute is impeded by allowing security in the license, the conflict is a false one created by the choice of the term “privilege.”

140. See supra note 138.

141. See supra note 114.

142. See U.C.C. § 9-104. Once this point is reached, the scope question ends with a
It is not easy to either find or imagine statutory policies and purposes that would profit by prohibiting security interests in liquor licenses. One does occasionally find statements in some statutes themselves forbidding anyone but the licensee to have any financial interest in the licensee's business, or prohibiting the transfer of title to or a financial interest in the license itself. This language, or language like it, seems to rest on vague anxiety over the prospect that a creditor with a financial stake in the licensee's enterprise might use his advantage to force the licensee into illegal but profitable activity. There is also concern about a party gaining interest in the enterprise who could not himself acquire a liquor license, perhaps by reason of poor character.

These anxious undertones, however, are rather quickly disposed of with respect to the secured creditor. The secured creditor insists on security because he is risk-averse and without security either would not extend credit, or would not extend credit except at an interest rate adjusted to take account of the increased risk of nonpayment. It is difficult to imagine that the secured creditor, who would quickly be rendered unsecured should the debtor lose his liquor license, would goad a debtor into behavior violative of the terms of the license.

In any event, to reach even this point requires the connection to be made between these notions or policies as they regard the acquisition of a financial stake in the debtor's tavern or bar in general, and security interests in particular. Of course, it is fair to enlist the aid of conventional methods of statutory analysis in mak-

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143. See Shuchman, supra note 49, at 424. The prohibition is based on the fear that the financier will exercise undue control over the business and, perhaps, in difficult times, pressure the licensee to commit illegal but profitable acts. See id. The soundness of this reasoning has been questioned. See id. at 424-25.


146. See supra note 143.

147. See Shuchman, supra note 49, at 424.

148. See id.
ing or dismissing any connection. For instance, in states where the licensing statute predates the adoption of Article 9, it is certainly arguable that the statute, enacted in complete innocence of Article 9 security interests, could not have intended to prohibit its attachment to liquor licenses. 💡 Still, personal property security devices do not begin with Article 9, though they are meant to end there. 💡 A pre-Code history of case law prohibiting chattel mortgages, assignments or other pre-Code security transfers may indicate an Article 9 security interest would have fared no better. 💡 On the other hand, pre-Code security transfers of liquor licenses may have been prohibited for reasons other than considerations of the liquor license control act.

One premise from which it might be convincingly argued that a licensing statute both intended and would be served by exclusion is that a licensee should be capable of acquiring and maintaining his business without the expediency of secured credit. That is, the licensee should be someone with the kind of assets and wherewithal to capitalize the enterprise without hypothecating his liquor license. Without capital or other assets going in, the entrepreneur is unlikely to acquire unsecured credit. 💡 Thus, the individual of

149. See Bogus v. American Nat’l Bank, 401 F.2d 458, 460-61 (10th Cir. 1968) (adoption of the U.C.C. broadened previous law and made property, including a liquor license, not a part of a lien subject to a security interest); Gibson v. Alaska Alcoholic Beverage Control Bd., 377 F. Supp. 151, 153 (D. Alaska 1974) (even though Alaska’s liquor licenses were considered privileges, the enactment of the U.C.C. made the license “property” to the extent that it could be pledged as security); In re Bennett Enters., Inc., 58 Bankr. 918, 919 (Bankr. D. Mass. 1986) (adoption of the U.C.C. by Massachusetts in 1986 broadened existing law such that a liquor license may be the subject of a security interest). But see In re Midland Servs., Inc., 10 U.C.C. Rep. Serv. (Callaghan) 489, 504 (Bankr. D. Neb. 1971) (the vitality of the state’s liquor control statute was not eroded by the adoption of the U.C.C.); In re Eagle’s Nest, 57 Bankr. 337, 340 (Bankr. N.D. Ind. 1986) (the adoption of the U.C.C. in Indiana did not affect the state’s alcohol control statutes).

150. See generally supra notes 9-10.


152. See generally Joint Committee of the States, supra note 44, at 82 (Table 17).
marginal means (who is therefore more likely to operate on the margin) is kept out of the industry altogether.\textsuperscript{154} If this rationale appears somewhat eccentric, it is not nearly as bizarre as others that are occasionally advanced to justify striking down a security interest in the debtor's license.\textsuperscript{154}

That it is necessary to engage in this sort of speculation is of greater significance than the speculation itself or where such speculation leads in a particular case. To reason from a vague or general statutory policy, like the advancement of temperance, to the conclusion that a liquor license should never be collateral for a security interest must nearly always be a matter of uncertainty.\textsuperscript{155} Trumping Code policies with extra-Code policies may be appropriate, but inasmuch as it is not an action without costs to commercial credit, our willingness to do so should be in proportion to the degree of confidence with which we arrive at the conclusion against hypothecation.

When the method of exclusion is tacit, as it is in those liquor license cases which define the license out of Article 9 coverage, it is appropriate to insist on the highest level of confidence in the extra-Code objectives "identified," as tacit exclusion imposes costs additional to those imposed by direct exclusion. More importantly, the balancing of Code against extra-Code policies and ends must not be lost in the method or route to exclusion. In the main, the liquor license cases fail in this important regard, expending considerable effort in deciding that a liquor license is not property, but expending little or none in consideration of the consequences that will follow from that decision.\textsuperscript{155} Again, trumping of Code policies

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Several states require applicant to show financial responsibility. See id.

153. See supra note 67 and accompanying text.

154. See, e.g., In re Eagle's Nest, Inc., 57 Bankr. 337, 340-41 (Bankr. N.D. Ind. 1986). The court stated:
[a] permittee's commercialization and promotion of the consumption of alcohol will be hindered if it cannot commit the capital represented by its permit to other uses. Without the ability to provide a security interest in a liquor license, the opportunity to obtain financing is substantially impaired. The reduced financing available . . . could reasonably, in the conception of the legislature, promote a policy of moderation in the consumption of alcoholic beverages.

Id. (footnotes omitted.)

155. See Lloyd, supra introductory note \*, at 79-80.

156. In re Eagle's Nest, Inc. is an exception worth mentioning. See 57 Bankr. 337 (Bankr. N.D. Ind. 1986). The court observes, quite accurately, that "[t]he apparent conflict between the commercialization policy of the UCC and the temperance policy of many state
by exclusion may be in order, and it may even be appropriate to accomplish exclusion tacitly, but something like the Two-Step approach proposed is a necessary part of the analysis because it forces attention upon the costs and gains of exclusion and away from a formal privilege-or-property inquiry.\textsuperscript{157}

\textbf{CONCLUSION}

There is a substantial risk of adulterating Code policies any time a Code term is left undefined, such that it becomes necessary to retreat to extra-Code definitions and referents. The problem is not that terms are left undefined; rather, it is that recourse may be made to definitions in other contexts which confuse the inquiry

alcoholic beverage control laws has been resolved, often without recognition, by many courts." \textit{Id.} at 338. "The minority position gives greater deference to local legislative concerns over the implications of alcoholic beverage consumption within the community." \textit{Id.} On the other hand, "[t]he majority position generally gives determinative weight to \ldots the maximization of commerce." \textit{Id.} The court proceeds to recite policies behind the Indiana Alcoholic Beverage law, namely, to protect the "economic welfare, health, peace and morals" of the Indiana citizenry, to "regulate and limit the \ldots sale \ldots and use of \ldots alcoholic beverages," and to "provide for the raising of revenue." \textit{Id.} at 339. The policies of the Indiana U.C.C.—including "to permit continued expression of commercial practices through custom, usage and agreement"—are juxtaposed. \textit{Id.}

The great step forward in \textit{Eagle's Nest} is the express recognition that the policies must be weighed one against the other, so that a pro-commerce result is not invariably called for upon mere iteration of Code policy. The court opines: "[i]t would be all to easy to identify this case as presenting a UCC issue and then to apply the UCC to the exclusion of alcoholic beverage laws." \textit{Id.}

The court does quite well to this point, but for some undiscernable reason, stumbles into a discussion of property versus privilege based on statutory language that "[a] permittee shall have no property right in a \ldots permit of any type." \textit{Id.} From this point, the opinion is doomed to finding that the license in Indiana is not property for U.C.C. purposes because of the cited statutory language. The discussion includes the usual, "[w]hile [the] \ldots license is not 'property' it can be quite valuable," together with "the interest of a permittee in his license has long been recognized as property entitled to constitutional protections," and so on and so forth. \textit{Id.} at 339-40.

The shift in analysis—perhaps better designated the step backwards in analysis—is unfortunate, although at least it is clear from the case why it will ultimately decide the license is not property. The statutory policies identified by the court on which the decision is based are openly discussed, somewhat extraordinarily. \textit{See supra} note 154.

157. Frankly, in the case of the liquor license at least, it is difficult to justify the costs to commercial credit imposed by direct exclusion, let alone the additional costs that follow from tacit exclusion that arise in the attempt to define the term "personal property" in section 9-102(1)(a). This is especially true where legislative intent against hypothecation has been extrapolated from general policies. In any event, these latter costs are easily avoided by direct exclusion through a forthright balancing of interests while leaving the business of defining the term "property" to the marketplace.
with policies and notions extraneous to the Code. Debating
whether a liquor license is a privilege or property is such a case.
The use of the words “privilege” or “non-property” in liquor li-
censing statutes revolve around statutory objectives often stated in
the most general terms, and offer little or nothing that is helpful in
deciding whether the license is “personal property” as that term is
used in Article 9.

Of course, where a term, like “personal property,” is left unde-
fined, some effort must be made to define it, and to some extent,
this means leaving the Code to search elsewhere. Care must be
taken, however, to insure the consistency of purposes of the extra-
Code referent with those of the Code. Where the Article 9 term,
“personal property,” is concerned, the choice of a definitional
referent can mean exclusion of a transaction that would profit from
inclusion, and the ramifications of tacit exclusion have practical as
well as theoretical impact. Knowing this, it is important to keep
Code policies and purposes always in mind.

To this end, when the question is one of whether to exclude a
transaction from the scope of the Article, the Two-Step analysis is
advantageous. It retains a firm hold on Code principles and objec-
tives, and forces recognition of what is at stake when transactions
or items of market worth are excluded. In addition, the analysis
insists on articulation of cognizable policies to be weighed against
those of Article 9 which might otherwise be balanced on the
strength of otherwise vague and, perhaps, indiscernible ends.