The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases

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THE MYSTERY AND MYTH OF “OSTENSIBLE OWNERSHIP” AND ARTICLE 9 FILING: A CRITIQUE OF PROPOSALS TO EXTEND FILING REQUIREMENTS TO LEASES

Charles W. Mooney, Jr.*

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I. INTRODUCTION

Article 2A of the Uniform Commercial Code1 was promulgated in August, 1987.2 During the seven years of study and drafting which culminated in Article 2A,3 the wisdom of imposing a

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1. ALL NAT’L Conf. of Comm’rs on Uniform State Laws. Uniform Commercial Code: 1987 Official Text with Comments. The Uniform Commercial Code will be hereinafter referred to as the Code; all citations to the Code are to the 1987 Official Text with Comments unless otherwise noted, and all citations to the Code are by section numbers only. Article 2A began its life as the Uniform Personal Property Leasing Act. See generally Boss, The History of Article 2A: A Lesson for Practitioner and Scholar Alike, 39 ALA. L. REV 575 (1988) (this Symposium).

2. The American Law Institute approved Article 2A at its Annual Meeting in May, 1987, and The National Conference of Commissioners on Uniform State Laws gave its final approval to certain changes at its Annual Meeting in August, 1987 (the Conference had previously approved an earlier version of Article 2A in August, 1986). Id. at 593-94.

3. The commencement of the study process began with the creation of the Subcommittee on Personal Property Leasing, Committee on Uniform Commercial Code, American Bar Association Section of Corporation, Banking, and Business Law (hereinafter ABA UCC Committee). Boss, supra note 1, at 584-85 & n.57. Earlier, more general suggestions were made to the effect that leasing would benefit from uniform statutory treatment. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. COOGAN, W. HOGAN, D. VAGTS & J. McDONNELL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (MB) § 29B.06[4][e] (1987); Heisman & Mooney, Drafting, Negotiating, and Constraining the Equipment Lease—An Overview, in EQUIPMENT LEASING—LEVERAGED
mandatory public notice (filing) requirement for leases of goods often was debated. 4 The debate reflected earlier proposals and inspired new proposals that a filing requirement for leases of goods be adopted. Indeed, the debate continues in the pages of this journal. 5 With one exception, 6 however, Article 2A does not impose a filing requirement for leases. 7

Provisions for the public filing or recordation of leases of goods have been quite rare in the United States. 8 Most recent commentators, however, have urged the adoption of a public notice requirement. 9 Douglas Baird and Thomas Jackson, for example, have argued that, subject to various exceptions, the Article 9 filing rules should be extended not only to leases of goods, but also to all other separations of ownership and possession. 10 Although the drafters and sponsors of Article 2A did not opt for a filing requirement for leases, that decision was reached without the benefit of thorough commentary by those who deny or question the wisdom of such a filing rule. The Article 2A process, therefore, has not marked a clear path for future treatment of other, nonlease separations of possession and ownership of goods. 11

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4. Whether a filing requirement should be imposed for leases was the subject of spirited debate by participants in programs on equipment leasing sponsored by the Practising Law Institute in 1981, 1983, and 1985; a program sponsored by the ABA UCC Committee in 1981; and an invitational symposium sponsored by the American Law Institute—American Bar Association Committee (ALI-ABA) on Continuing Professional Education in 1983. It was also the subject of much discussion during meetings of the Subcommittee on Personal Property Leasing of the ABA UCC Committee and, of course, by the Drafting Committee for Article 2A. See infra notes 42-44 and accompanying text.


7. See id. § 2A-101 comment para. 5; id. § 2A-301 comment para. 3.

8. See infra note 40 and accompanying text.

9. See generally infra Part III.


11. See Scott, A Relational Theory of Secured Financing, 86 COLUM. L. REV. 901, 970 (1986) ("Frequently, insight comes only through the accreting effects of successive scholarly efforts."). The “successive scholarly efforts” dealing with a filing requirement for leases of goods reached similar conclusions based on similar reasoning and have not been subjected to any searching criticism.
The principal goal of this article is to explore the appropriateness of a filing rule for leases in view of the justifications for and functions and effects of the public notice (filing) rules under Article 9 and earlier codifications of personal property law. This article will address the important challenge posed so well by Baird and Jackson: "At the very least... those who question the usefulness of a filing requirement in the case of leases should explain why there should be a filing requirement in the case of secured transactions that are identical from the point of view of third parties." There are cogent reasons for treating leases and secured transactions differently in the context of public notice. The principal feature common to leases and many secured transactions is the possession of goods by a debtor or lessee. Concerns for third parties based on the ostensible ownership by a possessor of goods, however, provide an incomplete explanation for the Article 9 filing rules. The historical development of chattel security law was not an inexorable march toward requiring public notice of separations of possession and ownership in order to reduce ostensible ownership concerns. The judicial and legislative developments also were

12. Much of this article deals with the identification of various "costs" and "benefits" of a filing requirement for leases. Those terms are used here in a broad sense. Although costs and benefits are sometimes dealt with in the context of arguments based (or stated to be based) on economic analysis, in general the reader may substitute freely such terms as "pros" and "cons" or "advantages" and "disadvantages."

Part II of this article provides some background concerning the treatment of leases of goods under prevailing common law and Article 2A and distinguishes such treatment from that afforded secured transactions under Article 9. It also deals with the process which resulted in the absence of a filing requirement in Article 2A. Part III summarizes the substance and reasoning of several proposals for the adoption of a filing requirement for leases. Part IV deals with the range of sanctions and effects (i.e., "priority rules") which might be imposed as a result of the failure of a lessor to comply with a filing requirement for leases. Part V considers the historical and current justifications and explanations for the doctrine of "ostensible ownership" and various filing and other public notice requirements. Part V also compares the functions and effects of the existing Code's public notice requirements for secured transactions, including sales of accounts and chattel paper, and consignments with the functions and effects which might result from a filing rule for leases. Part VI draws on the preceding Parts and compares the costs and benefits which might result from imposing, or not imposing, a filing rule for leases.

13. Baird & Jackson, supra note 10, at 189 n.46. Ronald Cuming has asked a similar question: "If the [filing] system works reasonably well for secured transactions, why should it not be employed in the context of certain types of commercially important, non-security transactions such as chattel leases and consignments?" Cuming, Canadian Developments in Personal Property Security Law, in 1 P. CooGAN, W. HOGAN, D. VAGTS & J. MCDONNELL, supra note 3, § 5D.05[1][a][ii], at 5D-10. Although Cuming may have intended his question to be rhetorical, this article does not treat it as such.
influenced by concerns for fraud and fairness apart from misleading appearances of ownership. The Article 9 filing rules serve a variety of functions which are unrelated, or only tenuously connected, to curing perceived problems of ostensible ownership. The Article 9 filing regime provides information about potential secured claims so as to permit the ordering of priorities based generally on the principle of first-in-time. The filing regime also responds to concerns about fraud and collusion by enhancing the veracity of claims to security and the timing of those claims for priority purposes. Because of inherent conceptual and contextual differences between leases and secured transactions, a filing requirement for leases would result in fewer and smaller benefits than are provided for many secured transactions under current law. If the effect of noncompliance with a filing rule for leases were similar to that which exists for secured transactions, a filing rule for leases also would result in greater costs than those resulting from the filing rules for secured transactions. Proponents of a filing rule for leases have not given adequate consideration to such costs or to the range of possible effects and sanctions for noncompliance with a filing rule.

This article also addresses three additional goals. First, it identifies various empirical, behavioral, and economic hypotheses and assumptions upon which proponents of a filing rule for leases (and advocates for the existing Article 9 notice filing rules applicable to secured transactions) have relied as well as those upon which I have relied. It thereby reveals matters in need of further research and investigation by exposing weaknesses in the arguments of such proponents as well as weaknesses in the arguments made here. No firm conclusion is reached as to whether a filing requirement for leases is warranted, largely because an adequate information base is missing.

Second, this article demonstrates that the wisdom of a mandatory filing requirement for leases is not a simple problem susceptible to a simple solution based on a simple principle, as suggested by some of the proponents of such a rule. The issue is, like

14. Two proponents of a mandatory filing requirement have argued: Once one realizes that these [ostensible ownership] problems have a common source, simple solutions to them become apparent. In proposing these simple solutions to problems that have consumed hundreds of pages of law review commentary, we are not advocating a radical departure from established wisdom. Rather, we are
most matters of public policy, a complex one which demands an investigation and analysis of numerous factual, behavioral, and economic considerations. Previous proposals for a filing rule have been incomplete or deficient in methodology or both.\(^{15}\)

Finally, this article may encourage a more thorough rethinking of the role of possession of personal property, particularly goods, and public notice requirements in our legal regime. Others have explored the role of possession in a variety of commercial law contexts and found the existing rules to be deficient.\(^{16}\) The specific debate over the need for a filing rule for leases may be quieted by the promulgation and eventual widespread enactment of Article 2A. But the explanations and justifications for attributing legal significance to possession and requiring public notice of interests in personal property should continue to be the focus of study. Courts and commentators alike continue to be perplexed by bailments of goods, such as bailments for processing, which are neither leases

urging only that rulemakers apply more generally the principle that has shaped the law of security interests in personal property for four hundred years: A party who wishes to acquire or retain a nonpossessory interest in property that is effective against others must, as a general matter, make it possible for others to discover that interest.

... An ostensible ownership problem ... exists whenever there is a separation of ownership and possession. Article 9's treatment of the ostensible ownership problem created by secured credit naturally leads one to ask whether the ostensible ownership problem created by leases or other bailments is different. We believe the answer is simple: The two ostensible ownership problems are not different in any relevant respect. They impose the same costs on third parties, and if a filing system is an appropriate response to the first problem, it is an equally appropriate response to the second.

Baird & Jackson, supra note 10, at 178, 186 (footnotes omitted) (emphasis added). The arguments developed by Baird and Jackson are discussed in more detail in Part III. See infra notes 73-85 and accompanying text.

15. These shortcomings may result, in part, from the overly narrow conceptualization of the issue as essentially a "secured transaction" or "Article 9" matter. Rather, such proposals necessarily involve very basic, important, and longstanding principles of personal property law generally. See Jackson & Schwartz, Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke, 133 U. Pa. L. Rev. 987, 988 (1985) ("The lesson is that wisdom in result is unlikely to derive from error in method.").

nor consignments.\textsuperscript{17} There is a reasonable prospect that in the foreseeable future Article 2 will be subjected to study for the purpose of considering amendments.\textsuperscript{18} Moreover, sooner or later, the sponsors of the Code may consider amending Article 9 as well.\textsuperscript{19} A richer store of literature examining these issues no doubt will enhance significantly the quality of any future Code drafting projects.

\section*{II. Leases of Goods: Relevant Background and Basic Issues}

As a result of the “boom” in equipment leasing during the last twenty-five to thirty years, the leasing of goods has become an extremely important commercial device.\textsuperscript{20} At common law, a lease of

\begin{itemize}
\item \textsuperscript{17} E.g., Wesgo Div. of GTE Prods. Corp. v. Harrison (\textit{In re} Sitkin Smelting & Ref., Inc.), 648 F.2d 252 (5th Cir. 1981) (delivery of scrap material for extraction of metals held a secured transaction subject to Article 9 perfection requirements); Eastman Kodak Co. v. Harrison (\textit{In re} Sitken Smelting & Ref., Inc.), 639 F.2d 1213 (5th Cir. 1981) (delivery of waste film for extraction of metals held a true bailment not subject to Article 9 perfection requirements); General Motors Corp. v. Bristol Indus. Corp., 38 U.C.C. Rep. Serv. (Callaghan) 989 (Bankr. D. Conn. 1981) (delivery of raw materials for processing held a secured transaction subject to Article 9 perfection requirements), rev’d on other grounds, 690 F.2d 26 (2d Cir. 1982); \textit{In re} Medomak Canning Co., 25 U.C.C. Rep. Serv. (Callaghan) 437 (Bankr. D. Me. 1978) (delivery of raw ingredients and packaging supplies for processing and packaging held a true bailment not subject to Article 9 perfection requirements), aff’d, 588 F.2d 818 (1st Cir. 1978); Harrington, \textit{A Caveat for Commodity Processing Industries: Insolvent Processors’ Creditors vs. Putative Owners of Raw Materials}, 16 U.C.C. L.J. 322 (1984); Comment, “Bailment for Processing”: Article Nine Security Interest or Title Retention Contract, 61 Or. L. Rev. 441 (1982). The Permanent Editorial Board for the Uniform Commercial Code (“PEB”) now has under consideration a draft PEB Commentary dealing with such nonlease, nonconsignment bailments. The scope of this article is confined essentially to bailments that are leases, however. As to consignments, see \textit{infra} Part V.D.
\item \textsuperscript{18} The ABA UCC Committee studied the prevailing problems under Article 2 and issued a consensus report in March, 1987, which does not represent any official ABA position, calling for a formal study by the sponsors of the Code, the National Conference of Commissioners on Uniform State Laws and The American Law Institute, to consider the need for revisions to Article 2. That recommendation was discussed in a meeting of the PEB on September 19, 1987. At that meeting the PEB approved in principle a formal study of Article 2; the details and timing of the project remain on the PEB agenda.
\item \textsuperscript{19} At the time of this writing neither the Code sponsors nor the PEB contemplate a project relating to revision of Article 9. However, a review and revision of Article 2, to the extent it would deal with issues relating to possession of goods, good faith purchase and the like, could involve reconsideration of related issues under Article 9. Cf. Dolan, \textit{Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the UCC}, 30 Hastings L.J. 1 (1978); Jackson & Peters, \textit{Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code}, 87 Yale L.J. 907 (1977).
\item \textsuperscript{20} The current volume of equipment leasing is impressive:
goods was, and remains, a form of "bailment for hire." The bailment consists of a delivery of goods by the lessor (bailor) to the lessee (bailee), for use by the lessee during the term of the lease, in exchange for a consideration to be paid by the lessee to the lessor, and pursuant to which the lessee is to redeliver the goods to the lessor at the expiration of the term. The concept might seem simple. Yet, the courts and commentators have struggled for many years to discover the essential distinctions between a lease (often referred to as a "true" lease, for purposes of contrast) and a transaction denominated a lease but which, in legal effect, is a secured transaction. In recent years many reported decisions and much commentary have grappled with the true lease-security interest dichotomy under the pre-1987 section 1-201(37) of the Uniform Commercial Code, which defines the term "security interest."
Many leasing transactions have taken the form of a so-called "finance lease." That term generally is used to denote a transaction wherein the lessor, at the request of a customer, acquires goods from a supplier selected by the customer and for the purpose of leasing the goods to the customer.25 Such transactions might appear to be the functional equivalents of secured purchase money financings. There are, however, important differences which bear on the wisdom of imposing a filing requirement for leases.

The essence of a true lease is the existence, as reasonably anticipated at the inception of the lease, of a meaningful residual interest for the lessor at the expiration of the lease term.26 When a
lessee complies with its obligations under a true lease, a meaningful residual value of the leased goods is left for the lessor at the end of the term. When a debtor in a secured transaction satisfies its secured obligations, the collateral remains the property of the debtor alone, and the secured party's security interest expires. The existence, at the end of the term, of a meaningful residual value of the leased goods that is retained by a lessor and not transferred to the lessee represents a fundamental conceptual distinction between true leases and secured transactions under current law.

Both Homer Kripke and John Ayer have argued, incisively and elegantly, that no meaningful distinction exists between a true lease and a secured transaction. Rather, they argue, there is a continuum comprised of an infinite variety of transactions. They view an attempt to force transactions into one of only two possible categories—lease or security interest—as an artificial and senseless exercise. Kripke explains that a lease is a transfer of a temporal property right of use to a lessee with a property right in the residual value retained by the lessor. Ayer persuasively demonstrates that when property is divided into separate bundles of rights, each representing some combination of upside and downside benefits and risks, there is an infinite variety of possible divisions. Viewed in this context, current law employs a crude approach: If a putative lessor's retained bundle of rights is material, the transaction is a true lease, and if the putative lessor's retained interest is expected to be nonexistent or immaterial at the end of the term, a secured transaction exists.

Whether it makes sense for the law to maintain the true lease-security interest dichotomy is itself a senseless inquiry unless an...
other question is asked and answered: If the legal distinction were abolished, how would transactions that are leases under current law be treated? It has been argued that the distinction is one which must be made, at least for some purposes. One such purpose under current law is the difference between the applicable remedies of, and damages recoverable by, a lessor when compared to the enforcement rights available to an Article 9 secured party. When a debtor defaults and a secured party takes possession of collateral, the secured party generally will be required to dispose of the collateral in a "commercially reasonable" manner and to give the debtor prior notice of the intended disposition. After the disposition, the secured party will be entitled to recover from the debtor any deficiency (i.e., remaining unpaid balance of secured obligation less net proceeds of the disposition) or will be required to pay over to the debtor any surplus (i.e., net proceeds of disposition less remaining unpaid balance of the secured obligation).

These rules underscore the significance of a lessor's residual interest and the inappropriateness of Article 9 remedies for parties to a lease. A secured party is required to credit the debtor with the entire net proceeds of a disposition. Were a lessor required to credit a lessee with the entire net proceeds from a disposition, however, the lessee would receive the benefit of the lessor's residual value—a stick in the bundle which was not transferred to

32. See, e.g., Boss, supra note 26, at 357; Coogan, Is There a Difference Between a Long-Term Lease and an Installment Sale of Personal Property?, 56 N.Y.U. L. Rev. 1036 (1981). The true lease-security interest distinction is determinative of many issues outside of the Article 9 perfection, priority, and enforcement context. For example, leases generally are not subject to usury laws, but a lease recast as a secured transaction often would be subject thereto. See, e.g., McGalliard v. Liberty Leasing Co., 534 P.2d 528 (Alaska 1975); Hill v. Bentco Leasing, Inc., 288 Ark. 623, 708 S.W.2d 608 (1986); Reisman & Mooney, supra note 3, at 12 & n.28. The issue also may be determinative for purposes of ad valorem taxes, sales and use taxes, applicability of certain consumer protection laws, and treatment for a variety of purposes under the Bankruptcy Code. See, e.g., Mooney, True Lease, supra note 24, § 29A.03[3]-[11], at 2929-37; Reisman & Mooney, supra note 3, at 12-14, 123-34, 164-76. Eliminating the distinction under the Code certainly would not end the need to make the determination in many other circumstances. Cuming has asserted, however, in addressing the registration (filing) requirement for leases under Saskatchewan law, that "[o]nce the issue of registration is removed, the problem of characterization becomes commercially insignificant." Cuming, supra note 13, § 5D.05[1][a][iv], at 5A-11; see also infra note 40 (discussing Saskatchewan law). Insofar as the quoted statement is intended to encompass circumstances in the United States (and the context suggests that it is), the statement is inaccurate.

34. Id. § 9-504(2).
the lessee and for which the lessee was not obliged to pay.\textsuperscript{35} It follows that abolishing the true lease-security interest distinction should not eliminate the necessity of taking into account the residual interest of a lessor in transactions which constitute true leases under current law.\textsuperscript{36}

Abolishing the true lease-security interest distinction also might subject leases to the perfection and priority regime of Article 9. As a general matter, a secured party must perfect its security interest in order to achieve protection against most conflicting creditor and purchaser claims to collateral.\textsuperscript{37} Perfection in goods intended for use, such as equipment,\textsuperscript{38} is normally achieved by filing a financing statement.\textsuperscript{39} In most jurisdictions in the United States and Canada, as well as in England, however, no filing or other public notice requirement is imposed on the parties to true leases, and the interest of a lessor generally is immune from attack on ostensible ownership grounds.\textsuperscript{40} Most proponents of imposing a

\textsuperscript{35} Ronald DeKoven has stated an appropriate measure of damages applicable to a lessee default: "[T]he present value of the difference between the rent reserved for the balance of the term less the market value of the use of the repossessed equipment for the balance of the term . . . ." DeKoven, supra note 3, § 29B.05[3], at 3012; see also DeKoven, \textit{Leases of Equipment: Puritan Leasing Co. v. August, A Dangerous Decision}, 12 U.S.F. L. Rev. 257 (1978). This measure would credit the lessee only with the value of its own property interest—the use value of the goods for the remainder of the term—for which it is required to pay rentals. Mr. DeKoven was the Reporter for Article 2A and the basic lessor measure of damages upon a lessee default provided by Article 2A is patterned closely on Mr. DeKoven’s model. See generally Rapson, \textit{Deficiencies and Ambiguities in Lessors’ Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute}, 39 Ala. L. Rev. 875 (1988) (this Symposium).

\textsuperscript{36} Kripke acknowledges this point. Kripke, supra note 27, at 729 ("It should not be too difficult for Mr. Mooney’s subcommittee to work out a formula by which the proceeds of such a sale would be divided in proportion to the present values of the term and the residual useful life, with the former applied against the present value of the lessee’s liability for rent.").


\textsuperscript{38} See U.C.C. § 9-109(2) (1987) (defining “equipment” as “goods . . . . if they are used or bought for use primarily in business”).

\textsuperscript{39} Id. § 9-302(1).

\textsuperscript{40} There are exceptions, however. South Carolina’s “bailment statute” has long provided that unless a lease of goods is recorded (or is for “temporary use” or qualifies under certain other minor exceptions) it is “null and void as to subsequent creditors . . . . or purchasers for a valuable consideration without notice.” S.C. Code Ann. § 27-23-80 (Law Co-op. 1970); see Note, \textit{Mandatory Recording of Personal Property Leases in South Carolina}, 50 S.C.L. Rev. 557 (1979); see also Idaho Code § 25-2001 (Supp. 1987) (recording of “[l]eases of more than ten (10) head of livestock must be in writing . . . acknowledged . . . and recorded .
filing requirement for leases of goods have failed to consider, much less grapple with, the effect of a lessor's noncompliance on the lessor's residual interest in the goods. It is central to the thesis of this article that an analysis of the merits of a filing rule for leases must take seriously the accompanying priority rules, including the effect of noncompliance on a lessor's residual interest. This issue is addressed in Part IV.

Article 2A does not mandate filing or any other form of public notice for leases, with the exception of leases of goods which become fixtures. The Official Comments to Article 2A offer little insight into the drafters' decision to reject the nearly uniform call of the commentators for a filing requirement. Although the matter was one which was intensely discussed and debated prior to...
and during the drafting process, there may be a good reason for the paucity of elaboration. Although there was a general consensus of the drafting committee in result—not to adopt a filing requirement—it is doubtful that there was a consensus on the reasoning or the weight afforded to the several arguments made for and against a filing requirement.

III. RECENT PROPOSALS TO EXTEND ARTICLE 9 FILING REQUIREMENTS TO LEASES

Undoubtedly influenced by the leasing "boom," recent years have witnessed a contemporaneous "boom" in legal writing dealing with the leasing of goods, usually denominated "equipment leasing." During the 1960s and 1970s several commentators proposed that true leases of goods be subjected to the Article 9 or similar filing requirements. The commencement in 1980 of a formal con-
sideration of the need and prospects for a uniform statutory treatment of personal property leasing presented a new agenda for the erstwhile and future essayists on the subject. The uniform law project that resulted in Article 2A provided a motivation and a medium for further exploration of the filing requirement issue.\footnote{See generally Boss, supra note 1; Mooney, Challenge, supra note 24, at 1623-29.}

Kripke offered some advice and raised even more questions for the drafters of the new law in a scintillating book review written in 1981.\footnote{Kripke, supra note 27.} Kripke argued that notice of a lessor’s interest should be filed in order to be “perfected.”\footnote{Kripke, supra note 5, at 798-801.} Coogan and Leary reacted to Kripke’s book review.\footnote{Coogan, supra note 32; Leary, supra note 25.}

(1971) (filing for long term noncancelable leases should be required based on concerns for apparent ownership); Note, Leases as Security: Some Problems of Identification, 8 B.C. IND. & COMM. L. REV. 764, 770 (1967) (filing requirement for leases may be necessary as a result of inability of courts to properly make true lease-security interest distinction); Note, 49 CORNELL L.Q. 672 (1964) (Article 9 filing requirements should be applied to leases so as to reduce potential litigation and abolish “secret lien”); Note, Recording of Equipment Leases: A Proposed Amendment to the Uniform Commercial Code, 47 NOTRE DAME L. REV. 993, 1008 (1972) (Article 9 filing and priority rules should be applied to leases of more than four months to give notice to creditors and reduce judicial difficulties with true lease-security interest distinction); Comment, Equipment Leasing Under the UCC, 13 UCLA L. REV. 125, 136-37 (1965) (leases other than “short term rental agreements” should be subjected to Article 9 filing rules to eliminate “secret lien”).

William Hawkland, speaking in May 1971 on the floor of the American Law Institute, proposed that Article 9 be amended to require filing for leases so as to deal with the “problem . . . of ostensible ownership.”\footnote{48 A.L.I. PROC. 298-99 (1971).} Hawkland also expressed concern that a precautionary filing by a lessor might create a risk that the filing itself would be viewed as an indication that the transaction was not a true lease. Hawkland’s proposal apparently came too late for any serious consideration by the Article 9 Review Committee. Telephone interview with Homer Kripke (June 18, 1987); see 48 A.L.I. PROC. 299-301 (1971); Hawkland, supra, at 115 & n.37. Hawkland’s comments do appear to have sparked some action by the Review Committee, however. Responding to Hawkland’s proposal, Peter Coogan suggested that the Official Comments might be revised to include a statement to the effect “that a filing does not necessarily indicate that the parties consider that they have a security agreement or that they have created a security interest.”\footnote{48 A.L.I. PROC. 300 (1971).} The Review Committee subsequently proposed a new § 9-408 which accomplished precisely what Coogan had suggested and which became a part of the 1972 Official Text of the Code. Hawkland, however, was disappointed that a filing rule had not been promulgated. Hawkland, supra, at 115.
difficult to fit the filing . . . and priority provisions of the UCC to most true leases. 51 A filing requirement would “eliminate uncertainty” in situations where it is difficult to characterize a transaction as a true lease or a secured transaction. 52 As to the issue of priorities, Coogan thought that the Article 9 priority rules had worked well for non-security transactions, such as consignments and sales of accounts and chattel paper, and similarly would work for leases. 53

Leary’s new filing proposals were more refined than those he had formulated a dozen years earlier. 54 Leary still viewed a filing requirement as a means to “protect” creditors of and purchasers from a lessee. 55 He argued, however, that a strict application of the Article 9 “race-to-the-record” priority rules would be “punitive,” at least if applied to provide creditors, as opposed to purchasers, with priority over a lessor’s interest. 56 He urged adoption of a “pure notice” system, coupled with a “purchase money priority”

51. Coogan, supra note 32, at 1047-48 (footnotes omitted). His reasoning, to the limited extent that he shared it, was relegated to a footnote. Id. at 1047 n.61.
52. Id. Of course, such “burdensome” filing requirements should not be applicable to certain leases; he suggested that leases of one year or less by excepted. Id. Coogan based his one-year exception suggestion on the Saskatchewan model. Id.; see supra note 40. Coogan did not explain why he had changed his position from that expressed in an earlier article where he concluded that a filing requirement for leases “not only is of questionable wisdom but also is unlikely to be adopted in the foreseeable future.” Coogan, supra note 24, at 960-61; see Coogan, Leasing and the Uniform Commercial Code, in EQUIPMENT LEASING-LEVERAGED LEASING, supra note 3, ch. 7. Coogan’s earlier article attempted to distinguish consignments and sales of accounts and chattel paper, which are subject to the public notice requirements under the Code, from leases, which are not. He appears to have been influenced primarily by a distaste for the complexity of drawing lines to exclude certain leases and his belief that § 9-408 would result in filings being made for most leases even in the absence of a requirement for filing. See Coogan, supra note 24, at 959-61.
53. Coogan, supra note 32, at 1047-48 & n.62; see also Coogan & Boss, Uniform Commercial Code Treatment for All Leases, in 1 P. COOGAN, W. HOGAN, D. VAGTS & J. MCDONNELL, supra note 3, ch. 4.3; infra Parts IV, V.D. & V.G.
54. See Leary, supra note 46.
55. Leary, supra note 25, at 1066, 1086-89.
56. Id. at 1086-87 & n.101.
similar to that in section 9-312(4). 57 Leary limited the scope of his proposals to “finance leases” of “equipment.” 58

Four significant and relevant articles were published in 1983. 59 Amelia Boss and Coogan co-authored an article which urged that true leases be included within the scope of Article 9. 60 Their rationale was based squarely on the policy of protecting third parties from a lessee’s apparent ownership. 61

57. Id. at 1087-89. Under the proposed “pure notice” system a creditor would not achieve priority over a lessor if the creditor had “actual notice” of the lessor’s interest. Such notice could result from an Article 9 filing, general knowledge “in the relevant market area that equipment of the type involved is generally leased or bailed rather than sold to users,” or from financial accounting information available to a creditor. Id. at 1087. It is not clear whether Leary would extend this rule to purchasers as well as creditors or, if he would so extend it, whether he would consider a secured party to be a purchaser for this purpose. Normally a secured party would be a “purchaser.” U.C.C. § 1-201(32) & (33) (1987).

58. See Leary, supra note 25, at 1061 & n.2. As to “finance leases,” see generally supra note 25 and accompanying text.

59. Ayer, Further Thoughts on Lease and Sale, 1983 Ariz. St. L.J. 341; Baird & Jackson, supra note 10; Boss, supra note 26; Coogan & Boss, supra note 53.

60. Coogan & Boss, supra note 53, § 4.3.04[4][a], at 4.3-44 to -46. They described their conclusions as “tentative.” Id. at 4.3-44. They acknowledged the necessity of special rules for a lessor’s remedies after a lessee’s default. Id. § 4.3.04[3], at 4.3-28 to -44. Their proposal would except leases for terms of less than one year from compliance with the perfection (§§ 9-302, 9-303, 9-305) and statute of frauds (§ 9-203(1)) requirements. Id. § 4.3.04[2][b], at 4.3-26 to -28.

61. [T]he public policy of protecting third parties which is exemplified in the public notice perfection requirements of Article 9 applies equally to any situation where the person in possession of goods—whether denominated the debtor, consignee, or lessee—has less than full ownership of the goods. He is not now the owner and even if he is to become the owner, goods in which another has an interest are on his premises. Thus, the perfection requirements (in [Article 9] Parts 3 and 4) should apply to leases.

Id. § 4.3.04[2][a], at 4.3-24 (footnote omitted). Their efforts to justify the proposed filing rule, however, were largely devoted to a listing of the acceptance of similar rules in other contexts. “A requirement of public notice as to chattel leases is a natural next step—from the real estate mortgage to the chattel mortgage, to conditional sales, to accounts and other intangibles, to consignments, to leases of chattels.” Id. § 4.3.04[4][a], at 4.3-45. The authors also refer to the Canadian experience and discuss the UNIDROIT draft convention on international financial leasing. As to developments in Canada, see supra note 40. The current draft of the UNIDROIT draft convention does not require public notice of financial leases within its scope, but only requires compliance with applicable local rules as to public notice, if any. International Institute for the Unification of Private Law (UNIDROIT), Summary Report on the Committee of Governmental Experts for the Preparation of a Draft Convention on International Financial Leasing, Study LIX, Doc. 46, App. II, Art. 5, ¶ 2, 3 (3d Sess. Apr. 27-30, 1987). Coogan and Boss have stated elsewhere that “[i]t is contemplated that most countries who adopt the UNIDROIT Leasing Rules will provide some sort of a public notice system to give local creditors of and purchasers from the lessee the type of protection
Prompted in large part by his participation in a 1983 invitational symposium, John Ayer also addressed the issue of public notice for leases. Ayer had “discovered one case that [threw] a wrench into” the argument that filing should be mandated for leases. Ayer posed a hypothetical which assumed a filing requirement for perfection against creditors of the lessee. Ayer concluded that the hypothetical lessor of a widget with a 1,000,000 dollar value, for a twenty-month lease term with aggregate rentals of 200,000 dollars, would, if it neglected to file, lose a 1,000,000 dollar widget and be left with only a 200,000 dollar unsecured claim in the lessee’s bankruptcy proceedings. Ayer thus raised an issue which had not been addressed squarely by earlier commentators: the effect of nonfiling under a mandatory filing requirement. He also recognized that an understanding of the function and effect of filing requirements for secured transactions is essential to any analysis of the need for, and application of, a similar filing rule for leases.

such a system can provide.” Coogan & Boss, Recent Developments in Chattel Security Law—1985, The United States, Canada and the World, in 1 P. COOGAN, W. Hogan, D. VAGTS & J. MCDONNELL, supra note 3, § 5C.04[3][d][iv], at 5C-106. I served as the United States representative to the Second and Third Meetings of Governmental Experts for the UNIDROIT convention on international financial leasing, in April 1986 and April 1987 in Rome, Italy. My impressions are precisely the opposite, at least insofar as true leases within the convention’s scope are concerned. The convention is now scheduled to be finalized at a diplomatic conference to be held in Ottawa, Canada, in May 1988.

As to the priority rules, Coogan and Boss were satisfied to allow the rules of Article 9, Part 3, to control. Coogan & Boss, supra note 53, § 4.3.04[4], at 4.3-46. They proposed that Article 9 be clarified to ensure the applicability of § 9-312(3) and (4) to leases, presumably depending on the use of the leased goods.

62. Ayer, supra note 59, at 342-43. Ayer gained “new perceptions” at an invitational symposium sponsored by the ALI-ABA Committee on Professional Education, held in New York, February 17-18, 1983. See ALI-ABA Invitational Symposium, supra note 49. Ayer endeavored to elaborate on the analysis and conclusions he advanced in an earlier article. See Ayer, supra note 27 (arguing that there is no rational and consistent borderline between true leases and sales); see also supra notes 27-28 and accompanying text.

63. Ayer, supra note 59, at 345-51.
64. Id. at 345.
65. Id.
66. My recollection is that this “penal effect” on the interest of a nonfiling lessor was the subject of much discussion before and during the invitational symposium mentioned by Ayer (for which I served as Planning Chairman and moderator of the plenary panel discussions). See supra note 62. Several proponents of a filing rule for leases were perplexed by this analysis of the effect of nonfiling.

67. Ayer, supra note 59, at 347-49. Ayer observed that the traditional notion that public notice rules are intended to address the problem of ostensible ownership does not
Boss responded to Ayer. She took quite seriously Ayer’s concern with the effect of nonfiling under a rule requiring filing for leases, an issue which she and Coogan did not treat in their then-recent proposal. She continued to defend the policy of requiring filing for leases based on the ostensible ownership rationale. She argued that Ayer’s concerns did not impugn the policy of a filing requirement, but merely suggested that “the consequences of a failure to file as currently formulated may impose disproportionate penalties on the true lessor who fails to perfect.” She concluded that leases may justify “special treatment” for the effect of nonfiling and that if there were to be uniform treatment of a failure to file for leases and secured transactions, “the entire scheme of consequences flowing from a failure to file would have to be reexamined.” She did not propose, however, any resolution of this issue or suggest any new priority scheme.

Baird and Jackson offer the most elaborate argument in support of a rule requiring filing for leases of goods. They argue for a more general acceptance in the Code of the principle that if a nonpossessory interest is to be acquired or retained in property the holder of the interest must “make it possible for others to discover that interest,” i.e., cure the problem of ostensible ownership. A conceptual cornerstone of their argument is that “metaphysical” notions of the location of “title” and divisions of property rights account for all cases under existing law. Ayer concluded that his analysis may have added only confusion, but he did take a “step forward” from earlier discussions of the filing issue by identifying the source of his confusion.

68. Boss, supra note 26, at 381-86.
69. Coogan & Boss, supra note 53.
70. Boss, supra note 26, at 382-85. Boss explained that there should be a “de minimus” exception from a filing requirement when the risks posed by nonfiling will not exceed the costs of imposing a filing requirement. Id. at 385 & nn.109-10. The de minimus exception might be based on the length of the lease term, the value of the goods, or the nature of the goods (such as consumer goods).
71. Id. at 385 (footnote omitted).
72. Id. at 386.
73. See Baird & Jackson, supra note 10. Baird and Jackson do not limit their proposal to leases, however. They argue that the filing requirement should logically be extended to other separations of possession and ownership such as other bailments generally, subject to exceptions. Id. at 186, 190-94. Various portions of this article dwell on the Baird and Jackson arguments, largely as a result of their elaborate and articulate analysis. The value of this critique has benefited greatly from their work. Indeed, this critique relies materially on other efforts by both Baird and Jackson writing together, separately, or with others.
74. Id. at 178.
that may not be discovered easily by third parties, such as an unfiled lessee's interest in leased goods, impose costs on third parties. Whether the costs should be borne by such third parties or by the holder of the property interest, such as by imposing a filing requirement on lessors, Baird and Jackson argue, should depend on a cost-benefit analysis: "whether the duty to give notice imposes costs without producing corresponding benefits." The determination should not turn on the characterization of the transaction as between the parties, since the costs imposed on third parties are the same in each case. Baird and Jackson recognize that both the imposition of a filing requirement on a lessor and the acquisition of information by a third party involve costs, but they argue that the burden generally should be placed on the lessor because the lessor is the party who can solve the ostensible ownership problem in the least costly way—i.e., by filing.

Although Baird and Jackson's cost-benefit analysis purports to encompass third parties generally, their rationale and discussion focuses primarily on costs to secured parties resulting from the secret interest of a lessor or bailor. They argue that the Article 9 filing system is more important to secured creditors than to unsecured creditors because secured creditors rely more on specific property of a debtor. The information provided by filing is especially important to secured creditors because of Article 9's general

75. Id. Baird and Jackson perceive that these costs result from the possession by a lessee-debtor of the property in question—the historical basis for the ostensible ownership doctrine. Id. at 180.
76. Id. at 179, 186.
77. Id. at 186-90.
78. Id. at 188-89. Their proposal would merely extend the existing notice filing rules of Article 9 to leases and other bailements. Id. at 188-89 & n.46. The costs relating to filing and searching public records are the only costs identified by Baird and Jackson. See id. at 185-86.
79. Id. at 183-84. Baird and Jackson acknowledge that their argument “ultimately rests on empirical assumptions about the need parties have for information and the ability of a filing system to provide it cheaply.” Id. at 183. Baird has further articulated the argument that the Article 9 filing system serves mainly to sort out conflicting claims among secured creditors. Baird, Notice Filing and the Problem of Ostensible Ownership, 12 J. Legal Stud. 53, 64-66 (1983); see also Baird & Jackson, Information, Uncertainty, and the Transfer of Property, 13 J. Legal Stud. 299 (1984). Secured creditors, they argue, charge lower interest rates because they rely on specific assets of a debtor rather than "solely on the debtor's honesty and general financial health." Baird & Jackson, supra note 10, at 183. Therefore, secured creditors desire reliable information as to competing claims against such assets. Id. at 184. By reducing risks for secured parties, the advantages of secured credit—principally, priority over unsecured creditors—are enhanced. Id. at 189.
priority rule of “first-in-time, first-in-right”80 and “because of the possibility of debtor misbehavior, it is undesirable to rely on the debtor for information about claims to his own assets.”81 As to the effect of a lessor’s failure to file, Baird and Jackson offer little elaboration. Apparently they would allow a lessor who failed to file, or whose filing was in some way defective, to be subject to the priority rules of Article 9, Part 3.82

Baird and Jackson, like most of the earlier proponents of a lease filing rule, conclude that some leases and other bailments should be excepted from the general filing rule.83 They acknowledge that, in constructing and applying such exceptions, “one may have to balance the virtues of clear rules against those of flexible standards as well as balance competing equities of two innocent parties.”84 Yet, they prefer such line-drawing, coupled with a pos-

80. Baird & Jackson, supra note 10, at 179, 185; see Baird, supra note 79, at 64-65 (“The Code’s filing system follows from its first-to-file rule... [A]rticle 9’s notice-filing system meshes perfectly with its first-to-file rule. It clearly establishes the priority of each secured creditor and little else.”).

81. Baird & Jackson, supra note 10, at 179. But cf. Baird, supra note 79, at 61 (“If debtor misbehavior is a problem that notice filing is intended to cure, it is a bad rule.”).

82. Baird & Jackson, supra note 10, at 189 n.46 (“Our proposal goes no further than to incorporate leases, bailments, and the like into Article 9’s filing rules and other third-party oriented rules.” (emphasis added)). Baird and Jackson, however, have argued that a lessor should be subject to a purchase money priority rule similar to the one in § 9-312(3), which would require notice to prior-filed claimants to overcome the generally applicable first-to-file rule. Id. at 194-96. Although Baird and Jackson express doubt as to the wisdom of a non-notice “purchase money” priority rule, such as that provided by § 9-312(4), they do note that such a rule might be justified “on aggregate cost-reduction grounds—for example, if reliance by earlier secured claimants were considered unlikely.” Id. at 196 (footnote omitted; see infra notes 296-97).

83. Baird & Jackson, supra note 10, at 190-94, 201. Such exceptions should take into account factors such as whether (i) “another legal regime,” such as certificate of title laws for automobiles, “solves the ostensible ownership problem,” id. at 190; (ii) property of certain types is generally known not to be the property of the possessor (such as telephone equipment, in a previous era), id. at 191; (iii) certain possessors (such as pawnbrokers) are generally known to possess property of others, id.; (iv) a transfer of possession occurs for such a short time, such as the loan of a lawnmower to a neighbor, that the cost of compliance with a filing rule would be inefficient, id. at 191-92; (v) a filing rule would be inconsistent with rules of negotiability of certain property, such as instruments, id. at 192; and (vi) automatic perfection without filing, as in the case of consumer goods, would be cost effective, id. at 193.

84. Id. at 194 (footnote omitted).
sesion trigger, to attempts to determine issues of ownership and title.\textsuperscript{85}

An additional filing proposal deserves mention. In April 1985 the National Commercial Finance Association (NCFA) suggested that the Article 2A drafting committee adopt a filing requirement for leases.\textsuperscript{86} Their rationale for requiring filing for leases, by and large, is based on ostensible ownership concerns.\textsuperscript{87} Their proposal differs significantly from earlier proposals, however, in that the effect of nonfiling would be limited to providing priority to a prior-filed Article 9 secured party and then only to the extent of advances made by such secured party subsequent to the lessee's receipt of possession of the leased goods.\textsuperscript{88} Presumably, this limitation is intended to be a rough substitute for favoring only those third parties who rely directly on the lessee's possession as evidence of ownership.

Most of the commentators mentioned above relied substantially on the ostensible or apparent ownership rationale as a justification for adopting a filing rule for leases. None subjected the factual assumptions underlying this notion to rigorous analysis. Some also argued that a filing rule would reduce litigation over whether a purported lease was a true lease or a secured transaction. Most of the commentators conceded that some leases, such as "short term" and consumer leases, should be excluded from any filing requirement. Most of the commentators also recognized that, even with a filing rule for leases, the true lease-secured transaction distinction still must be made for some purposes (principally, remedies and damages on a lessee's default). Of those who mentioned

\textsuperscript{85} Nevertheless, Baird and Jackson apparently would retain the "thief rule," pursuant to which secured creditors and other purchasers remain subject to the risk that there is a thief in the debtor's chain of title. \textit{Id.} at 176 n.4.

\textsuperscript{86} Letter from Donald Schwartz to Charles W. Mooney, Jr. (Apr. 22, 1985) (enclosing undated memorandum entitled \textit{Proposal for a Filing Requirement Under the Personal Property Leasing Act} and draft proposed § 305(d) to the Uniform Personal Property Leasing Act) (on file with the \textit{Alabama Law Review}).

\textsuperscript{87} "The basis for the proposal is that leases present at least the same ostensible ownership or secret lien dangers that liens or security interests do." \textit{Id.}, memorandum, at 2.

\textsuperscript{88} \textit{Id.}, draft § 305(d). Consumer goods and leases for terms of less than 21 days would be excepted from the NCFA filing requirement. Moreover, lessors would be required to file within 10 days after a lessee received possession of the leased goods—essentially the same rule as is now provided for purchase money security interests under § 9-312(4). NCFA is a trade association whose membership is comprised primarily of organizations that extend secured credit.
priorities and the effect of nonfiling, only Leary proposed a rule that would differ from the existing Article 9 scheme, although Boss, as a result of Ayer’s questions, acknowledged that a different rule for leases and secured transactions might be appropriate. But Leary, Boss, and Ayer did not consider priority rules and the effect of nonfiling for leases beyond the immediate effect of subordination of the lessor to some creditors of and purchasers from the lessee.

The commentary has not been uniformly supportive of a filing requirement for leases. At the time Article 2A was promulgated, however, the literature contained no comprehensive response to the arguments made by proponents of such a filing requirement. Baird and Jackson’s important challenge, which bears repeating, essentially remained unanswered: “[T]hose who question the usefulness of a filing requirement in the case of leases should explain why there should be a filing requirement in the case of secured transactions that are identical from the point of view of third parties.”

In a recently published article, Maryellen Burns endeavors to explain why a filing requirement should not be adopted for leases.

89. See supra notes 56-57 and accompanying text.
90. See supra notes 71-72 and accompanying text.
91. See generally infra text accompanying note 134 (discussing effects of nonfiling after expiration of lease term).
92. For example, Richard Speidel, Robert Summers, and James White reject as “outrageous” the notion that all nonpossessory owners of personal property should be required to file in order to prevail as against creditors of the possessor. R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL LAW, TEACHING MATERIALS 300 (4th ed. 1987). Interestingly, they derive their position from the concept of ostensible ownership. In their view a lessee’s possession of equipment does not create expectations in third parties that the lessee is an owner, but a bailee’s possession of inventory does convey the appearance of ownership. Id. at 300-01; see also White, Dancing on the Edge of Article 9, 91 COMM. L.J. 385, 397 (1986). Jeffrey Helman has argued that ostensible ownership concerns should be disregarded as vestiges of an obsolete doctrine and that a filing requirement for leases is, therefore, unnecessary. Helman, supra note 16, at 2728. Edwin Huddleson also has argued in defense of the omission of a filing requirement in Article 2A. See Huddleson, supra note 5, at 672-77. I, also, have questioned the need for a filing requirement for leases. See Mooney, Recent Cases Relating to Equipment Leasing, in EQUIPMENT LEASING 1983 (PLI) 74 (R. Bayer & A. Reisman co-chairmen) (“the benefits which might be achieved from a mandatory filing system for true leases would not outweigh the detriments”); Mooney, Challenge, supra note 24, at 1626 (questioning the need for mandatory public notice requirement for leases of goods).
93. Baird & Jackson, supra note 10, at 189 n.46.
but is appropriate for secured transactions. Burns argues, as have others, that the doctrine of ostensible ownership has become obsolete. More persuasively, she also argues that the Article 9 filing rules provide benefits, such as discouraging fraud and collusion, in addition to curing problems of ostensible ownership. These issues are addressed in Part V of this article. Burns fails, as have other commentators, to appreciate the significant extent to which choices as to priority rules bear on whether a filing rule for leases should be adopted.

IV. PRIORITY RULES, INCLUDING THE EFFECTS OF NONFILING: COSTS

This Part addresses the priority rules, including the effects of nonfiling, which might be applied under a regime which would mandate filing for leases of goods. Legal rules which give one person's property to another, or which command compliance with formalities such as filing as a condition to enforcing transfers and divisions of property against third parties, should to be adopted only if there are good reasons for doing so. Various Code rules, including the Article 9 perfection and priority provisions, produce such results. The proponents of a filing rule for leases generally have assumed or concluded that the adoption of a filing rule would expose the property rights of a noncomplying lessor of goods to third party claims. Such risks of noncompliance represent costs.

94. Burns, supra note 26. I obtained the Burns article after the initial draft of this article had been submitted to the Alabama Law Review.
95. Id. at 428-29, 462. For reasons explained in Part VI.A.2., that argument is not an adequate response to the issue posed by Baird and Jackson.
96. Id. at 443-67. However, her explanation of why a filing requirement for leases would be less beneficial than filing under Article 9 is not persuasive. See infra note 265.
97. See infra Part V.A. to V.C.
98. Burns recognizes that one appropriate consideration is "the opportunity cost imposed on those who mistakenly fail to file and lose their otherwise rightful interest in the subject [leased] property." Burns, supra note 26, at 461. But she generally fails to incorporate such costs into her analysis.
99. See Gilmore, The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman, 15 Ga. L. Rev. 605, 612 (1981) ("In a society that recognizes property as something more than theft, you do not go around lightly destroying property rights; you must have a compelling reason for awarding A's property to C.").
100. See, e.g., U.C.C. §§ 2-403, 9-301(1) & 9-312 (1987).
that would be imposed on lessors by a filing requirement. \textsuperscript{101} A filing requirement for leases probably would impose greater costs on lessors, lessees, and third parties than the corresponding costs imposed on secured parties, debtors, and third parties by the existing Article 9 perfection and priority regime. It is impossible to evaluate the wisdom of a filing requirement for leases without considering the effects of compliance and noncompliance. \textsuperscript{102}

The following examples may aid the discussion. First, assume that applicable law provides that a financing statement must be filed in order to perfect a lessor’s interest in the leased goods. Second, assume, as most of the commentators proposing a lease filing requirement have proposed or assumed, that the Article 9 perfection and priority rules would be applied to leases as well as to secured transactions, with leases treated as purchase money security interests for such purposes pursuant to section 9-312(4). \textsuperscript{103}

\textsuperscript{101}. The aggregate benefits might outweigh such costs, and the benefits provided by a filing requirement for leases might be different in magnitude and quality than those provided by the Article 9 perfection and priority regime for secured transactions. The costs imposed on the players by the existing regime for leases of goods (no filing requirement) also are relevant. The possible similarities and differences in the benefits and the costs imposed under the existing regime are discussed in Parts V and VI.

\textsuperscript{102}. Conclusions as to the wisdom or utility of a filing requirement under a scheme where the only sanction for failing to file would be a ten dollar fine would be quite different than a scheme where a lessor who failed to file would lose all its rights in the leased goods and forfeit any right to claim damages from the lessee. Contract law provides an apt analogy. For example, whether the law provides a remedy will determine whether a promise will be annotated with “contract” status. See \textsc{Restatement (Second) of Contracts} § 1 (1981) (stating that “[a] contract is a promise . . . for the breach of which the law gives a remedy”). Just as public notice of a lessor’s interest in leased goods may be a good idea as a general matter, observance by a promisor of its promises generally may be a good idea. Yet, the law does not enforce all promises. See \textsc{Eisenberg, Donative Promises}, 47 U. Chi. L. Rev. 1, 2-6 (1979). The consideration of the costs to lessors of a filing scheme generally has been limited to compliance costs associated with making filings, searching records, and the like. See, e.g., Baird & Jackson, supra note 10, at 185-86. Obviously, a lessor could avoid the risk and costs of noncompliance by complying (i.e., filing), and general compliance, at least by professionals, is not an unreasonable expectation. But a filing rule for leases shifts the risk of noncompliance from the lessee’s creditors and purchasers to the lessor and its creditors and purchasers. This additional risk to lessors is a cost of a filing rule that is in addition to filing-related costs of compliance. Measuring and balancing such costs against costs imposed on a lessee’s purchasers and creditors, however, are substantially more problematic than merely identifying the existence and nature of such costs. See generally infra Part VI. Yet, it is difficult to measure and balance anything unless it is first identified and taken into account.

\textsuperscript{103}. The proper purchase money priority provision also could be § 9-312(3), dealing with purchase money security interests in inventory. Although leases of goods to lessees who hold them for sale may be unusual, lessees who hold goods for lease (i.e., sublease) may be
Example A

Lessor leases equipment to Lessee for a term of two years, at which time Lessee is to redeliver the equipment to Lessor. The value of the equipment at the beginning of the lease term is $1,100,000. A reasonable estimation of the value of the equipment at the end of two years is $800,000. Lessee is obligated to pay rent in twenty-four monthly installments of $20,000 each, for a total of $480,000. For some reason, Lessor fails to file a financing statement or files a defective statement. Six months later, Lessee files a petition seeking relief as a debtor under the Bankruptcy Code. On that date the value of the equipment is $1,000,000.

What are the rights of Lessee's trustee in bankruptcy? The trustee in bankruptcy may exercise the rights and powers of a hypothetical judicial lien creditor. Those rights include the rights of a lien creditor, and because Lessor's interest is unperfected, the trustee's rights are superior to Lessor's interest in the equipment. Presumably, the trustee in bankruptcy may recover the equipment valued at $1,000,000 for the benefit of the unsecured creditors.

This result troubled Ayer and Boss. But Ayer concluded (or assumed) that Lessor's unsecured claim in Lessee's bankruptcy would be no more than the unpaid rentals under the leasing agreement—here, $360,000 assuming six monthly payments had

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more common. See U.C.C. § 9-109(4) (1987) (defining "inventory" as "goods ... held by a person who holds them for sale or lease") (emphasis added)).

104. Example A is similar to, and is intended to raise the issues raised by, Ayer's Example 1. See Ayer, supra note 59, at 345; see also supra notes 62-67 and accompanying text.

105. The ramifications of nonperfection explored here would be the same whether or not a trustee in bankruptcy were appointed. For example, under Chapter 11 of the Bankruptcy Code, a debtor in possession could utilize the avoidance powers of a trustee in bankruptcy. Bankruptcy Code § 1107(a).

106. Bankruptcy Code § 544(a).


108. Id. § 9-301(1)(b).

109. If the example were varied by assuming a prior-filed and perfected secured lender to the lessee, the secured lender also would have priority over the lessor to the extent of the secured loans. Id. § 9-312(5)(a). The trustee in bankruptcy, then, would be entitled to any excess value of the equipment over the secured lender's secured claim. See Bankruptcy Code § 506(a).

110. See supra text accompanying notes 62-72.
been made prior to bankruptcy. Ayer’s conclusion is incorrect. Lessee is in breach of a fundamental obligation under the lease—namely, the obligation to return the equipment at the end of the term or earlier in the event of Lessee’s default. If the equipment has been “appropriated” for the payment of Lessee’s other creditors, then Lessor should recover damages, which, presumably, would include an amount approximately equal to the present value of the anticipated residual value of the equipment. In order to

111. This case differs from most of the bankruptcy cases because the [lesser’s] claim does not correspond to the value of the property. In this example, no one ever intended that the [lessee] make payments approximating the value of the widget. To give the palm to the trustee here is certainly to award him a bonanza of some sort.

I confess that I am not sure how the law should deal with this case. Ayer, supra note 59, at 345.

112. See R. Brown, THE LAW OF PERSONAL PROPERTY § 11.7, at 282-84, § 11.9, at 300-02 (3d ed. 1975); J. Story, supra note 21, § 414, at 374-75. The statement in the text is somewhat incomplete and oversimplified. Applying the damages rules of Article 2A, Lessor would be entitled to recover, upon Lessee’s default, the present value of future rentals less the market rental value of the equipment for the remainder of the term. U.C.C. § 2A-528(1) (1987). Nothing in existing law or Article 2A, however, should prevent Lessor from recovering, in addition, damages for Lessee’s failure to return the leased equipment. See id. § 2A-525 comment para. 3 (explaining that Article 2A does not displace the common law of bailment in regard to, inter alia, “refusal of the lessee to return goods to the lessor after termination or cancellation of the lease”). Presumably, Lessor’s damage claim for loss of its residual would be approximately equal to the present value of $800,000.

The Uniform Commercial Code Committee of the State Bar of California is concerned about Article 2A’s statutory silence on this point. That committee has made a preliminary recommendation that Article 2A be changed to make it clear that the lessor’s damage recovery for the lessee’s failure to return leased goods includes the value of the lessor’s anticipated post-lease residual interest. REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA ON PROPOSED CALIFORNIA COMMERCIAL CODE DIVISION 10 (ARTICLE 2A), PRELIMINARY DISCUSSION DRAFT 58-59 (Apr. 7, 1987). That report recommends the addition of a new § 2A-532 to provide as follows:

In addition to any other recovery permitted by this article, the lessor shall be entitled to recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessee’s residual interest in the goods caused by the default of the lessee.

Id. at 59; see also Rapson, supra note 35, at 595 n.67. Similar concerns have been raised in connection with draft personal property security legislation in British Columbia, which, like the Saskatchewan law, would treat certain leases as secured transactions for purposes of perfection and priority. See Draft British Columbia Personal Property Security Act §§ 1, 21 (quoted in letter from Ronald Cuming to Charles W. Mooney, Jr. (Oct. 7, 1987) (on file with Alabama Law Review)).

Where the interest of a lessor . . . is subordinated to a trustee in bankruptcy . . . the lessor . . . is deemed as against the lessee . . . to have suffered . . . damages in an amount equal to.
avoid a trial on the issue of damages, the leasing contract might well contain a liquidated damages provision covering Lessee’s failure to redeliver the equipment.\(^{113}\)

The foregoing example and discussion illustrate several important points. Lessor has lost its residual interest in the goods,\(^{114}\) even though the residual interest never was transferred to Lessee and Lessee never agreed to pay for it.\(^{115}\) An Article 9 secured party has no residual interest to lose in the event of its failure to perfect. However, this comparison, standing alone, does not show that the costs imposed on unperfected lessors necessarily would be greater than the costs imposed on unperfected secured parties. An unperfected secured party also stands to lose a property interest—namely, a security interest with a value equal to the lesser of the value of the collateral and the amount of the secured obligation. Moreover, in Example A Lessor lost its residual interest (valued at the present value of $800,000 dollars), but received a claim, albeit unsecured, against Lessee of an approximately equal amount.\(^ {116}\) This simple arithmetic suggests that the unperfected lessor and an unperfected secured party stand to suffer equally. But the problem is not so simple. “Simple arithmetic” notwith-

(a) the value of the leased . . . goods at the date of bankruptcy, and
(b) the amount of loss resulting from the termination of the lease . . . .

_id._ § 21; _see supra_ note 40. The issue of the amount and nature of an unperfected lessor’s claim does not appear to have been the subject of any reported case under the Saskatchewan or South Carolina filing provisions. _See generally supra_ note 40.

A policy argument could be made, in support of Ayer’s conclusion as to the amount of a lessor’s claim, that the lessor should bear the risk of nonfiling or defective filing because the lessor is in the best position to avoid such errors. That argument is not persuasive. First, it would result in a substantial windfall to lessees and their creditors. Second, its premise would, in many cases, be false. For example, the filing might be defective as a result of the lessee’s wrongful or negligent removal of the equipment to another jurisdiction or the lessee’s change in its own location. _See U.C.C._ § 9-103(1)(d)(i) & (3)(e) (1987). Third, to the extent that custom is of any guidance, the risk of nonperfection, as between a debtor and a secured party, normally is borne contractually by a debtor as a result of representations and warranties and events of default contained in conventional documentation.

\(^{113}\) _See, e.g., U.C.C._ § 2A-504 & _comment_ (1987).

\(^{114}\) A priority rule could be fashioned to provide that an unperfected lessor’s residual interest is not subject to third party claims. Under such a rule, third party claims would be confined to the _lessee’s_ property interest—the use value during the term. This possibility is discussed _infra_ at notes 136-38 and accompanying text.

\(^{115}\) Lessor transferred to Lessee only the right to use the equipment for two years. At the inception of the transaction, Lessee’s use rights were valued by Lessor and Lessee at the present value of $480,000 payable over two years in equal monthly installments.

\(^{116}\) _See supra_ note 112.
standing, an unperfected lessor may be exposed to greater costs arising out of the loss of its residual value than that incurred by an unperfected secured party. In order to understand why, it is necessary to consider the differences between leases and secured transactions in the commercial context of the transactions.\footnote{117} It is fair to assume that a principal goal of lenders, whether secured or unsecured, is that debtors satisfy their obligations.\footnote{118} Viewed in this context, security interests are merely incidental to the obligations secured. If the obligation is satisfied, the corresponding security interest is terminated.

Since a creditor’s primary desire is to be paid or otherwise satisfied, it might be useful to ask why creditors sometimes are not paid. Although I am not aware of any empirical study precisely on point, it is probable that the failure of secured creditors to obtain their intended priority with respect to collateral would rank quite low on any list of such reasons.\footnote{119} Stated differently, creditors normally do not view recovery from the debtor’s collateral as their

\footnote{117. There may be normative concerns about the fairness of the potential elimination of lessor’s property rights beyond the property rights transferred to lessee (i.e., lessee’s leasehold interest). Cf. Ayer, supra note 59, at 342-43; Boss, supra note 26, at 382-87; supra notes 62-72 and accompanying text. Ultimately, such arguments that any particular effect of lessor noncompliance would be a sanction that “does not fit the crime,” that is “penal,” or that otherwise is “unfair” are merely claims that the disparity is too great between the sanction imposed and the benefits provided by a filing requirement. It is more useful to focus on the relative costs and benefits.}

\footnote{118. Creditors also may desire to engage in profitable repeat business with debtors and to observe norms essential to maintenance of their status in the community. For a discussion of the Article 9 coverage of transactions that do not secure obligations in the conventional sense, such as a consignment deemed a “sale or return” and a sale of accounts or chattel paper, see generally infra Part V.C.

The following discussion depends on the assumption in the text and several other assumptions based on literature dealing with the credit process and the author’s personal observations and experience.

\footnote{119. See Phillips, supra note 16, at 6: [W]hat [a secured creditor] wants is repayment of the debt, not ownership of [the debtor’s] assets. A “security interest” may be viewed as a property right, but its function is understood by the participants to be limited; the aim is to salvage more for this creditor in the event [the debtor’s] enterprise fails. Id. (footnotes omitted). Phillips cites statistics (from Bankruptcy Act Revision, Hearings on H.R. 31 and H.R. 32, before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 94, No. 27, Pt. 1) demonstrating that secured creditors often recover less than their secured claims in bankruptcy proceedings. Id. at n.26. The point is that even perfected secured creditors often, perhaps usually, fail to fully recover the amount of their claims when a debtor is financially distressed.}
principal “way out.” 120 Collateral is only one of many factors affecting whether secured creditors decide to extend credit and whether secured obligations will be repaid. 121

To be sure, contemporary equipment leases normally involve substantial elements of credit extension. A lessor expects and desires payment of the rentals, and particularly in the case of a long-term lease, the credit analysis undertaken and the other decision-making behavior of lessors may bear substantial similarities to that of lenders generally. 122 But some important differences exist. A lessor expects to keep one foot outside of the credit market. As an investor in and owner of the equipment, a lessor's interest, unlike a security interest, is not measured by the amount of credit extended. An analysis of the economic substance of leases makes this clear. The value of the lessor's residual interest in the leased

120. See, e.g., A. Farnsworth & J. Honnold, COMMERCIAL LAW 774 (4th ed. 1985): A lawyer who thinks that the security device is the most important part of a credit transaction will be quickly corrected by a banker or merchant. From the point of view of seller or lender, the most important safeguard for the loan is the likelihood that the borrower will voluntarily repay. Evaluation of this likelihood calls for mature judgment of the borrower's character, ability and financial status, and of the business outlook. Recourse to the most ironclad security is sure to be costly... Foreclosing on security indeed involves a serious breakdown of the lending operation, which depends for profit on a rapid and routine flow of money in and out through the hands of clerks.

See also Scott, supra note 11, at 944-49.

121. See, e.g., Bryan, The Banker and the Credit Decision, in BANK CREDIT 2-4 (H. Prochnow ed. 1981) (discussing “the three C's of credit... character, capacity and capital”). There is much to say in favor of legal rules which force players to confront the actual transactional risks that they face in any given context. For example, it is not necessarily cost effective to insulate creditors from risks of debtor misbehavior and dishonesty, such as attempts to deceive creditors as to the nature of a debtor-lessee’s interest in equipment. Gilmore made a similar point in connection with his criticism of the Code’s repeal of the rule of Benedict v. Ratner, 268 U.S. 353 (1925). He stated:

The financing assignee, who serves a useful function in providing working-capital loans, is not an ignorant stranger. He is in a position to find out—and, before putting up his money, does find out—all there is to know about the operations of his borrowers. He has a close and continuing relationship with them. He can, if he chooses, require the strictest accounting from them. He does not need to be insulated, as a matter of law, from the risks of the transactions in which they engage. Because he can investigate, supervise, and control, he should be encouraged to do so and penalized if he has not done so.

Gilmore, supra note 99, at 627.

goods normally will exceed the amount of the lessee's rental obligations. A lessor, then, does not rely on the lessee's satisfaction of its obligations as the lessor's "way out." A lessor necessarily relies on the leased equipment itself to be made whole for its investment. This may be contrasted with a typical secured creditor that expects to receive satisfaction from the disposition of the debtor's collateral as a last resort. Viewed ex ante, the effects of nonperfection for lessors, therefore, would be more costly than for secured creditors because lessors rely more on the leased equipment. This disparity in costs of noncompliance would exist even if the sticks in the bundle representing the entire value of the equipment are comprised of the use value during the lease term plus the residual value at the expiration of the lease, the market value of equipment at any point in time during the lease term necessarily would exceed the use value. It follows that a lessor's interest, assuming it could recover possession of the equipment free of the lessee's interest as in the case of a default, would normally exceed the amount of a lessee's obligations to pay rent under the lease, assuming also that the lease rental obligations approximate the market value of the use of the equipment during the lease term. Circumstances such as the destruction of uninsured leased equipment, obsolescence, or depreciation at a more than the anticipated rate could affect the actual value of equipment.

125. This increased noncompliance pain (i.e., cost) to lessors might be compared to the pleasure (i.e., benefit) experienced by a secured creditor who becomes senior as a result of lessor noncompliance. Assume the situation in which a secured party claiming a security interest in all existing and after-acquired equipment of a debtor-lessee and an equipment lessor which inadvertently fails to file or files in the wrong filing office. If a debtor-lessee default were to occur, the secured party would be pleased to discover that it could look to
as between a lessor and a secured purchase money seller of equipment, the closest Article 9 analogue of an equipment lessor.\textsuperscript{126}

The foregoing discussion of lessor costs does not suggest that the “metaphysical” distinction between a true lease and a secured transaction necessarily affects the costs imposed on third parties, such as a lessee’s creditors and purchasers, as a result of ostensible ownership concerns. The location of title or ownership alone should not drive the consideration of the wisdom of public notice requirements for various types of transactions or relationships.\textsuperscript{127}

Example A illustrates another category of costs that would result from a lease filing requirement that incorporates the Article 9 priority rules. Recall that Lessor will be entitled to a claim against Lessee for damages arising out of Lessor’s loss of its residual interest in the leased goods.\textsuperscript{128} Lessor’s property rights would be cut off by the trustee in bankruptcy, but Lessor’s contract rights would not be. This distinguishes the treatment of a lease from that of a secured transaction, even if the the same perfection and priority rules are applied to each. The total amount of a lessor’s claim will vary depending on whether a lessor’s interest is perfected. The to-

\begin{footnotesize}
126. This statement depends on the accuracy of the assumptions made about the nature of credit extensions. Douglas Baird has observed correctly that the case for a filing requirement may be stronger for some secured transactions than others and that the costs and benefits of a filing requirement for leases must be compared with those of the filing requirement for purchase money security interests. Letter from Douglas Baird to Charles W. Mooney, Jr. (Dec. 30, 1987) (on file with the Alabama Law Review).

127. See Baird & Jackson, supra note 10, at 179-79, 186.

128. See supra note 112.
\end{footnotesize}
It follows that if an "unperfected" lease were avoided, a determination of the amount of a lessor's damages for failure to return the leased goods would be necessary; such a determination would not be necessary in the case of an unperfected secured transaction. The necessity of this determination, whether provided for in the leasing agreement or made the subject of post-default negotiation or litigation, imposes costs on a lessor and a lessee. Moreover, the only way that the parties and a court will know whether this determination is necessary is by first determining whether the transaction involved is a lease or a secured transaction. 130

Example A suggests still other costs which would be imposed on lessees. By forcing the appropriation of Lessor's property rights in order to satisfy other claims against Lessee, at once a new, greater obligation of Lessee has surfaced. Presumably, Lessee did not desire or intend to obligate itself to pay for the entire value of the equipment. Rather, it only desired and intended to "purchase" a portion of the value: the right to use the equipment for two years. Thus, Lessee has been forced to incur a debt that it otherwise would not have incurred. 131

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129. A security interest also can secure a contingent obligation, but security interests granted in connection with extensions of credit normally secure liquidated obligations.
130. Several proponents of a lease filing rule have recognized that this determination also involves costs and have touted a filing rule for the very reason that it would reduce costly determinations of the lease-security interest issue. See, e.g., Baird & Jackson, supra note 10, at 200; Coogan & Boss, supra note 53, § 4.3.04[4][a], at 4.3-45; Coogan, supra note 32, at 1047 & n.61; Hawkland, supra note 46, at 114; Feden, supra note 46, at 158; Note, supra note 46, at 1006; see also Ziegel, The New Canadian Personal Property Security Legislation, 1986 Lloyd's Mar. & Com. L.Q. 160, 173.
131. This conclusion might not follow if the lessee is conceptualized as voluntarily assuming a contingent obligation to pay damages in the event of nonperfection. The statement in the text assumes that the lessee desires only to purchase and pay for the temporary use of the equipment and to incur additional obligations only in the event of a casualty loss (which normally can be insured against) or the lessee's voluntary actions. Whether the policy rationale for a lease filing rule justifies imposing this additional nonperfection risk on the lessee is, of course, a subject of this article. The point here is that the exposure of the lessee to additional obligations as a result of nonperfection is a factor, and a cost, to be considered.
applicable law, may exceed the amount actually realized from the equipment.\textsuperscript{132} For example, assume the existence of a prior-filed secured party who has the benefit of an after-acquired property clause. The secured party’s disposition of the equipment may produce less than the amount of Lessor’s damage claim against Lessee. It is likely that the amount recovered by a lien creditor, who sells at a sheriff’s sale outside of bankruptcy, would produce even less than a sale by a secured party, who sells in a commercially reasonable manner.\textsuperscript{133}

\textit{Example B}

Assume the same facts and assumptions as in Example A, except that Lessee completed all payments under the lease and did not file a bankruptcy petition. At all pertinent times there existed a perfected secured lender (\textit{SP}_1) to Lessee. \textit{SP}_1’s security agreement contained an after-acquired property clause that covered all equipment acquired by Lessee at any time. Lessee did not default and, at the expiration of the lease, the equipment was turned over to Lessor. Lessor then sold the equipment to \textit{B}_1, a wholesaler, and \textit{B}_1 resold the equipment to \textit{B}_2. \textit{B}_2 borrowed the purchase price from \textit{SP}_2 and granted a security interest in the equipment to \textit{SP}_2 properly and timely perfected by filing. Two years later, Lessee defaulted on its obligations to \textit{SP}_1. \textit{SP}_1 then learned of the earlier lease, traced the equipment, and sued \textit{B}_1 for conversion, \textit{B}_2 for conversion and possession of the equipment, and \textit{SP}_2 for a determination of the priority of \textit{SP}_1’s security interest.

What result? \textit{SP}_1 probably will prevail in all of its claims, but may receive only one satisfaction. Under the Article 9 perfection and priority rules, \textit{SP}_1’s security interest in the equipment “continues . . . notwithstanding sale, exchange or other disposition

\textsuperscript{132} This lessee cost is not pronounced in the case of avoidance and disposition by a lessee’s trustee in bankruptcy. Because only a fraction of a lessor’s unsecured claim normally would be paid in a bankruptcy proceeding, a lessee’s estate (and the general creditors) still would be better off after avoiding the unperfected lease even if a lessor’s claim exceeded the amount actually recovered from the equipment by the estate.

\textsuperscript{133} See U.C.C. § 9-504(3) (1987) (requiring secured party’s disposition of collateral after default to be made in a commercially reasonable manner). The procedures for judicial sales by judgment creditors generally do not afford a judgment debtor with such procedural protections designed to enhance the sales price. See, e.g., N.Y. Civ. Prac. Law § 5233 (McKinney 1978) (providing for sale at public auction and posting of notice or advertisement at least six days prior to sale).
thereof unless the disposition was authorized by [SP_1] in the security agreement or otherwise.\textsuperscript{134}

B_1, B_2, and SP_2 could have protected themselves by investigating the past history of the equipment, determining that at some point it had been leased to Lessee, searching the records for filings against Lessee, and discovering SP_1's filed financing statement. Each transferor, including Lessor, could have produced documentation demonstrating its acquisition of the equipment, but Lessor's documentation would not have affirmatively demonstrated a negative—the absence of any lease at any time. Under existing law, without a filing rule for leases, SP_1's security interest would have attached only to Lessee's leasehold interest, and upon expiration of the lease, SP_1's security interest also would have expired.

Example B illustrates that a filing requirement for leases probably would impose greater costs on third parties than the costs imposed on those parties by the existing Article 9 regime in the same context. Assuming no third party had asserted prior rights,

\textsuperscript{134} U.C.C. § 9-306(2) (1987). The mere expiration of the lease and the delivery of the equipment to lessor may not constitute a disposition. Cf. \textit{In re Jermoo's Inc.}, 38 Bankr. 197 (Bankr. W.D. Wis. 1984) (termination of franchise agreements pursuant to terms of agreements not a "transfer" under Bankruptcy Code §§ 101(50) (then § 101(40)), 548). But cf. \textit{In re Queen City Grain, Inc.}, 51 Bankr. 722 (Bankr. S.D. Ohio 1985) (termination of lease by lessor for lessee's default is a "transfer" under Bankruptcy Code §§ 101(50) (then § 101(40)), 548); \textit{In re Ferris}, 415 F. Supp. 33 (W.D. Okla. 1976) (termination of lease by lessor for lessee's breach of covenant is a "transfer" under Bankruptcy Act §§ 1(30), 67d, 11 U.S.C. §§ 1(30), 107(d) (1898) (repealed 1978)). The absence of a disposition would not help Lessor's cause in any event. Absent a disposition, there is nothing in Article 9 which would give rise to any claim that SP_1's security interest became ineffective. Lessor's taking possession of the equipment following expiration of the lease would have perfected its interest if § 9-305 were applied. But, since Lessor's interest was not perfected at the time that Lessee received possession of the equipment or within ten days thereafter, Lessor would not achieve priority over SP_1 under the purchase money priority rule of either § 9-312(3) or (4). SP_2 might argue that it is prior to SP_1 by operation of the § 9-312(4) purchase money priority rule, or the facts of Example B could be changed by positing that SP_2 claims under an after-acquired property clause and that SP_2 filed against B_2 earlier than SP_1 filed against Lessee. SP_2 might then argue that it is prior pursuant to the § 9-312(5)(a) first-to-file rule. SP_2 should not prevail in either case, although a literal reading of the cited priority provisions would seem to favor SP_2. Barkley Clark has explained correctly that the first-to-file rule "presupposes only a single debtor." B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 3.8[4], 353-54 (1980 & Supp. 1987). B_2 purchased the equipment subject to SP_1's security interest and there is no basis for SP_2 to acquire greater rights in the equipment than SP_1's debtor, B_1, acquired. See id. ¶ 3.8[4], at 54 ("The principle of limited ownership might well be read into § 9-312 as a supplementary principle of law via § 1-103."); see also Harris, supra note 124, at 225 & n.182 (generally agreeing with Clark's conclusion).
upon expiration of a lease a lessor, even if unperfected, could recover the goods and place them in the stream of commerce. Upon satisfaction of a debtor’s obligations to an unperfected secured party, however, the goods would remain with the debtor. Under a filing scheme for leases incorporating the Article 9 perfection and priority rules, “negotiability” of the equipment in Example B would be diminished after the expiration of the lease. A filing rule designed to provide information for Lessee’s purchasers and creditors would serve to create additional, long-term clouds on an unperfected Lessor’s title to the potential detriment of Lessor’s purchasers and creditors.\textsuperscript{135}

In the foregoing discussion of costs that would result from the adoption of a filing rule for leases, the applicability of the Article 9 priority rules was assumed. Some of these costs could be reduced by varying the priority rules to fit the special case of leasing. One possible variance would serve to reduce the additional lessor costs arising out of lessor reliance on the residual interest.\textsuperscript{136} The adjusted priority rule might provide that an unperfected lessor’s residual interest would not be subject to claims of lien creditors of and purchasers, including secured creditors, from the lessee. The lessor’s unperfected interest, then, would result in an unsecured claim of the lessor for rentals and other damages attributable to the lease term only. This approach would be problematic in several respects. First, it would introduce substantial complexity both in formulation and operation.\textsuperscript{137} Second, even if a conceptually neat

\textsuperscript{135} This result might suggest a weakness in Article 9 rather than a reason for not imposing a filing requirement on leases. Arguably, Article 9 should require secured parties to be more diligent when filings become seriously misleading. See U.C.C. § 9-402(7) (1987) (refiling required only for collateral acquired more than four months after change results in seriously misleading financing statement; refiling not required when collateral transferred by debtor). See generally Burke, The Duty To Refile Under Section 9-402(7) of the Revised Article 9, 35 Bus. Law. 1083 (1980).

\textsuperscript{136} See supra notes 105-25 and accompanying text.

\textsuperscript{137} Assume a lessee of equipment is in default under an unperfected lease and rights prior to those of the lessor are asserted by either the lessee’s trustee in bankruptcy or a secured creditor of the lessee. The trustee or secured creditor may desire to dispose of the leased goods. The rule might permit the disposition of only the lessee’s leasehold interest, but that interest might not be marketable as a practical matter. Or, the rule might permit disposition of all interests in the goods accompanied by a valuation and division of proceeds between the trustee or secured creditor (proceeds attributable to the leasehold interest) and the lessor (proceeds attributable to the residual interest).

Next assume that the lessee is a debtor in possession in a case brought under Chapter 11 of the Bankruptcy Code. The debtor may desire to continue to use the equipment during
rule were to be devised, it would not be fully protective of a lessor's residual interest to the extent that a lessor, upon a lessee's default, would be deprived of its ability to claim the benefit of its residual interest prior to the end of the lease term. Third, such a priority rule would not be responsive to the principal rationale that most proponents of a lease filing requirement have relied upon: ostensible ownership. If the purpose of a lease filing requirement is perceived to be the elimination of misleading appearances, a priority rule that permits third parties to recover less than the full value of the goods and respects a lessor's "secret" residual interest would not be strictly faithful to that goal. Notwithstanding these deficiencies, such a priority rule might be a useful compromise.

The third party costs illustrated by Example B could be addressed by requiring a creditor of or a purchaser from a lessee to assert its rights in the leased goods against an unperfected lessor prior to the expiration of the lease term. Again, such a rule would introduce complexity and would not be fully responsive to ostensible ownership concerns.

One possible modification to the Article 9 priority scheme relates to another cost. The cost of a filing requirement for leases would be most harsh in the case of amateur, casual, nonprofessional lessors. Filing might be required only for leases by the lease term. Presumably, the debtor could do so without making any rental payments because the lessor is merely an unsecured creditor for purposes of its claim for rents. And, presumably, the lessor would be treated as an owner or secured creditor as to its residual interest. It is unclear, however, how application of this priority rule (or even the Article 9 perfection and priority rules, if applied to leases) would mesh with Bankruptcy Code § 365 in the case of a lessee bankruptcy. Section 365 provides a framework for the assumption or rejection of executory contracts and unexpired leases. If the unperfected lessor's interest were avoided pursuant to § 544(a), would the lease nevertheless be treated as a lease for purposes of § 365? Could the trustee in bankruptcy use or dispose of the leased goods without assuming the lease pursuant to § 365? Would § 365 override § 544(a)? Cf. In re Air Vermont, Inc., 781 F.2d 130 (2d Cir. 1985) (unperfected secured creditor held entitled to protection of Bankruptcy Code § 1110 notwithstanding otherwise applicable avoidance power under Bankruptcy Code § 544(a)). But cf. In re Bazen, 425 F. Supp. 1184 (D.S.C. 1977), aff'd mem., 571 F.2d 574 (4th Cir. 1978) (lessor's interest not avoidable under Bankruptcy Act § 70, 11 U.S.C. § 110 (1898) (repealed 1978), because lessor complied with recording requirement of South Carolina bailment statute).

138. This result might occur if a lessee-debtor in possession sought to retain use of the leased goods during the lease term. See supra note 137.

139. For example, such a rule would necessarily have to deal with what constitutes "assertion."
“professional” lessors. Essentially, the Article 9 rules are designed for use by professional creditors. Perhaps Article 9 secured transactions involving nonprofessional secured parties are quite rare, with the possible exception of possessory pledges. Extending these rules to casual, nonroutine leasing transactions entered into by nonprofessionals, who are unfamiliar with the rules and who might not be expected to obtain advice of counsel, could impose unreasonable and substantial risks and costs on such lessors.

Priority rules applicable to a lease filing requirement also might be varied from the Article 9 rules by narrowing and refining the class of beneficiaries to those who warrant special protection. This approach would reduce the additional costs that a filing requirement would create by restricting the circumstances in which a third party could assert priority. The NCFA proposal provides an example. That proposal would eliminate the possibility of a su-

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140. This is the approach taken in Saskatchewan, where the filing requirement for leases does not apply to “a lease transaction involving a lessor which is not regularly engaged in the business of leasing goods.” SASK. STAT. 1979-80, ch. P-6.1, § 2(y); see supra note 40; cf. Leary, supra note 25, at 1061 & n.2 (proposed filing requirement limited to “finance leases”).

141. This is, no doubt, what the Article 9 drafters had in mind when only sales of certain kinds of receivables, accounts and chattel paper, were included within the scope of Article 9. See 1 G. GILMORE, supra note 23, § 10.5, at 309; infra note 330.

142. It may be that such casual leases are frequent occurrences, even if not usual for any particular lessor. The burden of complying with Article 9’s public notice requirements might impose substantially greater costs for nonprofessionals than the costs imposed on professional extenders of credit presently affected by the rules.

143. See, e.g., Peden, supra note 46, at 155-58 (explaining that the Article 9 perfection rules are “designed to protect” the persons who obtain priority over unperfected security interests—i.e., the sanctions flowing from nonperfection reflect the persons intended to be protected by perfection); cf. U.C.C. § 7-404 (May 1949 Draft) (certain good faith buyers of leased equipment, but not lessee’s creditors, take free of interest of equipment lessor who fails to comply with “sign posting” requirement).

144. See supra text accompanying notes 86-88. The “pure notice” priority rule proposed by Leary would be a more modest variation from the existing Article 9 scheme. See supra text accompanying notes 55-56. Sanctions for nonfiling or defective filing might be devised that would not involve defeating the lessor’s property rights, such as civil or criminal fines for lessors. Or, similar sanctions on lessees who deceive creditors or purchasers concerning the status of leased goods could be constructed. Cf. Baird, supra note 79, at 61; Helman, supra note 16, at 31. The sanctions might even be so mild as merely shifting, in all cases, the burden of persuasion to an unperfected lessor as to the true lease character of the transaction. However, it is generally assumed in this article that the sanctions which would be imposed for noncompliance with a filing requirement for leases would impair a lessor’s property rights as against some class of beneficiaries.
prior claim by a lien creditor or trustee in bankruptcy and would expose a lessor’s interest only to certain secured parties.

The Code itself provides other possible analogues for priority rules that might accompany a filing requirement for leases. One is the rule of section 2-403(1) which permits a good faith purchaser for value to obtain “good title” to goods purchased from a transferee having only “voidable title” to the goods. Such a purchaser need not be a buyer in ordinary course of business, but often may be a reliance party that expects the goods to be free of unknown, conflicting avoidance claims. Unsecured creditors, including lien creditors, do not benefit directly from the voidable title rule of section 2-403(1).


147. A purchaser who is a buyer normally will be aware that the purchase is being made, and a buyer’s reliance, by virtue of the voidable title rule of § 2-403(1), presumably will include an element of reliance on the absence of any “secret” avoidance claims held by the seller’s predecessors in interest. But the degree of reliance by a purchaser will depend on the context. A secured creditor of a debtor holding voidable title to goods is a “purchaser” that may benefit from the § 2-403(1) rule, even if the secured creditor is claiming under an after-acquired property clause in circumstances where the secured creditor has no subjective awareness of the particular goods in question. See U.C.C. § 1-201(32) (1987) (defining “purchase”); id. § 1-201(33) (defining “purchaser”); see also Shell Oil Co. v. Mills Oil Co., 717 F.2d 208 (5th Cir. 1983); United States v. Wyoming Nat’l Bank, 505 F.2d 1064 (10th Cir. 1974); Guy Martin Buick, Inc. v. Colorado Springs Nat’l Bank, 184 Colo. 166, 519 P.2d 354 (1974) (en banc); Swets Motor Sales, Inc. v. Pruisner, 336 N.W.2d 299 (Iowa 1975). Any “reliance” by such a secured creditor might be only a general expectation as to rights to be obtained in after-acquired collateral.

In the absence of the voidable title rule, disgruntled sellers might be encouraged to cry “fraud” in the face of conflicting claims of good faith purchasers, thereby creating difficult factual issues and, perhaps, facilitating straw grasping, strike suits, and even perjury. However, in priority contests between lessors and good faith purchasers from lessees, it is likely that lessors generally would possess more verifiable and concrete evidence (i.e., the leasing contract) that would demonstrate that the lessee obtained the goods under a lease rather than as a buyer.

148. See U.C.C. §§ 1-201(32) (1987) (defining “purchase”); id. § 1-201(33) (defining “purchaser”); id. § 2-403(1) (one with voidable title can transfer good title to good faith purchaser for value). Because the interest in property obtained by a lien creditor does not arise out of a voluntary transaction (at least on the part of the debtor-transferor), a lien creditor is not a purchaser. Id.; see id. § 9-301(3) (defining “lien creditor”); see also Mazer v. Williams Bros., 337 A.2d 559 (Pa. 1975).
Another potential analogue is provided by the entrustment rule of section 2-403(2). An “entrusting of possession of goods to a merchant who deals in goods of that kind” empowers the merchant “to transfer all rights of the entruster to a buyer in ordinary course of business.” The beneficiaries of section 2-403(2) represent a still more limited class—buyers in ordinary course of business—than the beneficiaries of the voidable title rule of section 2-403(1) or the beneficiaries of nonperfection under the Article 9 rules.

A consideration and comparison of these analogues may reveal which, if any, might offer an appropriate model for the effect of nonperfection under a filing rule for leases. Although the spectrum presented by the Article 9 rules, the voidable title rule and the entrustment rule reveals an increasingly narrowing universe of beneficiaries, the impact and significance of the interests that are cut off by third parties, and the consequences to the party that is deprived of its interest, reveal an opposite pattern. It also appears that the progression from the Article 9 rules to the voidable title rule to the entrustment rule illustrates an increasingly significant role of possession of goods.


150. The unperfected secured creditor loses only its collateral in the context of a credit transaction in which the collateral often may not be the primary anticipated source of repayment. See supra notes 114-25 and accompanying text. Although the transferor of a voidable title loses its rights in the goods as against a good faith purchaser for value from the transferee, such a transferor nevertheless intends to sell the goods to the transferee and, presumably, often delivers to the transferee the goods together with documentary evidence of such transferee’s acquisition of title. Such transferors normally do not expect to retain any interest in the goods after the transfer is consummated. Moreover, the entruster to a merchant loses its rights to a buyer in ordinary course of business even though it contemplated only a temporary bailment for safekeeping, repair, or the like and, presumably, provides the merchant with no documentary evidence of title.

151. The unperfected secured creditor, who has not filed, taken possession of the goods, or notified a third party bailee of its security interest, see U.C.C. § 9-305 (1987), will be subordinated to third parties whether or not the debtor is in possession of the goods. Although the transferee of a voidable title will not necessarily be in possession of goods and the good faith purchaser from such a transferee need not take possession in order to benefit from the rule of § 2-403(1) (delivery of goods is not an essential element of a “purchase” under § 1-201(32)), the transferee of the voidable title usually would be in possession of the goods and the good faith purchaser who is a buyer usually would take possession. Cf. id. § 9-301(1)(c). Finally, the applicability of the entrustment rule of § 2-403(2) depends entirely on the possession entrusted to a merchant.
It is true that no filing regime is provided under current law to protect the defrauded seller from the holder of voidable title or the entruster from the merchant dealer. Yet, there is no reason why the drafters of a filing requirement for leases could not consider these non-Article 9 property rules in the context of determining the appropriate beneficiaries of such a filing requirement. A comparison of these priority rules (the Article 9 rules, the section 2-403(1) voidable title rule, and the section 2-403(2) entrustment rule) suggests an important point: The different protected classes or beneficiaries of these rules and the different circumstances in which the rules operate indicate an attempt to adjust the results (i.e., subordinating or cutting off the rights of one party in favor of another party) to the particular circumstances and contexts involved.\footnote{152} Whether analyzed in terminology and by methodology intended to estimate costs and benefits or efficiency, to determine which of two innocent parties is best situated to withstand or protect against the risks, or to allocate risks based on normative notions of fairness, such rules reflect an effort to match the sanctions with the circumstances. This crucial exercise has been given scant attention by the proponents of a filing rule for leases.\footnote{153} The mere demonstration that a filing requirement for leases of goods would be useful does not necessarily lead to the conclusion or as-

\footnote{152. Baird and Jackson have argued that the first-in-time principle should not be modified to incorporate an actual reliance standard. See Baird & Jackson, supra note 79, at 318-20. Yet, they apparently believe that reliance by a protected class is a central component of an appropriate priority rule, even if it is not applied on a case-by-case basis. See Baird & Jackson, supra note 10, at 208 n.96. The protected class that would benefit from lesser nonperfection might be limited to those who would normally be expected to rely on the absence of public notice and/or a lessee's possession of goods. See generally Dolan, The U.C.C. Framework: Conveyancing Principles and Property Interests, 59 B.U.L. Rev. 811 (1979) (discussing the Code as a "single construct resting on four basic property interests and three basic conveyancing principles").}

\footnote{153. Any such consideration must take into account the relationship between the desired function of a filing rule and the parties that would benefit from compliance or noncompliance as well as the costs and benefits arising out of its application. Baird and Jackson have articulated the point well in the context of considering what separations of ownership and possession should be excluded from a filing requirement: "As in other commercial law problems, one may have to balance the virtues of clear rules against those of flexible standards as well as balance competing equities of two innocent parties." Baird & Jackson, supra note 10, at 194. It is not sufficient to stop with a consideration of candidates for exclusion from the rule. The effects of nonfiling in transactions subject to a filing rule also must be considered.}
umption that the Article 9 priority rules would be equally appropriate for leases.

Finally, any perceived virtues of tailoring priority rules to the particular context of leasing transactions should be balanced against the inherent costs of special rules for leases. Some commentators have argued that requiring filing for leases would reduce the need to grapple with the troublesome true lease-security interest issue.\textsuperscript{154} To the extent that special priority rules for leases, whether perfected or unperfected, were adopted, this goal would be undercut. For example, if the NCFA proposal\textsuperscript{155} were adopted, a trustee in bankruptcy would remain motivated to attempt to characterize a lease as a secured transaction whenever the equipment is not completely encumbered by a valid, prior security interest.\textsuperscript{156} More generally, in many cases it would be necessary to make the true lease-security interest determination in order to know which priority rule would apply.\textsuperscript{157}

The discussion in this Part provides some of the responses to the challenge posed by Baird and Jackson—that critics of a filing rule for leases ought to explain why filing nevertheless should be imposed for secured transactions.\textsuperscript{158} Depending on the applicable priority rules, there may be costs imposed by a filing requirement for leases that are of a different character and that exceed those which result in the case of secured transactions. It is not sufficient simply to note that in each case there is a separation of possession and property rights. However, other important distinctions lie not in the relative costs, but in the relative benefits.

\textsuperscript{154} See supra note 130.
\textsuperscript{155} See supra notes 86-88, 144.
\textsuperscript{156} Unless the putative lease were so recast, the trustee could not recover the "equity" in the leased goods under the NCFA proposal, which would provide only a limited benefit for certain secured creditors.
\textsuperscript{157} Although the examples deal with nonfiling or defective filing, the structure of a priority scheme dealing with proper filings also could undercut the goal of simplification if the rules applied to leases differed from those applied to security interest. Moreover, even if the Article 9 priority rules, without change, were applied to a lease filing requirement, the true lease-security interest issue would not go away. See supra note 130 and accompanying text (necessity of true lease-security interest characterization for purposes of determining amount of unperfected lessor's claim). The true lease-security interest distinction also would continue to play a role in many other contexts unrelated to perfection and priority. See supra note 32 and accompanying text.
\textsuperscript{158} See supra note 13 and accompanying text.
V. "Ostensible Ownership" and the Article 9 Filing Regime

This Part of the article explains that a filing requirement for leases would provide smaller and fewer benefits than are provided by the filing requirements of the Article 9 perfection and priority regime. It addresses some history and endeavors to explain some of the mystery and expose some of the myths surrounding the doctrine of ostensible ownership and the Article 9 filing rules.

Subpart A explains that the historical development of chattel security public notice systems and the doctrine of ostensible ownership provide little, if any, support for the imposition of a filing requirement for leases of goods. Subpart B explains that the benefits of the Article 9 filing rules are not limited to curing problems of ostensible ownership. Rather, filing under Article 9 enhances the benefits of secured credit by providing readily available information necessary to the ordering of priorities, generally on a first-in-time basis. Filing provides this information in a manner that is less costly than other alternatives and is verifiable and certain as to time, thus discouraging fraud and collusion. These functions of filing are less significant, and therefore provide less benefit, in the case of leases. Subpart C explains why the existing public notice requirements for certain non-security transactions—consignments and sales of accounts and chattel paper—are not apt analogues for imposing a filing requirement on leases. Finally, Subpart D addresses the special case of sale-leaseback transactions.

A. History, Mystery, and Myth

Proponents of a filing requirement for leases consistently have relied on the doctrine of ostensible ownership as the principal policy justification for such a rule. When a lessor puts a lessee in possession of goods, the argument goes, the lessee's possession creates the appearance of ownership by the lessee and may mislead

159. See generally supra Part III.
160. What constitutes possession for purposes of any particular legal rule is, itself, a difficult enough issue. See, e.g., 1 G. Gilmore, supra note 23, § 14.2, at 440-41; Shartel, Meanings of Possession, 16 MINN. L. REV. 611 (1932); Tay, The Concept of Possession in the Common Law Foundations for a New Approach, 4 MELB. U.L. REV. 476 (1964); Thayer, Possession and Ownership, 23 LAW Q. REV. 175 (1907); Thayer, Possession, 18 HARY. L. REV. 196 (1905). For present purposes, it is assumed that possession is something upon which all would agree.
third party creditors and purchasers, including secured creditors. Therefore, the lessor should be required to cure this ostensible ownership problem by giving notice (i.e., filing) of its otherwise secret interest at the pain of having its interest subordinated to a third party upon failure to file. The proponents either explicitly or implicitly have assumed or argued that the same policy justification underlies the filing and other perfection and priority rules of Article 9 and also underlay the development of pre-Code chattel security law. This Subpart explores some flaws in these arguments.

1. Some history: Fraud and filing.—The development of chattel security devices, including related public notice requirements, does not clearly reflect an engine fueled by an underlying policy of curing perceived problems of ostensible ownership. An adequate explication and critique of these historical developments would require, at the least, another article. It is sufficient here to demonstrate only that the “history” reflects an essentially ambivalent, inconsistent approach and is not likely to offer a clear signal as to the wisdom of adopting a filing requirement for leases. 161

The common thread running through the development of chattel security law was a pervasive judicial and legislative concern about fraud. This fraud concern is separable from the ostensible ownership concern that possession of personal property begets misleading appearances of ownership upon which creditors and purchasers may rely. Unfortunately, the failure of many courts and commentators to make this distinction has led to much confusion and mystery. For example, the so-called “vendor-in-possession” doctrine, epitomized by the celebrated Twyne’s Case, 162 often has

161. This is not to say that the history is irrelevant or that it does not offer valuable insight as well as support for arguments on both sides of the issue. The value of such insight would depend on the “history” to be considered and the intensity of the study. For a criticism of most legal scholarship because of its failure to come to grips with critical historicism, see Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017 (1981). The following brief glance at the history succumbs to much of Gordon's critique. It mentions mostly reported judicial decisions and legal commentary and omits consideration of other evidence which might bear on the relevant social conditions or contexts. See id. at 1034-35 & n.65. Other commentators who have addressed the issue of a filing requirement for leases are vulnerable to the same criticism.

162. 3 Coke 80b, 76 Eng. Rep. 809 (Star Ch. 1601). The case was based on the Statute of 13 Elizabeth which provided that transfers with the "intent[] to delay, hinder or defraud creditors and others" were void, provided for recovery of the "whole value of . . . goods and chattels" transferred, to be shared by the Crown and aggrieved parties (such as creditors), and provided for criminal sanctions against the parties to the transfer. 13 Eliz., ch. 5 (1570).
been associated closely with the development of chattel security law generally, including the evolution of systems of public filing or recordation.\textsuperscript{163} The rule, as it has developed, may be stated simply to require that when A transfers an interest in A’s property which is in A’s possession, but A nevertheless retains possession of the property, the transfer is, or is presumed to be, fraudulent and void as against A’s creditors and purchasers.\textsuperscript{164} Curiously, \textit{Twyne’s Case} often is accepted as a principal source of the doctrine of ostensible ownership.\textsuperscript{165} As others have pointed out, \textit{Twyne’s Case} was a criminal action involving imputed fraud, not ostensible ownership.\textsuperscript{166} Although the transfer was made “pending the writ”\textsuperscript{167} of

The statute was intended in large part as a revenue measure. 1 G. GLENN, \textit{FRAUDULENT CONVEYANCES AND PREFERENCES} §§ 61b, 61c, at 89-93 (rev. ed. 1940). It has been observed that \textit{Twyne’s Case}, “inextricably mixed though it may be with Lord Coke’s gloss, has become practically a part of the statute itself.” A. ELKUS & G. GLENN, \textit{A TREATISE ON SECRET LIENS AND REPUTED OWNERSHIP} 3 (1910).


\textsuperscript{164} The statement in the text fails to consider various issues considered by courts and legislatures over the years, such as the effect of goods being in the possession of a third party bailee rather than the transferor, and whether subsequent creditors are entitled to benefit from the rule. For an excellent modern treatment of the “vendor-in-possession” doctrine, see 1 G. GLENN, \textit{supra} note 162, §§ 341-63, at 591-624; see also A. ELKUS & G. GLENN, \textit{supra} note 162, §§ 1-118, at 1-85; 2 S. WILLISTON, \textit{supra} note 23, §§ 351-404, at 384-502; Coogan, \textit{supra} note 24, § 4A.07A[1], at 4A-182 to -192.

\textsuperscript{165} The thesis of the statute [of 13 Elizabeth, ch. 5] ... is that the possession of property is a good indication of ownership ... \textit{Twyne’s case} judicially established the proposition.

As the possession of property is, to the judicial mind a fair indication of its ownership, it is equally true, as a proposition founded upon human experience, that the possession of property presumptively begets credit.

A. ELKUS & G. GLENN, \textit{supra} note 162, §§ 6, 9, at 3, 5 (footnote omitted).

\textsuperscript{166} See Dolan, \textit{supra} note 16, at 30-33 (arguing that rule of \textit{Twyne’s Case} grounded in fraud rather than ostensible ownership concerns); see also Clark, \textit{The Duties of a Corporate Debtor to its Creditors}, 90 \textit{HARV. L. REV.} 505, 514 (1977) (\textit{Twyne’s Case} may be characterized as one “which involved actual, detrimental deception”); Dolan, \textit{supra} note 152, at 819 (“\textit{Twyne} itself rests not on ostensible ownership reasoning, but rather applies absent any showing of reliance. \textit{Twyne} protects the concept of conveyancing by refusing to divorce it completely from notions of possession or seisin.”). \textit{Twyne}, the transferee, was convicted because there was found to exist an intent “to delay, hinder or defraud creditors.”
another creditor of Pierce, the transferor who remained in possession, that creditor in no way was misled by the transfer and Pierce's continued possession. The court simply did not believe that the transfer was legitimate and executed in good faith.

Some of the confusion and imprecision surrounding the nexus between ostensible ownership concerns and antifraud concerns in the context of the vendor-in-possession doctrine is traceable to the "reputed ownership" provision, which was enacted as part of the English bankruptcy law. Garder Glenn explained that the relationship between the reputed ownership doctrine, which never was widely adopted by statute in the United States, and the avoidance of fraudulent conveyances based on the vendor-in-possession doctrine, is grounded in estoppel. Yet, some examples of how the vendor-in-possession doctrine was applied by the courts indicate that the doctrine's relation to notions of reputed (i.e., ostensible) ownership is not as direct as Glenn perceived. First, in a majority of the states the effect of a seller's retention of possession is merely

3 Coke at 82a, 76 Eng. Rep. at 816. Indeed, the transfer in question was made to Twyne in satisfaction of a valid claim of Twyne against Pierce, the transferor, "pending the writ" of another creditor. 3 Coke at 80b, 76 Eng. Rep. at 811. Pierce's retention of the property transferred was only one of six badges of fraud relied upon by the court. That the transfer was made "in secret" and was "general" appeared to be of no less concern to the court than Pierce's retention of possession. 3 Coke at 80b, 76 Eng. Rep. at 810-11. 167. 3 Coke at 80b, 76 Eng. Rep. at 811.

168. The same can be said of an early and important case adopting the rule of Twyne's Case in the United States. Sturtevant v. Ballard, 9 Johns. 337 (N.Y. 1812).

169. Steven Harris, noting the generality of the transfer condemned by the court, has made the point to the author as follows: "The court simply refused to believe that Pierce had transferred his underwear to Twyne." Telephone interview with Steven Harris, Professor of Law, University of Illinois College of Law (June 22, 1987).

170. 21 Jac. I, ch. 19, § 11 (1623). That provision, carried forward in later enactments, provided generally that goods in the possession of a bankrupt would be available for the satisfaction of creditors' claims. The reputed ownership rule never was a part of the English Companies Acts which govern most business insolvencies. Moreover, the most recent version of the English reputed ownership provision, § 38(2)(c) of the Bankruptcy Act of 1914, has been repealed by the Insolvency Act 1985, on the basis that the doctrine has become obsolete. 2 Eliz., ch. 65, § 235(3), sched. 10, pt. III (1885); see A Revised Framework for Insolvency Law, 1984, Cmnd. No. 9175, at 40; Insolvency Law and Practice, 1982, Cmnd. No. 5558, at 248-50. For a discussion of the relationship of the reputed ownership and fraudulent conveyance aspects of the vendor-in-possession doctrine, see 1 G. Glenn, supra note 162, §§ 344-63, at 602-24.

171. 1 G. Glenn, supra note 162, §§ 346-48, at 606-07. Thus, present creditors may forbear from pursuing their claims and subsequent creditors may extend credit "on the faith of the vendor's apparent ownership." Id. § 347, at 606; see also A. Elkus & G. Glenn, supra note 162, § 12, at 8-9 (quoting Todd v. Nelson, 109 N.Y. 316, 327, 16 N.E. 360, 364 (1889)).
evidence of, or creates only a rebuttable presumption of, fraud. Where an inference of fraud can be satisfactorily explained away, the retention of possession is not fraudulent even though the ostensible ownership concerns would be the same in either case. Second, it generally was held that a vendee, who takes possession of the goods prior to the time the goods are seized by legal process instituted by a creditor, will prevail over the creditor. Insofar as the vendor-in-possession doctrine is based on notions of reputed ownership, Glenn conceded that “[t]he logic of the rule breaks down” at this point. Finally, the vendor-in-possession doctrine was applied in cases in which the goods were not in the possession of the vendor but, rather, were in the possession of a third party bailee, with the requirement that the vendee notify the bailee in order to defeat subsequently levying creditors. Again, this rule, or exception, is less than faithful to the ostensible ownership rationale.

172. Writing in 1980, Coogan found only five states in which a seller’s retention of possession was fraudulent per se. Coogan, supra note 24, § 4A.07A[1][a][i], at 4A-184 to -185. One of the states he identified, Oklahoma, repealed its vendor-in-possession statute in 1986 when it enacted the Uniform Fraudulent Transfer Act. See Okla. Stat. Ann. tit. 24, § 6 (West 1987) (repealed 1986); see also 1 G. Glenn, supra note 162, §§ 351, 354, at 609-12; 2 L. Jones, supra note 23, §§ 320-21, at 6-8. That a vendor’s retention of possession of goods is merely evidence of fraud which can be overcome by evidence of good faith has been the law in England for many years. See Martindale v. Booth, 3 B. & Ad. 498, 110 Eng. Rep. 180 (1832). The Code overrides the vendor-in-possession doctrine only to a limited extent and otherwise leaves non-Code law intact. See U.C.C. § 2-402(2) (1987) (“retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent”); id. § 2A-308(1) (similar rule); id. § 2A-308(3) (seller-lessee’s retention of possession in sale, for value and in good faith, to buyer-lessee in sale-leaseback transaction not fraudulent).

173. 1 G. Glenn, supra note 162, § 349, at 607. Glenn strongly criticized this rule: This result seems wholly illogical.... These subsequent creditors should be entitled to the benefit of the rule of reputed ownership.... Nor is there much logic in the reasoning by which the courts attempt to justify their rule. ... [T]he vendee does not take possession. Thus the ostensible ownership, which is misleading to creditors. How that can be cured by a last minute snatch on the buyer’s part, is quite beyond the writer.

Id. at 608-09 (footnotes omitted). Responses to Glenn’s criticism are that the ultimate delivery by the vendor to the vendee is some evidence of the existence of good faith all along (i.e., possession would not be delivered if a transaction were a sham) and, further, when the absence of fraud is established, the reputed ownership concerns must give way.

174. Id. § 358, at 615-16. In the case of a bailee that had issued a non-negotiable document of title, the rule was codified in § 34 of the Uniform Sales Act. Unif. Sales Act, § 34, 1 U.L.A. 492 (1906) (superseded). Section 7-504(2) now contains a similar rule. See U.C.C. § 7-504(2) (1987).
The common law courts traditionally viewed a transfer for security purposes, such as a mortgage, as merely one species of sale which could be subjected to scrutiny under the vendor-in-possession doctrine. *Clow v. Woods* \(^{175}\) illustrates an early attempt to create a nonpossessory chattel mortgage. \(^{176}\) In that case, a mortgage of all of a tanner’s equipment and inventory was held “fraudulent and void” where the debtor was to remain in possession, in the absence of default, pursuant to the terms of the mortgage. \(^{177}\) In so ruling, the court recognized the perceived risks imposed on creditors by virtue of the debtor’s continued appearance of ownership. \(^{178}\) The debtor’s retention of possession and the concurrent appearance of ownership, however, was only a part of the court’s rationale for ruling as it did. \(^{179}\) The court was concerned, in the main, with the potential for such a transaction to be used as a means of deception and as a means to effectuate dishonest purposes. \(^{180}\) The concern was fraud, actual or potential, and not

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\(^{175}\) 5 Serg. & Rawle 275 (Pa. 1819).

\(^{176}\) Chattel mortgages eventually were legitimated in the United States by statutes, enacted in most states during the nineteenth century, that generally required public filing or recordation as a condition to validation. 1 G. Gilmore, supra note 23, §§ 2.1–2, at 25–26. The common law pledge was not so burdened by the fraud concerns because an essential component of the pledge was the bailment (i.e., delivery) of the pledged property to the pledgee, which reduced both the fraud and ostensible ownership concerns. See, e.g., J. Story, supra note 21, §§ 286, 297, at 265–66; see also 1 G. Gilmore, supra note 23, § 14.4, at 445–49 (discussing “equitable pledge”). For discussions of the distinction between the pledge and the chattel mortgage at common law, see 1 G. Gilmore, supra note 23, § 1.1, at 5–91; L. Jones, supra note 23, § 4, at 10–12.

\(^{177}\) *Clow*, 5 Serg. & Rawle, at 288. The court relied on the rule of the Statute of 13 Elizabeth. Id. at 278, 288. See generally supra note 162.

\(^{178}\) “In every case where possession is not given, the parties must leave nothing unperformed, within the compass of their power, to secure third persons from the consequences of the apparent ownership of the vendor.” *Clow*, 5 Serg. & Rawle at 282 (Gibson, J.) (emphasis in original). “There is no way of coming at the knowledge of who is the owner of goods, but by seeing in whose possession they are.” Id. at 284 (Duncan, J.).

\(^{179}\) Much emphasis also was placed on the absence of any attempt to do what was possible to effect a delivery of possession to the mortgagee, such as a symbolic delivery, id. at 281–82 (Gibson, J.); id. at 284–86 (Duncan, J.); the generality of the conveyance of all of the debtors stock in trade, including the failure to include a specific inventory, id. at 282 (Gibson, J.); id. at 286–87 (Duncan, J.); and the absence of any good reason, aside from the parties’ convenience, for the debtor’s retention of possession, id. at 279, 281–82 (Gibson, J.); id. at 285 (Duncan, J.).

\(^{180}\) Id. at 282 (Gibson, J.) (“I do not suppose the parties had in fact a fraudulent view, but as such a transaction might be turned to a dishonest use, it was their duty, as far as in their power, to secure the public against it.”). It is interesting that the court appeared to bless an alternative structure whereby the mortgagee would have purchased the goods at the outset and leased them to the mortgagor:
merely an estoppel-like reliance on the debtor's ostensible ownership. The common law treatment of the conditional sale, unlike that afforded the chattel mortgage, demonstrated tolerance for the separation of possession and ownership. At common law, the conditional seller’s rights in the goods generally were held to be valid as against creditors of and purchasers from the conditional buyer in possession. That result is difficult to reconcile with the notion that the common law abhorred “secret liens” and sought to protect third parties from the risks of misleading appearances.

The object of the parties might have been attained without any (at least with less) risk to the public, by the landlord himself becoming the purchaser in the first instance, and permitting the tenant to have the use of the property: in which case, the transaction would have been a safe and fair one; and that course should have been pursued.

Id. at 280 (Gibson, J.). Baird and Jackson suggest that perhaps “Justice Gibson, in 1819, could imagine a world without nonpossessory security interests, but he could not imagine a world without personal property leases.” D. Baird & T. Jackson, Security Interests in Personal Property 30 (2d ed. 1987). Their suggestion is plausible, although we will never know exactly what kind of world Justice Gibson might have imagined. It is clear enough, however, that because the outward appearances would be the same in the case of either the lease or the mortgage approach, what was perceived as “fair” and “safe,” as opposed to a “fraud,” turned on some considerations other than mere concern for the possessor’s ostensible ownership. Had the possessor first acquired possession as a bailee (i.e., lessee), no issue of converting assets available to creditors into assets unavailable to creditors ever would have arisen. The appearance would have been the same, but the potential for defrauding creditors out of something to which they were otherwise entitled would not have existed.

181. This judicial hostility and mistrust of nonpossessory chattel security arrangements was not particularly slowed by the enactment of the chattel mortgage statutes, notwithstanding provisions for public filing in those statutes. See supra note 176. The courts generally construed the statutes as strictly as possible against the mortgagees; chattel mortgages continued to be viewed as fraudulent conveyances. See 1 G. Gilmore, supra note 23, § 2.2, at 26-27. The unfriendly reception by the courts was exemplified as well by the failure of many courts to give effect to after-acquired property provisions, especially those arrangements which left a debtor free to deal with its mortgaged stock in trade. See generally id. §§ 2.3-2.6, at 27-47.

182. The conditional sale was an arrangement that evolved into a financing device in which the conditional seller of goods retained (reserved) title until the conditional buyer paid the purchase price, notwithstanding delivery of the goods to the conditional buyer. For discussions of the development of the conditional sale in theory and practice, see generally 1 G. Gilmore, supra note 23, §§ 3.1-3.3, at 62-73; 2 G. Glenn, supra note 162, §§ 506a-515, at 869-91; 3 L. Jones, supra note 23, §§ 900-98, at 1-14.


184. See 1 G. Gilmore, supra note 23, § 3.2, at 67 (“[T]he result achieved by conditional sale theory ran directly counter to one of the most firmly rooted doctrines of the common law: the protection of creditors against undisclosed interests in property.”).
Yet, from the standpoint of concerns arising from the risk of fraud, such as that involved in *Twyne's Case*,\textsuperscript{185} an obvious factual distinction appears: the conditional sale involved a delivery of goods to the conditional buyer, rather than a transfer by an existing owner in possession not accompanied by a delivery.\textsuperscript{186} During the late nineteenth and early twentieth centuries, when the conditional sale emerged in the United States as an important secured financing device, a majority of the states responded legislatively by enacting conditional sale acts.\textsuperscript{187} These statutes generally required some form of public filing or recordation as a condition to a conditional seller's priority over good faith purchasers from and, in most cases, creditors of a conditional buyer.\textsuperscript{188}

\textsuperscript{185} 3 Coke 80b, 76 Eng. Rep. 809 (Star Ch. 1601).

\textsuperscript{186} Glenn severely criticized the minority rule championed by Pennsylvania courts which subordinated a conditional seller's rights to those of a conditional buyer's creditors based on the reasoning of *Twyne's Case* as applied in mortgage cases such as Clow v. Woods, 5 Serg. & Rawle 275 (Pa. 1819). See, e.g., Martin v. Mathiot, 14 Serg. & Rawle 214 (Pa. 1826). Glenn stated:

\textit{The mistake lies in the idea that the conditional sale is really a sale with a condition subsequent, whereas in truth there is no sale at all, but merely a contract to sell. The fact that this contract is accompanied by a bailment for use cannot make out a case of reputed ownership unless we are to say that every bailment is void against creditors of the bailee. No court in its senses ever said that.}

\textsuperscript{2} G. Glenn, supra note 162, § 509, at 876. Glenn concluded that the Pennsylvania courts were misled by the English Reputed Ownership provision (discussed supra note 168) which generally was not embraced in the United States. \textit{Id.} at 874; see also Harkness v. Russell, 118 U.S. 663 (1886) (canvassing United States authorities and discussing inapplicability, in most, of reputed ownership doctrine derived from English bankruptcy law). Ironically, Pennsylvania courts accepted the "bailment lease," a surrogate for the conditional sale which was functionally and economically indistinguishable, although no public filing or recordation requirements were applicable to bailment leases. See 1 G. Gilmore, supra note 23, § 3.6, at 77-78; 2 G. Glenn, supra note 162, § 509, at 875-76; Montgomery, \textit{The Pennsylvania Bailment Lease}, 79 U. Pa. L. Rev. 920 (1931).

\textsuperscript{187} 1 G. Gilmore, supra note 23, § 3.2, at 67-68; 3 L. Jones, supra note 23, § 1004, at 107-08.

\textsuperscript{188} See, e.g., \textit{Unif. Conditional Sales Act} § 5, 2 U.L.A. 6-9 (1918) (superseded). It has generally been accepted that the principal motivation for such public notice requirements was the protection of innocent purchasers and creditors from reliance on the conditional buyer's apparent ownership. See \textit{Unif. Conditional Sales Act} § 5 Commissioners' Note, 2 U.L.A. 7 (1918) (superseded) ("To prevent injury to innocent persons who may rely on the buyer's apparent ownership, it seems desirable to insert this filing requirement in the Uniform Act. The burden on the seller is slight, and the benefit to the public is great."); see also 3 L. Jones, supra note 23, § 1004, at 107. But Gilmore's observation best captures this development: "Now that the conditional sale was being used as a security device, it should be treated like a security device. That is to say, it should be treated like a chattel mortgage." 1 G. Gilmore, supra note 23, § 3.3, at 63.
Judicial concerns about fraud were not limited to security devices relating to goods, such as chattel mortgages and conditional sales. *Benedict v. Ratner*\(^\text{189}\) exemplified judicial hostility to security devices and the continued significance of fraud (unrelated to ostensible ownership concerns). *Benedict* involved a financing arrangement whereunder a debtor-assignor assigned its present and future accounts receivable to a lender-assignee to secure advances made by the lender-assignee.\(^\text{190}\) The account debtors were not notified of the assignment, and the debtor-assignor was permitted to use collections of proceeds of the receivables in the usual course of its business without accounting for the collections to the lender-assignee.\(^\text{191}\) Justice Brandeis, speaking for a unanimous Court, held the arrangement to be "fraudulent in law and void" under New York law.\(^\text{192}\) According to the Court, this result was dictated by the failure of the lender-assignee to reserve and exercise dominion over the assigned accounts consistent with an assignment.\(^\text{193}\) The fraudulent nature of allowing the debtor unfettered and unpoliced dominion over its receivables was considered to be inherent, as it had been viewed in decisions relating to chattel mortgages covering a debtor's stock in trade.\(^\text{194}\) The opinion expressly eschewed reliance on the concept of ostensible ownership.\(^\text{195}\) Certainly, the fraud

In England a different tack was taken. The Factors Act, 1889, was interpreted to permit innocent good faith purchasers to obtain good title from a conditional buyer. *Factors Act, 1889, 52 & 53 Vict., ch. 45, § 9; see Lee v. Butler, 2 Q.B. 318 (1893).* The hire-purchase transaction, which was not subjected to the rule of the Factors Act, thus emerged as the English functional equivalent of the conditional sale which flourished in the United States. See *Helby v. Matthews, 1895 A.C. 471 (P.C.); See generally R. Godd & J. Ziegler, Hire-Purchase and Conditional Sale 9-11 (1965); A. Guest, THE LAW OF HIRE PURCHASE 15-16 (1966).\(^\text{189}\)

\(^\text{189.}\) 268 U.S. 353 (1925).

\(^\text{190.}\) *Benedict, 268 U.S. at 357-58.*

\(^\text{191.}\) *Id. at 359. The eventual emergence of "non-notification" accounts receivable financing was influenced by *Benedict,* which was decided prior to the widespread use of such financing. See generally 1 G. Gilmore, supra note 23, chs. 7 & 8.*

\(^\text{192.}\) *Benedict, 268 U.S. at 360.*

\(^\text{193.}\) *Id. at 361-64.*

\(^\text{194.}\) *Id. at 362-63; see Gilmore, supra note 99, at 622-23 (criticizing the Court's application of authorities relating to chattel mortgages on stock in trade to the assignment of receivables).*

\(^\text{195.}\) *Benedict, 268 U.S. at 262-63.*

[1]It is not true that the rule... is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a
concerns involving inherently unobservable intangibles were unrelated to misleading appearances, or ostensible ownership.

The legislative approach to accounts receivable financing demonstrated most clearly that the purpose of public notice (i.e., filing) requirements was not limited to the ostensible ownership rationale. During the 1940s and 1950s most states enacted accounts receivable statutes.¹⁹⁶ Notwithstanding much controversy and debate, eventually most of these statutes required public notice by filing as a condition for protection against subsequent assignees and creditors of the assignor.¹⁹⁷ But, it could not be clearer that the doctrine of ostensible ownership was not applicable to inherently unobservable intangibles. Other benefits, or the elimination of other perceived evils, were at the root of arguments in favor of a filing requirement for assignments of these intangibles. Gilmore attributes the eventual adoption of such filing requirements to the reassertion of "the traditional bias in favor of publicity and against 'secret liens.'"¹⁹⁸

presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.

Id.; see also 1 G. Gilmore, supra note 23, § 8.4, at 262 ("[I]t was entirely clear that 'secrecy' was not a determinitive factor in the case.").

Although the rule of Benedict was widely followed and non-notification receivables financers apparently learned to live with it, it was rejected by Article 9. See U.C.C. § 9-205 comment 1 (1987); see also 1 G. Gilmore, supra note 23, § 8.5, at 265-71. Gilmore later criticized the approach taken in Article 9 and defended the policy justifications (if not the jurisprudential approach) for the result in Benedict. Gilmore, supra note 99, at 625-27.

¹⁹⁶ See 1 G. Gilmore, supra note 23, § 8.6, at 271. See generally id. § 8.6-8.8, at 274-86. The principal impetus for such enactment was the decision of the Supreme Court in Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434 (1943), which, in the absence of such curative statutes, left non-notification accounts financing vulnerable in bankruptcy proceedings of a debtor-assignor under the common law of most states. See 1 G. Gilmore, supra note 23, § 8.6, at 271-74. The holding of Klauder exposed non-notification accounts financing to invalidation as a voidable preference under § 60 of the Bankruptcy Act which, at the time, deemed a transfer to occur at the time it was so far perfected so as to be superior to a good faith purchaser from the assignor-debtor. 11 U.S.C. § 96(a) (1898) (repealed 1950). Thus, the assignments were vulnerable in states which adhered to the rule that a subsequent assignee would take priority over a previous assignee who had not notified the account debtor of the assignment.

¹⁹⁷ See 1 G. Gilmore, supra note 23, § 8.7, at 274-76. For an argument that public notice requirements should not be extended to assignments of accounts receivable and trust receipt financings, see Hanna, The Extension of Public Recordation, 31 Colum. L. Rev. 617 (1931).

¹⁹⁸ 1 G. Gilmore, supra note 23, § 8.7, at 275. For the most part the statutes were drafted so as to encompass only the types of business receivables which typically served as collateral for the extension of business credit. Id. at 276-78. The common law rules dealing
The foregoing indicates that much of the judicial hostility directed toward nonpossessory security interests was rooted in concerns about fraud. It also shows that filing requirements were intended to address problems, including fraud, other than then-perceived ostensible ownership, resulting from nonpossessory security devices. Even the early pre-Code filing systems were not well-designed to address ostensible ownership concerns. The Article 9 filing requirements also serve purposes other than reducing concerns about ostensible ownership.

with assignments of other choses in action were essentially left in place; public notice by means such as filing was not generally required. Id. at 277-78. Some courts held that the enactment of accounts receivable statutes effectively overruled Benedict v. Ratner. Id. § 8.8, at 281-86.

199. The reference to "fraud" is intended to include the distrust and suspicion of the motives of the parties, and the fear that such devices could be used to obtain unfair advantages over other creditors. See Clark, supra note 166, at 506-17 (discussing fraudulent conveyances in terms of principles of "Truth, Respect and Evenhandedness" and the connection between the "Evenhandedness" principle with the law of voidable preferences in bankruptcy).

200. Glenn made the point well in the related context of recording acts for sales transactions:

One thing which Coke recommended ... was publicity, and so it was felt in England, and in some of our States, that there must be a hard and fast method of settling at the outset the question whether there was good reason for the transaction taking the form which it did, or whether in truth it was a mere sham. In that way belated explanations, after thoughts, and perjury, would be avoided. Thus come the recording acts relating to the sale of goods. They were intended to provide a modern substitute for the notoriety which Coke advised in Twyne's Case.

1 G. Glenn, supra note 162, § 352, at 610 (footnotes omitted); see 2 G. Glenn, supra note 162, § 497, at 853.

Under the registry laws the filing or recording of a mortgage has the same effect as a delivery of the property in relieving the mortgagor of the onus of proving the honesty and good faith of the transaction. Either of these acts is sufficient to compel anyone assailing the mortgage to prove affirmatively that it is fraudulent in fact.

2 L. Jones, supra note 23, §§ 329, at 15 (footnotes omitted); see also Harris, supra note 124, at 190-94.

201. See Baird, supra note 79, at 48:

[T]he nineteenth-century filing systems did little to address the ostensible ownership problem, the costs that arise when parties divide ownership interests in personal property. Secured parties ... had to engage in elaborate and complicated filing rituals that not only were costly ... but often did not provide ... information about the prospective debtor's assets at low cost, because [third parties often] could not easily determine which filing system he had to check.

Baird's description is consistent with the argument that the filing systems to which he refers were, essentially, grounded in the rebuttal of fraud rather than solving problems of ostensible ownership. See Hanna, supra note 197, at 622.

202. See infra Part V.B.
Gilmore summed it up best with his observation that "[i]n the history of our security law there has been one constant factor: whenever a common law device has been covered by a statute, some form of public recordation or filing has been required as a condition of perfection of the security interest." Yet, some of the drafters of Article 9 thought that filing ought to be abandoned. Moreover, Gilmore's statement is as striking for its narrowness as for its breadth. It addresses only statutory treatment of security devices. Certainly it does not encompass the survival of nemo dat guod non habet (one cannot give what one does not have) under the common law and under the Code.

203. 1 G. Gilmore, supra note 23, § 8.7, at 274. Pre-Code public notice requirements have been mentioned in connection with chattel mortgages, see supra note 176, conditional sales, see supra notes 187-88, and accounts receivable, see supra notes 196-97. Other pre-Code chattel security devices also were subject to some form of public notice requirement. For example:


(2) Factor's Lien Acts. See generally 1 G. Gilmore, supra note 23, §§ 5.3-5.6, at 133-45.


204. Early in the process the Article 9 Reporters proposed that filing systems be scrapped in favor of imposing a duty on secured creditors to ensure that debtors' financial statements fully disclosed their security interests. This proposal was abandoned because of opposition by secured creditors who apparently realized that a unified, simplified notice filing system would provide them with more protection. 1 G. Gilmore, supra note 23, § 15.1, at 463-65.

205. See, e.g., J. Vaines, supra note 145, at 153-55; 2 S. Williston, supra note 23, § 311, at 241-42; see also 1 G. Gilmore, supra note 23, § 7.10, at 229 n.1 ("It appears to have become fashionable to quote the rule in one of its Latin versions only in the nineteenth century.").

206. See U.C.C. § 2-403(1) (1987) ("A purchaser of goods acquires all title which his transferee had or had power to transfer . . ."). One is expected to know that the phrase "all title which" must be read to include "only such title as." The nemo dat principle has been referred to, aptly, as a "derivation rule," since the rights of a transferee derive from those of a transferor. E.g., D. Baird & T. Jackson, supra note 180, at 3-8; Harris, supra note 124, at 192 n.55. Section 2-403(1) states the obverse of nemo dat, which is "the shelter, or umbrella, principle: the taker receives everything the transferor had to convey." Dolan, supra note 152, at 812 (footnote omitted). The treatment of theft is a classic example; a thief can transfer no better title to stolen goods than he has, which is none. R. Brown, supra note 112, § 9.3, at 193-94; 2 S. Williston, supra note 23, § 311. For an economic analysis of the thief rule, see Weinberg, Sales Law, Economics, and Negotiability of Goods, 9 J. LEGAL STUD. 569 (1980). Of course, the thief rule does not apply in the case of negotiable instruments and certain other intangibles. See, e.g., R. Brown, supra note 112, § 9.5, at 195-97; Warren, supra note 145, at 478-79. A variety of exceptions to the rule of nemo dat were evolved at common law. See R. Brown, supra note 112, §§ 9.6-9.7, at 197-206; J. Vaines, supra note
The treatment afforded leases and other bailments is a striking example of the survival of the \textit{nemo dat} principle. Bailments generally have remained unburdened by public notice requirements and, absent estoppel or the like, essentially have been unimpaired by the doctrine of ostensible ownership. Possession is not and, at least for several hundred years,\textsuperscript{207} has not been a general requirement for the protection of property interests in goods. Indeed, an early draft of Article 9 contained a public notice requirement for certain leases, which ultimately was rejected.\textsuperscript{208}

If "history" has anything to say about whether there ought to be a filing requirement for leases, it tells us that there ought not to be one. Yet, some proponents of a lease filing requirement suggest that "history" reflects a march toward requiring public notice of all separations of possession and ownership.\textsuperscript{209} I disagree with those proponents. The enactment of a filing requirement for leases would be as much a departure from historical trends as it would be a natural progression. Hundreds of years of respect for the "secret" interest of a lessor, which survived intact during periods of intense judicial and legislative hostility toward nonpossessory security devices, cannot be dismissed easily as "an accident of history . . .

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\begin{quote}
We find it laid down in the Year Books that, if I deliver goods to a bailee to keep for me, and he sells or gives them to a stranger, the property is vested in the stranger by the gift, and I cannot maintain trespass against him; but that I have a good remedy against the bailee . . . . These cases have been understood, and it would seem on the whole rightly, not merely to deny trespass to the bailor, but any action whatever . . . . No lawyer needs to be told that . . . . this is no longer the law. The doctrine of the Year Books must be regarded as a survival from the primitive times when we have seen the same rule in force . . . .
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\textit{Id.} (footnote omitted).
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208. Section 7-404 of the May 1949 Draft of the Code (the secured transactions article was then denominated Article 7) imposed a "sign posting" requirement on equipment lessors, although it provided that only "buyers" who "bought the equipment for new value and received delivery thereof without knowledge or reason to know of the owner's interest" would take free of a noncomplying lessor's interest. U.C.C. § 7-404 (May 1949 Draft). This approach was ultimately rejected, in large part as a result of opposition by the leasing industry. \textit{See} Leary, \textit{supra} note 46, at 250 n.85.
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209. \textit{See} Baird & Jackson, \textit{supra} note 10, at 178 (quoted \textit{supra} note 14); Coogan & Boss, \textit{supra} note 53, § 4.3.04[4][1], at 4.3-45 (quoted \textit{supra} note 61).
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developed largely from unexamined notions." Gilmore sternly warned us not to ignore "what the courts were trying to tell us." If expanding the filing requirements to encompass leases of goods is sound policy, and it may well be, then it must be supported on grounds other than some vague notion of historical and logical inevitability.

2. Ostensible ownership: A closer look.—The argument in favor of a filing requirement for leases of goods based on ostensible ownership concerns warrants close examination. The weakness of claims that pre-Code and Article 9 filing requirements were grounded on the ostensible ownership rationale does not prove that ostensible ownership problems are not real or that a filing requirement is unwise.

One flaw in the argument is immediately apparent. Because filing generally is not required for leases under current law, a lessee's possession of equipment does not make ownership of the equipment ostensible at all. Simply stated, possession of equipment by a user carries with it no suggestion whatsoever, based on existing law, that the equipment is owned, rather than leased, by the possessor. Moreover, the prevalence of equipment leasing

211. Gilmore, supra note 99, at 627 (criticizing the Code's extension of the good faith purchase doctrine in the face of increased and persistent judicial hostility).
212. See supra text accompanying notes 159 passim.
213. See supra Part V.A.1.
214. See supra notes 40-41 and accompanying text.
215. This discussion assumes that a filing rule for leases would affect essentially only leased equipment. See U.C.C. § 9-109(2) (1987) (defining "equipment" as "goods . . . used or bought for use primarily in business"). It is reasonable to assume that leases will virtually always involve a bailment for the purpose of use of the goods by the lessee (or, perhaps, the lessee's sublessee). Although some leased goods are consumer goods, see id. § 9-109(1), most proponents of a filing rule for leases have recognized that consumer leases probably would be excluded from the rule as with purchase money security interests in consumer goods. See id. § 9-302(1)(d). When a lessee of goods subleases the goods to a sublessee, the goods would be characterized as the lessee's "inventory" for Article 9 purposes. Id. § 9-109(4). The relevant consideration is not the precise characterization under Article 9, but the fact that the goods are being used by a possessor for business purposes. Because the goods will be equipment in the hands of the user, it would rarely make sense for a secured party (or lessor, if there were an applicable perfection requirement) to perfect by taking possession under § 9-305. Perfection in such goods is virtually always achieved by filing. See id. §§ 9-302, 9-303.
216. Harris makes the point well in the context of the vendor-in-possession doctrine: A straightforward premise underlies the common law notion that retention of possession is deceptive or fraudulent: possession of goods implies unencumbered ownership. In a legal system in which a contrary premise prevails and in which no inferences
during recent years \(^{217}\) demonstrates, as a factual matter, that possession by a user indicates a reasonable possibility that equipment is leased, not owned, by the user. A more refined conceptualization of the ostensible ownership argument is required. The ostensible ownership argument could be based on the assumption that if a filing rule were adopted for leases, then ownership (or, at least, freedom from claims of unperfected lessors) would be “ostensible” from the fact of possession of the leased equipment. Enacting a filing rule for leases, then, finally would provide a legal basis for the myth that ownership of equipment is ostensible from the fact of possession.\(^{218}\)

Because it is commonly known that business equipment often is subject to security interests, one might argue that such common knowledge justifies the abolition of a filing requirement for secured transactions as well. Justifications for a filing requirement for secured transactions exist, however, which are unrelated to ostensible ownership concerns.\(^{219}\) Focusing on ostensible ownership

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\(^{217}\) See supra note 20.

\(^{218}\) More precisely, a filing rule would permit an interested person who ascertained that a prospective debtor or seller is in possession of equipment and that the appropriate records do not reflect a filing to assume that the equipment is not leased or that any lessor’s claim is unperfected. Even if the Article 9 perfection rules were applied to leases, however, some gaps would remain. For example, the four-month rule of § 9-103(1)(d) and the ten-day grace period for purchase money security interests in § 9-301(2) each undercut the ostensible ownership rationale.

\(^{219}\) Consider a “colorful” rhetorical question put to me by John Dolan: Would the proponents of a filing rule for leases be satisfied, and would the ostensible ownership concerns be solved, by a rule requiring that all leased equipment be painted “school bus yellow”? Aside from difficulties posed for sales and financings of school buses, not to men-
problems created by nonpossessory interests offers an unduly narrow view of the various costs and benefits of imposing a filing rule as a condition for protection of any property interest.

Another weakness of the ostensible ownership argument for a lease filing requirement relates to the “ostensible” component, rather than the “ownership” component just addressed. As an empirical matter, are the potential beneficiaries of a filing requirement—creditors of and purchasers from lessees—often deceived or misled by the possession of equipment by lessees? Stated otherwise, do the potential beneficiaries actually rely on the possession of goods by a prospective debtor or seller? The proponents of a filing rule for leases have not presented an empirical case that reliance, resulting in deception, is actually a problem. Some critics of the role of the ostensible ownership doctrine in our laws and jurisprudence have persuasively made the case for nonreliance, however. For example, John Dolan has observed that “[m]odern credit practices . . . have outgrown the ostensible-ownership doctrine.” Although hard empirical data remains elusive, a review of Code cases dealing with priority disputes between lessors and third parties supports the argument that mistaken and detrimental reliance on lessees’ possession of equipment is not commonplace. Perhaps there is no real “problem” at all.

Part V.B addresses the justifications for filing under Article 9 and considers the extent to which similar benefits might result from subjecting leases to the Article 9 perfection and priority regime.

220. The identity of potential beneficiaries would depend on the nature of the priority rules that would accompany the adoption of a filing requirement for leases. See generally supra Part IV.

221. Dolan, supra note 16, at 30. For similar arguments, see, e.g., Burns, supra note 26, at 429, 456-67; Helman, supra note 16, passim; Phillips, supra note 16, at 35-38. See also Harris, supra note 124, at 191 n.49 (“That creditors rely on the debtor’s possession of personal property in deciding whether to extend credit long has been considered dubious,” citing Davis v. Turner, 45 Va. (4 Gratt.) 422, 441 (1848) (Baldwin, J.).

222. Cases reported in volumes 1 (first series) through 2 (second series) of Callaghan’s Uniform Commercial Code Reporting Service were reviewed in an attempt to estimate the incidence of actual reliance on leased, or purportedly leased, equipment by creditors of and purchasers from lessees. One hundred thirty cases (treating cases reported more than once
Arguments that actual reliance on a debtor’s possession of goods by extenders of credit is insignificant are persuasive, even compelling. But even the total absence or elimination of ostensi-

as one case and excluding consumer cases) were identified in which the true lease-security interest issue was involved and which involved a priority dispute between a putative lessor and a third party. In 94 cases (72.3%) the priority dispute involved the failure to file a financing statement and in 36 cases (27.7%) a purportedly defective filing was involved. Of these 130 cases, 92 (70.8%) involved a priority dispute between a putative lessor and a lien creditor (or a trustee in bankruptcy or debtor in possession), 31 (23.8%) involved a dispute with a secured creditor, 6 (4.6%) involved a dispute with a non-secured creditor purchaser, and 1 (.8%) was impossible to characterize. No distinction was made between cases concluding that the transaction involved was a true lease and those concluding that it was a secured transaction. It was assumed to be unlikely that any of the lien creditor (or trustee in bankruptcy or debtor in possession) cases involved actual creditor reliance on the leased equipment. An attempt was made to glean from the remaining 37 decisions (competing secured creditor and other purchaser cases) some indication of whether the competing parties relied on the debtor-lessee’s possession. Seven cases (5.4%) were classified as probable or possible reliance cases, and 5 (3.9%) were impossible to classify. The remaining 26 (20%) cases were classified as nonreliance cases. If the assumptions and classifications were accurate, between 5.4% and 9.3% of the cases may have involved some reliance by a third party creditor or purchaser.

The classifications were necessarily imprecise. Because actual reliance was not material to the decisions, as a legal matter, it generally was not mentioned. Moreover, certain conventions were adopted in the classification process. For example, if a competing secured creditor claimed under an after-acquired property clause, nonreliance was assumed. And, if the equipment involved was specifically mentioned in a competing secured creditor’s security agreement reliance was assumed. The attempt was made to identify reliance on the lessee’s ownership of equipment rather than such reliance caused by the lessee’s possession. As a general matter, the facts disclosed in the reports did not permit identification of reliance on possession. Further investigation of court records, business records of the parties, and interviews with the parties and counsel would, no doubt, shed additional insight. Even allowing for a reasonable margin of error in the classifications, however, it appears that the incidence of third party reliance may be slight.

Reliance by buyers of goods, as opposed to creditors, may be a more frequent phenomenon. See supra note 147.

The argument that the ostensible ownership doctrine has become obsolete and is an anachronism is less satisfying. Empirical studies of creditor and debtor behavior necessary to demonstrate that less significance is attributed to possession of goods today than in earlier times have not been developed. Moreover, the obsolescence argument assumes (i) the existence of circumstances at earlier times which led to substantial reliance on possession and (ii) that ostensible ownership concerns were and continue to be at the root of public notice requirements. Each of those assumptions is troublesome. See generally supra Part V.A.1. If the demise of ostensible ownership justifies a rejection of a filing requirement for leases today, then the argument also must acknowledge that the law was inappropriate during earlier times (i.e., prior to the demise) when ostensible ownership concerns were real, but filing for leases was not required. Have the times finally caught up with the law?

The perceived demise of ostensible ownership may provide more cogent support for arguments in other contexts, such as the temporal issue of when one becomes a “buyer” for purposes of § 1-201(9) (defining “buyer in ordinary course of business”). David Frisch has persuasively argued that neither the passing of title nor the delivery of possession of goods
ble ownership concerns would not provide any clear signal as to whether a filing requirement for leases should be adopted. Again, the Article 9 filing regime provides benefits other than curing the problem of ostensible ownership.224

Baird and Jackson argue that the ostensible ownership concerns arising from a lessee’s possession and the secret interest of a lessor are the baseline theme upon which a filing requirement for leases is justified.225 They contend that this baseline makes more sense than one which depends on locating the “ownership” or “title” inherent in the interest of a true lessor.226 But, neither theoretical model is necessarily useful in evaluating the merits of a filing requirement for leases. A presumption favoring either approach, “possession” or “title,” can create a doctrinal trap that serves to cloud, rather than illuminate, the analysis. Rather, examining various types of property claims in particular contexts may provide a more useful framework for identifying the relative merits of requiring public notice as a condition for perfecting a property interest as against claims of third parties.227

to a prospective buyer should mark the creation of “buyer” status. Frisch, Buyer Status Under the U.C.C.: A Suggested Temporal Definition, 72 Iowa L. Rev. 531, 556-67 (1987). Baird and Jackson, relying on ostensible ownership considerations, would opt for a rule that would make a buyer’s taking of possession the criterion for obtaining “buyer” status in this context. Baird & Jackson, supra note 10, at 209-12. Frisch contends that the time when a prospective buyer becomes a “buyer” should turn on when it becomes entitled to “an award of a possessory remedy” against the seller. Frisch, supra, at 570-72. The context of Frisch’s argument is that of construing the Code, a “modern” statute, in light of contemporary practices and expectations. But the lease filing issue occurs in a different context because the generally accepted norm for many, many years has been not to require public notice for leases.

224. See supra note 219; see also infra Part V.B.
225. See Baird & Jackson, supra note 10, at 186-90.
226. Id.
227. A decision to reject a filing requirement for leases does not necessarily mean that filing should not be required for certain other bailments. When goods constitute inventory in the hands of the bailee, such as in the case of “bailments for processing” or “tolling contracts,” the benefits of a filing rule might exceed those that would result from a similar rule for leases if, for example, third parties rely more on possession of inventory than possession of equipment. See White, supra note 92, at 397.

I am not suggesting that every owner of a good who puts it in the possession of a third party runs the risk of losing it to a buyer or a trustee in bankruptcy unless he files a financing statement. Courts should be concerned with the circumstances of ostensible ownership . . . I would argue . . . for most industrial equipment in a society where equipment leases are so commonplace that one should not put much store by possession of equipment. That is not true, however, for cases involving inventory and
Notwithstanding their emphasis on ostensible ownership, the proposals of Baird and Jackson for exclusions from a generally applicable filing requirement for bailments do recognize that neither a title approach nor a possession approach will in all cases indicate the wisdom of a filing rule. The exceptions that they propose are related to the relative costs and benefits of imposing a filing requirement in particular contexts. Other proponents of a filing requirement for leases would, on similar grounds, exempt certain leases from the requirement. It follows that my conceptual differences with proponents of a filing requirement for leases, whose arguments are based largely on ostensible ownership concerns, may be limited. My substantive quarrels and uncertainties arise from two basic views. First, I take a different view of the approach to various costs and benefits which might flow from imposing a filing rule on leases. Second, I remain unconvinced that either a baseline of ostensible ownership grounded on a lessee’s possession and a lessor’s “secret” interest or a baseline grounded on the location of title or ownership provides a helpful benchmark for examining the policy in question.

things like inventory. . . . Here there is little to put [a secured credit of the possessor] or other third parties on notice.

Id., see also U.C.C. § 2-326 (1987) (public notice requirements must be met for protection of interest of consignor for “sale or return,” but not in the case of consignor for “sale on approval”); infra note 308 and accompanying text. See generally supra note 17 and accompanying text.

Although I argue more generally for consideration of the context of various separations of possession and ownership as an important element of evaluating the need for a rule mandating public notice, White’s argument appears to be grounded solely on an ostensible ownership rationale. Moreover, White’s argument incorrectly assumes that ostensible ownership concerns arising out of such contexts can have a bearing, under current law, on whether a transaction is covered by Article 9. See White, supra note 92, at 396-97. Since true bailments are not covered by Article 9, and the appearances created by possession of goods are identical whether a bailment or a secured transaction is involved, ostensible ownership concerns offer no guidance as to the determination of whether a true bailment or a secured transaction exists. White’s argument may support a change in the law, but it does not support the conclusion that some true bailors are required to perfect their interests under current law merely because some bailments are perceived to create serious ostensible ownership problems.

228. See supra note 83 and accompanying text.

229. See generally supra Part III.

230. See generally infra Part VI.
B. Benefits of Article 9 Filing Rules for Secured Transactions and Leases: A Comparison

This Subpart addresses various benefits, including reductions in costs, provided by filing under the Article 9 perfection and priority scheme. These benefits are compared to those which might flow from subjecting leases of equipment to similar filing requirements. I argue that a filing requirement for leases probably would produce smaller and fewer benefits than those provided for secured transactions under existing law.

In an important conceptual sense, Article 9 does not legitimate or provide the legal basis for secured credit. To the contrary, its perfection and priority scheme establishes barriers to secured credit. The rules comprising the scheme impede a debtor and a secured party from dividing property rights so as to be effective against third parties. Property rights (i.e., security interests) transferred to or retained by a secured party may be transferred again by a debtor, and are vulnerable to claims by a debtor's creditors and purchasers, unless the Article 9 perfection and priority scheme is observed. To this extent, Article 9 clearly overrides the principle of nemo dat quod non habet—one cannot give what one does not have.

Concepts aside, however, this characterization is distorted in an historical sense. Article 9 and its statutory predecessors represented an accretion of legislative “reforms” which ultimately displaced centuries of judicial and legislative rigidity and hostility toward nonpossessory security interests. Such a hostile environment did not and does not generally prevail in the case of leases and other bailments. It is more appropriate, therefore, to ask why

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231. The discussion continues to focus on equipment and perfection by filing. See supra note 215. Except as otherwise noted, the discussion also continues to assume that priority rules substantially the same as those provided by Article 9 would apply to a filing requirement for leases.

As a general matter, I do not here question the need for filing rules, such as those included in Article 9, in a perfection and priority scheme for secured transactions. Although certain criticisms of the functional role of possession in that scheme have merit, see generally Phillips, supra note 16, the thrust of this discussion assumes the general satisfaction with and continued operation of the existing Article 9 rules.


233. See supra notes 205-06 and accompanying text.

234. See generally supra Part V.A.
leases should be *included* in the Article 9 perfection and priority scheme rather than why they should be *excluded*.

What are the benefits of a filing scheme for secured transactions? An essential characteristic of a security interest is the prior right in the collateral which is conferred on the secured party. A secured creditor will charge a lower interest rate on account of receiving collateral only if it can rely with relative safety on the priority of its claim. A secured creditor requires a means to determine that it will receive such priority and can do so under the Article 9 notice filing system. A viable regime for secured credit depends on the baseline, but not exclusive, rule of "first-in-time, first-in-right." A secured creditor, once it achieves priority, re-

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235. Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 *Yale L.J.* 1143, 1153, 1163-64 (1979); see also Baird, supra note 79, at 62 & n.27; Baird & Jackson, supra note 10, at 183-86; Carlson, *Rationality, Accident and Priority Under Article 9 of the Uniform Commercial Code*, 71 Minn. L. Rev. 207, 216-17 (1986). Jackson and Kronman go on to consider how the lower interest rate charged by secured creditors may not be fully offset by resultant higher interest rates charged by unsecured creditors (to account for an increased risk), thus demonstrating benefits offered by secured credit. They rely primarily on the differences in "monitoring costs" incurred by differently situated creditors. Jackson & Kronman, supra, at 1149-61. Their explanation has been criticized. See, e.g., Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. Legal Stud. 1, 9-14 (1981) [hereinafter Schwartz, *Current Theories*]; Scott, supra note 11, at 909-10. In recent years several commentators have engaged in highly theoretical discussions of the policy rationale and conceptual basis for the Article 9 perfection and priority scheme. See, e.g., Ayer, supra note 27; Baird, supra note 79; Buckley, *The Bankruptcy Priority Puzzle*, 72 Va. L. Rev. 1393 (1986); Carlson, supra; Jackson & Kronman, supra; Jackson & Schwartz, supra note 15; Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. Pa. L. Rev. 929 (1985); Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 Yale L.J. 49 (1982); Phillips, supra note 16; Schwartz, *The Continuing Puzzle of Secured Debt*, 37 Vand. L. Rev. 1051 (1984); Schwartz, *Current Theories*, supra; Scott, supra note 11; White, *Efficiency Justifications for Personal Property Security*, 37 Vand. L. Rev. 473 (1984). This commentary either deals in depth with, or is premised upon, attempts to "explain" a "theory" of secured credit and the interplay between such explanations and the Article 9 perfection and priority scheme. These recent expositions are strikingly explicit and elaborate in their treatment of the operation, effects, and rationale of the Article 9 rules as they affect the rights of secured creditors, other purchasers, and unsecured creditors. The commentary relies upon or deals with economic analyses of the "efficiency" or other justifications and explanations for the existence of secured credit.

For purposes of this discussion, the author assumes that the law will continue to bless (not prohibit) the creation of security interests which are generally enforceable "against the world."

236. See, e.g., Baird, supra note 79, at 56-57, 60, 63-64; Baird & Jackson, supra note 10, at 183-84.

237. See, e.g., Baird, supra note 79, at 64-65; Baird & Jackson, supra note 10, at 179-80; Jackson & Kronman, supra note 235, at 1182. A perfected security interest in goods
quires an assurance that, as a general matter, no subsequent conflicting claim will become senior.\textsuperscript{238} The Article 9 notice filing scheme provides a mechanism for the operation of this first-in-time principle for security interests.\textsuperscript{239}

A prospective secured creditor may receive some assurance of priority in goods upon discovering that the debtor is in possession of the goods, thereby confirming that the goods have not been pledged to a competing secured party\textsuperscript{240} or delivered to a buyer, and searching the proper filing office to ascertain the nonexistence of prior filings against the debtor covering the same collateral.\textsuperscript{241}

\textsuperscript{238} Generally is prior to the rights of later-arising lien creditors, U.C.C. § 9-301(1)(b) (1987), subsequent good faith purchasers, id. § 9-301(1)(c), and later-perfected or later-filed secured creditors, id. § 9-312(5)(a). There are, of course, exceptions. See, e.g., id. § 9-307(1) ("buyer in ordinary course of business ... takes free of a security interest created by his seller"); id. § 9-312(3) (purchase money security interest priority for inventory); id. § 9-312(4) (purchase money security interest priority for collateral other than inventory). The exceptions create more controversy than the general first-in-time rule. See, e.g., Jackson & Kronman, supra note 235, at 1167-75 (explaining justifications for purchase money priority rules); Scott, supra note 11, at 961-63 (criticizing Jackson and Kronman explanations and offering other explanations).

Perceptions of the function and importance of the first-in-time principle may vary depending on whether a priority contest exists between a secured creditor and a lien creditor, between a secured creditor and a purchaser other than a secured creditor, or between secured creditors inter se.

\textsuperscript{239} David Carlson has observed, accurately, that the Article 9 scheme does not strictly embrace the principal of first-in-time, since that label is more properly descriptive of the time of acquisition of rights in property. The Article 9 scheme is better described as a first-to-perfect system. See Carlson, supra note 235, at 212 & nn.14, 15. To be even more precise, if perfection is achieved by filing, then the time of filing generally will be used for priority purposes as between secured parties. See U.C.C. § 9-312(5)(a) (1987).

\textsuperscript{240} See U.C.C. § 9-305 (1987) (security interest in goods may be perfected by possession); id. § 9-312(5)(a) (security interest perfected by possession is senior to security interest subsequently perfected by filing). If the property is intangible, such as accounts, then the debtor's possession is not material. See id. § 9-302(1)(a); id. § 9-305 (perfection of security interest in accounts only by filing and not possession).

\textsuperscript{241} This process would involve determining the correct name of the debtor, the relevant state's law which governs perfection, and the proper filing office or offices in such state. See U.C.C. § 9-103 (1987) (choice of law rules for perfection of security interests in multiple state transactions); id. § 9-401 (place of filing). Other issues may be subsumed in such determinations, depending on a determination of the type of goods involved, such as the period of time during which the goods have been located in a particular jurisdiction or the location of the debtor. See id. § 9-103(1)(d) (four-month grace period for reperfection when goods already subject to security interest are brought into state); id. § 9-103(3)(a) & (b) (location of debtor determines law applicable to perfection when collateral is mobile goods); id. § 9-103(3)(e) (four-month grace period for reperfection when debtor changes its location to another jurisdiction); see also Harris, supra note 124, at 212-13 & nn.143-45.
Similarly, other interested persons (prospective buyers and unsecured creditors, for example) may benefit from a filing system which discloses the existence of potential prior claims to personal property.\textsuperscript{242} Thus, one benefit of the Article 9 filing regime is that it provides information to interested third parties who desire to uncover potential claims to the property of a debtor.\textsuperscript{243} If requiring filing for purposes of perfection and priority of security interests is the least costly way to provide such information, then the costs of discovering the information and the risks of nondiscovery imposed on third parties who desire the information are reduced by the filing regime.\textsuperscript{244}

It follows that imposing a filing requirement for leases would allow interested third parties to discover the interest of a lessor by searching the files. A clean filing search \textit{coupled} with verification of the debtor’s possession of goods, would provide a prospective secured creditor, purchaser, or unsecured creditor with assurance that either the goods were not leased or, if they were, that the lessor would be unperfected.\textsuperscript{245} This benefit is \textit{qualitatively} the same as that provided by the perfection requirements for secured transactions under Article 9.\textsuperscript{246} The proponents of a filing requirement

\begin{itemize}
\item \textsuperscript{242} See infra text accompanying notes 289-91, 299-302.
\item \textsuperscript{243} See Baird, supra note 79, at 57-59, 62-66.
\item \textsuperscript{244} See Baird & Jackson, supra note 10, at 183-84.
\item \textsuperscript{245} This assurance of freedom from claims would extend only to security interests created by the debtor and claims of lessors of goods to the debtor, not to claims of the debtor’s predecessors in interest or security interests created by them. For example, the goods might be stolen or some other defect in the debtor’s title might exist.
\item \textsuperscript{246} Baird and Jackson make a similar point: “The subsequent creditor’s need for this information is in no way diminished by the fact that the earlier interest was acquired through a bilateral agreement that had the attributes of a lease. Therefore, these attributes should not affect the filing requirement.” Baird & Jackson, supra note 10, at 188.
\end{itemize}

It has been argued that financial statements prepared in accordance with generally accepted accounting principles (GAAP) should be sufficient to protect creditors and purchasers from being misled by “secret” interests of secured parties of and lessors to a debtor or lessee. E.g., Helman, supra note 16, at 39-30. Others disagree. See, e.g., Phillips, supra note 16, at 39-41. In the case of leases, the existence of material leases should be disclosed in financial statements prepared in accordance with GAAP. See generally Dieter, Stewart & Underwood, supra note 20, ch. 4. On the other hand, many lessees do not prepare financial statements in accordance with GAAP. And transactions which occur in the gap between the time of preparation and dissemination of financial statements and the time of preparation and dissemination of subsequent periodic statements would not be reflected. It certainly must be true that financial statements place many purchasers and creditors on notice that some of a debtor-lessee’s property is subject to security interests or leases. But, as a general matter, reliance on financial statements would appear to be a poor substitute for filing.
for leases generally have recognized this benefit and have concluded that it sustains the argument in favor of a filing requirement for leases.

Such a narrow approach, however, is flawed. In three respects it fails to take into account, attempt to compute, and compare the aggregate net benefits.²⁴⁷ First, the informational benefits of a lease filing requirement might be quantitatively less than the benefits resulting from the existing filing requirement for secured transactions. For example, it may be easier and less costly for third parties to discover that goods are leased than it would be for third parties to discover the existence of a security interest in the absence of a filing requirement.²⁴⁸ Second, there may be other benefits provided by the filing requirement for secured transactions that are greater than those that would result from a filing requirement for leases.²⁴⁹ Third, the costs to lessors, lessees, and third parties of imposing a filing requirement may exceed the costs resulting from the existing perfection requirements for secured transactions.²⁵⁰ The wisdom of mandating filing for leases is not demonstrated merely by identifying one perceived benefit—information—which would be substantially identical to the benefit resulting from the perfection and priority rules applicable to secured transactions. Otherwise, the logical extension of the argument would be the imposition of a comprehensive title registration scheme for all forms of personal property.²⁵¹ Most would agree, however, that the cost of such a scheme could not be justified by the benefits.²⁵²

The remainder of this Subpart addresses the first and second categories of possible differences in benefits—differences in reduc-

²⁴⁷. Baird and Jackson consider the net benefits of imposing a filing requirement on non-secured transaction separations of possession and ownership in the context of exceptions to the general rule of filing. Baird & Jackson, supra note 10, at 190-94. But they proclaim that the inherent bilateral differences between leases and secured transactions have no impact on the benefits to be obtained and imply that the costs, similarly, would not be affected by such bilateral distinctions. Id. at 186, 188, 190.
²⁴⁸. See infra text accompanying notes 257-86.
²⁴⁹. See generally infra text accompanying notes 260-88.
²⁵⁰. Costs of a filing requirement for leases and the accompanying priority rules are discussed supra Part IV and infra Part VI.
²⁵¹. With the exception of certain specialized types of property, such schemes are unknown for personal, as opposed to real, property. See Baird & Jackson, supra note 79, at 306-07.
²⁵². Id.
tion of discovery costs and other, greater benefits—between a proposed lease filing requirement and the filing requirement applicable to secured transactions.

1. Information: Reduction of discovery costs.—Under existing law, an interested person who wants to discover conflicting claims to a debtor's goods may search the public records for the existence of financing statements covering the goods. Once the appropriate records are identified and inspected, the searcher will learn whether a secured creditor of the debtor might claim an interest in the goods. But even if a debtor is in possession of goods and no filings are found, an interested person nevertheless must conduct further investigation to determine the nature and existence of conflicting claims to the goods. Such investigation is necessary even in order to determine the appropriate filing office to be searched.

As a general matter, the Article 9 scheme extends only to whatever rights in the goods which the debtor might have. The nature and extent of the debtor's rights must be divined from the debtor or other sources.

The investigation by an interested person might reveal that the goods are leased. For example, a lessee, when asked by an interested person, may disclose the existence and particulars of the lease. Of course, a debtor, when asked, also could reveal the existence of a security interest even in the absence of a filing system. The interested person also might discover the existence of a lease by searching the Article 9 files, if the lessor had filed a precautionary financing statement.

253. See supra note 241.

254. A filed financing statement, however, will not confirm whether the secured party in fact claims a security interest. "A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." U.C.C. § 9-402(1) (1987) (second sentence). Except in the case of consumer goods, a secured party is not obligated to terminate a filed financing statement after satisfaction of the secured obligations unless demanded by the debtor. Id. § 9-404(1) (second sentence). The information required to be included in an effective financing statement is rather meager. See id. § 9-402(1) (first sentence); see also Baird & Jackson, supra note 79, at 308-09.

255. See supra note 241.

256. Prospective purchasers and secured creditors probably rely to a substantial extent on the debtor for such information. In some cases only naked representations by the debtor may be requested and relied upon. In other cases, evidence of the source of the debtor's title, such as invoices or bills of sale, may be examined and the authenticity of such evidence may be verified with predecessors in the chain of title. This might require additional Article 9 searches against the names of such predecessors. Such relevant information is not normally available either from searching against the debtor's correct name in the correct filing offices or from verifying that a debtor is in possession of goods.
ary financing statement in the proper office pursuant to section 9-408.\textsuperscript{257} Moreover, the interested person might request documentation to evidence the source of rights in goods held by a debtor or lessee. Unless a lessee provides fraudulent documentation and the interested person does not discover the fraud, such as by failing to verify the authenticity of documentation, the documentation normally would inform the interested person of the existence of the lease. Authentic documentation would show that the lessee is not an owner of the goods, as well as the existence and nature of the lessor’s claim.

It is significant, however, that in most cases the receipt of authentic documentation as to a debtor’s rights would \textit{not} reveal the interest of a conflicting secured claim. An interested person investigating the source of a debtor’s title, no matter how diligent, might not be satisfied regarding the \textit{nonexistence} of a security interest granted by the debtor unless the interested person relied on the debtor’s assurances or could rely on the absence of any conflicting public filing. The debtor’s title documentation would look the same whether or not the debtor had granted a security interest. But the existence of a lease as the source of a lessee’s interest is a positive, rather than a negative, fact which could be discovered by an investigation of a debtor-lessee’s source of title.\textsuperscript{258} Therefore, in many cases it is less costly for an interested person to discover the existence of a lease than it would be for a person to discover a security interest in the absence of filing. A filing requirement for leases would not reduce the costs of discovery, including risks of nondiscovery, to as great an extent as the existing filing system reduces the costs of discovering security interests. Stated other-

\textsuperscript{257} The information function of the Article 9 perfection scheme is fully satisfied when a filing is made regardless of whether any sanction is imposed for the failure to file.

\textsuperscript{258} The statement in the text should be qualified in two respects. First, where the evidence of title consists of documentation which itself reveals the existence of a security interest, such as in a conditional sale or when the equipment is covered by a certificate of title disclosing a security interest, then an investigation of the source of title should reveal the claim of the secured party. Second, if a lessee were a previous owner of the goods and had sold them to a lessor and leased them back, the lessee’s original evidence of title might appear regular in all respects and would not reveal the existence of the leasing arrangement. \textit{See infra} Part V.D (discussing sale-leaseback transactions). Kripke acknowledges that the point made in the text, which he attributes to Donald Rapson, has merit. Kripke, supra note 5, at 800-01. However, he argues that the same circumstances may exist in the case of a conditional sale and concludes that the argument “is insufficient to warrant a statutory interruption of the movement toward public notice of split ownership situations.” \textit{Id}. 
wise, there is a greater need for a filing requirement for secured transactions than for leases.\textsuperscript{259}

The foregoing further illustrates that except in cases of debtor misbehavior, such as a debtor's failure to reveal conflicting interests or provision of fraudulent documentation, the filing system may provide little additional information to interested persons. Many interested persons will, at a minimum, inquire as to conflicting interests. Perhaps the informational function of the Article 9 filing regime, at least in the context of prospective extensions of credit and purchases, may not be significant in fact.

2. Other, greater benefits for secured transactions.

(a) Timing and veracity: Priority ordering, discouraging fraud and collusion.—Under Article 9, the exact time of perfection or filing generally controls priority.\textsuperscript{260} In the case of equipment, perfection is virtually always accomplished by filing.\textsuperscript{261} Filing provides definite, irrefutable evidence of the baseline time on which the first-in-time priority rule will be applied. This memorialization of the relevant time, for priority purposes, serves as an "official scoreboard" that is visible and, by definition, accurate.\textsuperscript{262}

Determining priorities based on the time of public filing reduces evidentiary costs and disputes in connection with secured transactions. It eliminates the need to ascertain and prove the time at which a security agreement was signed, an advance was made, or a debtor acquired rights in collateral in order to apply the first-in-time principle.\textsuperscript{263}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{259} Searching the public files, however, might be less costly than investigating the debtor's source of title.
\item \textsuperscript{260} See U.C.C. § 9-301(1) (1987); id. § 9-312(5)(a).
\item \textsuperscript{261} See supra note 215.
\item \textsuperscript{262} See Baird, supra note 79, at 55 ("A notice-filing system ... sorts out property claims among those who have or seek property claims; its function is not to give the world at large notice of security interests." (emphasis added)); id. at 62-63 (notice filing under Article 9 similar to staking claims to mineral interests, citing Kitch, The Nature and Function of the Patent System, 20 J. Law & Econ. 265 (1977)).
\item \textsuperscript{263} See id. at 64 (other possible benchmarks for a general priority rule unsatisfactory because they would require reliance on debtor's records); see also Jackson & Kronman, supra note 235, at 1162. Perfection by possession does involve a determination of issues such as those mentioned in the text and has been criticized on this basis. Baird, supra note 79, at 64 & n.31; Phillips, supra note 16, at 20-34. But any perceived deficiencies in the rules for perfection by possession does not reduce the importance of this memorialization function of filing. Many organizations, large and small, may lack systems of recordkeeping which would facilitate determination of the exact timing of acquisition of rights in collateral, espe-
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\end{footnotesize}
Another, perhaps more significant, benefit results from a system which encourages memorializing the timing of transactions by public filing: the reduction of opportunities for fraud and collusion. The filing made in a public office ensures the veracity of the timing and the existence of a security interest by eliminating the possibility, which might exist under a "first-to-attach" rule, that a debtor and a secured party could conspire to claim that a security interest was created earlier than it actually was. The relationship of public filing to the veracity of claims to security also may explain the rule that provides priority to lien creditors over unperfected security interests.

A filing requirement for leases generally would not produce timing and veracity benefits as great as those provided for secured transactions. The timing and veracity of a lease normally would...
be easier to determine and prove than would be the timing and veracity of many secured transactions were it not for the existing Article 9 filing requirements. Unless a lessor is a manufacturer, there often will be a third party vendor involved in a leasing transaction and, consequently, some independent, verifiable paper trail will reflect the time of the lessor’s acquisition of its interest in the equipment. And the lessee will have no genuine evidence of any interest other than its interest as lessee under the lease. 267 It is also likely that documentary evidence, perhaps involving third party carriers or the like, may exist to demonstrate the time of lessee’s receipt of possession of the equipment under the lease. 268 But when a debtor grants a security interest in previously acquired equipment, there often may be no evidence of the timing of the transaction other than the agreements between the debtor and the secured party.

Under existing law, there is no timing issue for leases at all. If a transaction is a true lease, the lessor’s interest generally prevails over prior and subsequent creditors of and purchasers from the lessee. 269 Adopting a filing rule for leases at once would create a timing issue and require that the timing to be memorialized by a public filing. Moreover, it is probable that leases would not be subject to the first-to-file rule in any event, assuming a filing were made substantially contemporaneously with the leasing transaction. A purchase money-type priority rule would be appropriate for leases if a filing requirement were imposed. 270 The lessor’s

267. Sale-leaseback transactions, however, represent an exception to this point. See infra Part V.D.

268. It is customary practice for professional equipment lessors to obtain an “acceptance and delivery certificate” or the like in order to memorialize the delivery of equipment to lessees. See Bayer, supra note 122, at 166-68.

269. See supra notes 40-41 and accompanying text.

270. Most commentators have acknowledged that a “purchase money” type priority rule, similar to § 9-312(3) or (4), would be appropriate for leases if a filing requirement were imposed. Filing within 10 days after the lessee’s receipt of possession of the equipment would be necessary for lessor priority if § 9-312(4) were to be used as a model. Application of a rule based on § 9-312(3), which covers purchase money security interests in inventory, would require the lessor to file and to give notice to prior-filed secured parties prior to the lessee’s receipt of possession. See also U.C.C. § 9-301(2) (1987) (purchase money security interest perfected by filing within ten days after debtor receives possession has priority over intervening lien creditor). How would these purchase money priority rules work in the case

acquisition of goods provides adequate means to discover leases. Id. She is closer to the mark here, because she appears to recognize that discovery of leases may be easier than discovery of secured transactions. Yet, she fails to explain explicitly why this is so.
interest, then, would be superior to previously or subsequently filed or perfected security interests.

(b) Purchase money security interests.—The argument that the information, timing, and veracity characteristics of public filing provide greater benefits for secured transactions than would result from a filing requirement for leases can be criticized on the basis that it fails to take account of the treatment of purchase money security interests under Article 9. Certainly, purchase money security interests have more in common with leases than do other security interests. Purchase money security interests in equipment, however, are not excused from the Article 9 filing requirements and also are not strictly subjected to the first-to-file priority rule. And, like most leases, purchase money security interests necessarily involve the acquisition of a new asset.

This criticism is well taken. Filing does provide smaller benefits for purchase money security interests than for transfers of security interests in earlier-acquired collateral. Nevertheless, some features of purchase money security interests and leases suggest

of a lessee which never received possession of the goods (such as when a lessor or vendor delivers goods directly to a sublessee without the lessee ever obtaining possession)? Would proponents of a filing rule based on curing ostensible ownership problems be satisfied if such a lessor were not required to file? A literal application of rules such as those in §§ 9-301(2), 9-312(3), and 9-312(4) could mean that the filing necessary for purchase money priority could be delayed indefinitely, since the ten-day grace periods provided in those sections do not begin to run until the debtor receives possession of the collateral. Cf. In re Automated Bookbinding Servs., Inc., 471 F.2d 546, 552 (4th Cir. 1972) (“receives possession” as used in § 9-312(4) means the demonstration of ostensible ownership through exercise of “simple physical control,” citing 2 G. Gilmore, supra note 23, § 29.3, at 787). The same issue can arise under current law for a purchase money lender (the secured party) to an equipment lessor (the debtor) when the equipment is delivered by the vendor directly to the lessee. A purchase money security interest even might be perfected after the commencement of a bankruptcy case and nevertheless prevail over a § 544(a) avoidance claim. See Bankruptcy Code §§ 544(a), 546(b). But see Bankruptcy Code § 547(e)(2)(C) (transfer not perfected within ten days after it is effective between the parties deemed to be made “immediately before the date of the filing of the petition”). That it may seem bizarre for the late-filing purchase money secured party to be prior to competing secured parties and lien creditors, so long as it files prior to a final determination of priority, serves to undercut arguments that the Article 9 perfection and priority scheme is grounded essentially on an ostensible ownership rationale. I would argue that when purchased goods reach a state of reposer in connection with a fully consummated sale transaction, the ten-day grace period should begin to run notwithstanding that the debtor-buyer may not have received actual physical possession of the goods.

272. See id. §§ 9-301(2), 9-312(3), 9-312(4).
273. See id. § 9-107.
that a filing regime produces greater benefits in the case of purchase money security interests than would result from a filing requirement for leases. For example, in many purchase money financings the debtor receives documentation evidencing title which does not reflect the existence of the purchase money secured party. Additionally, there may or may not exist a prior-filed secured party claiming an interest in the new equipment, and even if such a prior-secured party does exist, its security interest may be extinguished subsequently by satisfaction of the secured obligation. As to all subsequent claimants, then, the purchase money secured party is like any other secured creditor, and the first-to-file rule will ensure priority. Moreover, a debtor’s “equity” in equipment subject to a purchase money security interest, even if the security interest is perfected by filing, may be put in play in the marketplace by the creation of a subordinate security interest, attachment, execution by a creditor, or other transfer of the equipment. As to subsequent claimants and transferees, filing for purchase money security interests provides benefits (information, timing, and veracity for ordering priorities) similar to those

274. This situation exists when a debtor borrows money and uses it to purchase the collateral. If the only documentary evidence of the debtor’s acquisition of the collateral is a conditional sale or similar agreement, then the debtor’s title documentation itself would be likely to reflect the secured party’s interest. But excluding conditional sales from a filing requirement would encourage parties to structure financings as conditional sales so as to avoid filing.

275. It can also be argued that Article 9 need not be taken as it is found in order to compare the relative benefits of a filing requirement for leases. Perhaps Article 9 ought not to require filing for purchase money priority as against prior-filed secured parties. That was the law prior to the Code. See Carlson & Shupack, Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code (pt. 1), 5 Cardozo L. Rev. 287, 326 & n.169 (1984); see also infra note 296. I do not attempt to sustain that argument here. Note, however, that such an approach would be inconsistent with one of the basic conceptual underpinnings of Article 9: the unification of treatment of all secured transactions that have the same economic effect without making unnecessary distinctions based on the form of the transaction or the location of “title.” See U.C.C. § 9-101 comment (“The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.”). See generally 1 G. Gilmore, supra note 23, § 9.1, at 288-94. Yet, Article 9 does contain exceptions from filing as a condition to perfection. See U.C.C. § 9-302(1)(a) (1987).

276. The equity may result from a downpayment, reduction in the secured debt, or appreciation of the equipment. A transfer of an interest in the equipment might or might not violate the debtor’s agreement with the purchase money secured party. See U.C.C. § 9-311 (1987) (“debtor’s rights in collateral may be voluntarily or involuntarily transferred ... notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default”).
provided for other secured transactions. A filing requirement for leases might provide fewer benefits. If a lease were perfected by a proper filing, then, as under current law, the lessee would have no interest to transfer or to be subjected to creditors’ claims except a leasehold interest. Leasehold interests are inherently less marketable interests than ownership interests and consequently may be less frequently put in play, especially by honest lessees, than ownership interests in equipment subject to security interests, purchase money or otherwise. Some will be unconvinced by arguments that appear to split hairs so as to distinguish between benefits provided by filing for purchase money security interests and leases. Others may argue that filing should not be required for purchase money security interests. The issue is where to draw the line.

(c) Contextual differences between secured transactions and leases.—The previous discussion in this Part illustrates some ways in which the benefits that would be achieved by a filing requirement for leases might be less significant than those which result from the existing filing requirement for secured transactions. But that discussion is incomplete. It fails to acknowledge explicitly that Article 9’s shape largely reflects patterns of credit markets rather than property markets. The discussion implicitly proceeded on the premise that the principal, if not the sole, function of the Article 9 scheme is to provide a means of ensuring a secured creditor’s prior claim to specific assets of a debtor.

Article 9 does not limit either the types of “obligations” which may be secured by a security interest in personal property or who

277. As an empirical matter, a leasehold interest in equipment probably is far less useful to a lessee’s creditors and transferpees than an ownership interest in equipment subject to a prior security interest. See id. § 2A-303(1) (lease contract may prohibit voluntary transfers; effectiveness of transfers that materially increase burden or risk to a party depends on providing specified protections to such party); id. § 2A-307(1) (creditor of lessee generally takes subject to lease contract). See generally Harris, The Rights of Creditors Under Article 2A, 39 Ala. L. Rev. 803 (1988) (this Symposium).

278. Public filing rules were slow to be adopted for conditional sales. See generally supra notes 124-26 and accompanying text. Although the ostensible ownership concerns after the delivery of goods under a conditional sale and in the case of a chattel mortgage are the same, generally the courts responded with less concern about the fraud potential of conditional sales than with the “secret” nonpossessory mortgage of goods already on hand.

279. Even if the benefits provided by filing for purchase money security interests and leases were the same, the costs of imposing a filing requirement for leases could be greater. See supra notes 124-26 and accompanying text.
may be a secured party. But it cannot be seriously questioned that security interests usually are taken by professional lenders or sellers engaged in the business of extending credit. Viewing secured transactions in the context of a credit market may provide insight into the function of the perfection and priority rules that is not provided by considering those rules either in the context of a system of ordering claims to specific property or in the context of curing ostensible ownership concerns arising from nonpossessory interests in personal property. As discussed in Part IV, secured creditors may be expected to rely less on collateral than lessors rely on the residual interest in leased goods.

A filing requirement for secured transactions may provide benefits relating to credit extension and related conveyancing aspects of the Article 9 perfection and priority rules which might not be provided by a filing requirement for leases.

Operating in conjunction with the concept of notice filing and the broad sweep of after-acquired property and future advance clauses, Article 9’s first-to-file rule may create a “situational monopoly” for a secured creditor. Aided by the first-to-file rule, an abbreviated notice filing and a security agreement entitles a secured party to obtain priority in after-acquired personal property, as well as existing personal property, to secure existing debt and future advances. The dominant, exclusive position which a secured creditor may achieve under Article 9 may be usefully characterized as the “relational” aspect of secured transactions.

280. See U.C.C. § 1-201(37) (1987) (“‘Security interest’ means an interest in personal property or fixtures which secures an obligation.”). The term “obligation” is not defined in the Code.
281. See supra text accompanying notes 118-25.
282. See U.C.C. § 9-312(5)(a) (1987); see also id. § 9-301(1)(b).
283. See, e.g., Jackson & Kronman, supra note 235, at 1167 (“Although the after-acquired property clause saves costs, it also creates what economists call a ‘situational monopoly,’ in that a creditor with a security interest in after-acquired property enjoys a special competitive advantage over other lenders in all his subsequent dealings with the debtor.” (footnote omitted)).
284. See U.C.C. § 9-204(1) (1987) (security agreement may cover after-acquired collateral); id. § 9-204(3) (secured obligations may include future advances); id. § 9-205 & comment 1 (debtor’s liberty to “use, commingle or dispose . . . of collateral” does not render security interest “invalid or fraudulent against creditors”; repealing rule of Benedict v. Ratner, 268 U.S. 353 (1925)); id. § 9-312(5)(a) (general first-to-file-or-perfect priority rule as among secured creditors); id. § 9-402 (formal requisites of financing statements).
285. See Scott, supra note 11. Scott reviews and critiques various current theories seeking to explain why secured credit exists and the benefits, if any, that it provides.
The related, but in some respects discrete, functions of information, ordering of priorities, timing, and veracity embraced by the Article 9 filing scheme serve not only to identify and evidence claims to collateral, but also to identify the existence and extent of the dominant position of secured creditors.286 Secured creditors, then, may stake claims on relationships as well as collateral.287 The user-friendly structure of Article 9 may not be so friendly to general creditors who do not hold a dominant position by virtue of secured status. But the informational attributes of the filing system may protect such creditors from such security interests just as it provides protection for secured creditors.288

principal criticism is the emphasis that such theories place upon the collateral itself is the “focal point for the creditor’s efforts to discourage asset substitutions or conversion.” Id. at 911. He also criticizes such theories for assuming that the myriad types and contexts of secured financing are subject to explanation by a single theory.

While the drafters of the Code sought to achieve some transactional efficiency by bringing these diverse patterns under a single regulatory scheme, they may have unwittingly contributed to the current uncertainty. It is unlikely that a single explanation can rationalize all of these various forms of security. Because they are attempts at comprehensiveness [sic], current analyses are vulnerable to criticism from competing visions. As a consequence, the existing literature fails to assemble and evaluate even the most rudimentary data on patterns of secured and unsecured lending.

Id. at 912. Scott examines prevailing patterns of secured credit and finds them largely consistent with a “relational theory” of secured financing. Id. at 918-19, 925-33, 958-59.

Here, Scott’s article is useful only as an example of the identification and description of the dominant relationship that a secured creditor may achieve as a result of the Article 9 priority scheme. I do not address or express any view here on whether Scott’s more refined descriptions of and hypotheses concerning creditor and debtor behavior are accurate or demonstrate economic benefits of secured credit, as he claims.

The “relational” aspect of secured credit, as I have qualified the use of that term, is not unlike the “enterprise theory,” which Leary described more than twenty years ago. See Leary, Secured Transactions, Revolution or Evolution, 22 MIAMI L. REV. 54, 62-65 (1967) (“Let others talk of the floating lien, the author prefers the ‘enterprise concept,’ the idea of a going concern or a flow of goods, or a balance-sheet asset, even if fluctuating, as security for a debt.”).

286. The meager requirements for financing statements under § 9-402 may require a searcher of the files to undertake further investigation to uncover the facts. See supra note 254.

287. This may explain some of the interest in Article 9 filings by some unsecured creditors and, thereby, the rule providing lien creditors with priority over unperfected security interests. See infra notes 300-01 and accompanying text.

288. The exceptions to the first-to-file rule, principally the purchase money priority rules of § 9-312(3) and (4), underscore the obvious point that notice of the potentially dominant position of a secured creditor is not the only function of the Article 9 filing scheme. Just as no single explanation may account for the occurrence of or the benefits provided by
It would be anomalous for features such as after-acquired property clauses and future advance clauses to be included in an lease agreement. A lessor's interest in discrete leased equipment, therefore, would not represent the same type of "threat" to a lessee's creditors that is represented by many secured financing arrangements. Lessors would not be expected to occupy the role of a dominant, relational secured creditor. Consequently, a filing requirement for leases would not provide information about a dominant relationship or a transaction possessing significant conveyancing attributes, such as after-acquired property and future advance clauses.

(d) Different effects on beneficiaries.—How would a filing requirement for leases of equipment affect the potential beneficiaries of such a requirement, assuming the general applicability of the Article 9 priority rules? A response to this question will illustrate some of the points previously made in this Part, as well as some additional points.

(i) Buyers: Non-secured creditor purchasers.—Buyers of goods in ordinary course of business would be affected very little by a filing requirement for leases. Even in the unusual situation where goods are leased to a merchant dealer in goods of that kind, such buyers would take free of the interest of a lessor to their seller. Buyers of used equipment not in ordinary course would benefit to the extent that they would take free of an unperfected lessor's interest, assuming a priority rule similar to section 9-301(1)(c) were adopted for unperfected leases. Under existing law such buyers would not take free of a lessor's interest. It is doubtful, however, that a filing rule would be worth the candle solely on the basis of protection of such buyers. Unless such a buyer were completely happy to accept the seller-lessee's creditworthiness to stand behind title warranties, buyers in such non-ordinary course transactions ought to, and probably do in

secured credit, no single explanation may account for the existence and function of the filing scheme for secured transactions.

289. U.C.C. §§ 2-403(2) & (3) (1987). Application of the priority rule of § 9-307(1) to leases would have the same effect. See id. § 2A-305(2).

290. The rule of nemo dat holds here. See id. § 2-403(1) (first sentence). Not only would a buyer who is not a buyer in ordinary course of business fail to take free of a lessor's interest, but a lessee may be restricted from voluntarily transferring its leasehold interest. See id. § 2A-303(1)(a) & (7). This is a different rule than would apply to a debtor's transfer of an interest in collateral. Id. § 9-311.
most cases, investigate the source of the seller's title.\textsuperscript{291} Such an investigation likely would reveal the existence of the lessor's interest.\textsuperscript{292}

\textbf{(ii) Secured creditors.}—Baird has argued forcefully that the principal beneficiaries of Article 9 filing are secured creditors and potential secured creditors who require information in order to be assured of priority.\textsuperscript{293} A creditor who obtains a security interest in a debtor's existing equipment would benefit from a filing rule for leases if the secured creditor failed to investigate the source of the debtor's title \textit{and} if the debtor's misbehavior deceived the secured party as to the existence of the debtor's lessor.\textsuperscript{294} Secured purchase money financiers of used equipment can make the same investigation of title as that made by non-ordinary course buyers.\textsuperscript{295}

As for lenders who claim an interest in after-acquired property, the value of after-acquired property clauses is most pronounced in the context of financing continually shifting masses of property, such as inventory and receivables, rather than in the context of financing used equipment.\textsuperscript{296} A principal value of after-

\textsuperscript{291} The statement in the text is based on personal experiences and observations of documentation and procedures employed in sales transactions and commonly rendered advice of counsel to buyers. See also Burns, \textit{supra} note 26, at 459 (arguing that because of the "unusual nature of such transactions" such buyers should rely on their own vigilance, including "external evidence of title").

\textsuperscript{292} See \textit{supra} text accompanying notes 258-59.

\textsuperscript{293} Baird, \textit{supra} note 79, at 60-62.

\textsuperscript{294} See \textit{supra} text accompanying notes 257-59.

\textsuperscript{295} See \textit{supra} text accompanying note 291. If the debtor were a buyer in ordinary course of business, the purchase money financer would be sheltered from claims of the seller's secured creditors or a lessor to the seller to the same extent as the debtor. See \textit{supra} note 289 and accompanying text.

\textsuperscript{296} See U.C.C. § 9-204(1) comment 2 (1987); see also Hawkland, \textit{Consignments Under the U.C.C.: Sales or Security?}, U.C.C. \textit{COORDINATOR} 395, 412-13 (1963); Jackson & Kronman, \textit{supra} note 235, at 1166-67. Some commentators have argued that this phenomenon suggests the propriety of applying a "transactional" filing rule, rather than the Article 9 presumption favoring notice filing, for collateral other than inventory, receivables, and the like. See Coogan, \textit{Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"} 72 \textit{HARV. L. REV.} 838, 879-80 (1959); Jackson & Kronman, \textit{supra} note 235, at 1180-82.

Baird and Jackson argue that the law should condition purchase money priority in equipment on the giving of notice to a prior-filed secured party, as is now required for purchase money priority in inventory. \textit{Compare} U.C.C. § 9-312(3) (1987) \textit{with id.} § 9-312(4). See Baird & Jackson, \textit{supra} note 10, at 194-96. Apparently they perceive that secured creditors claiming after-acquired equipment place such reliance on equipment that negative covenants of debtors do not provide sufficient protection. Remarkably, they base their argu-
acquired property clauses covering equipment may lie in the relational function of security rather than secured creditor reliance on collateral value of equipment that a debtor may acquire from time to time. ¹²⁹⁷ Empirical investigation might demonstrate that the chief benefit of a filing rule for leases, insofar as secured creditors of lessees claiming under after-acquired property clauses are concerned, would be only the prospect for an unexpected "windfall" when a lessor fails to file or makes a defective filing. ²⁹⁸

In sum, it is plausible that the principal effects of a filing requirement for leases would be to protect certain creditors who claim security interests in equipment, but fail to investigate their debtor's source of title and are deceived by their debtor's misbehavior, and to provide a windfall potential to secured creditors who claim under after-acquired property clauses.

(iii) Unsecured creditors.—It is likely that the chief impact on unsecured creditors of a filing requirement for leases would be a windfall benefit resulting from a lessor's noncompliance with a filing requirement.²⁹⁹ Although Baird acknowledges that some benef-

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¹²⁹⁷ I do not suggest that an after-acquired property clause covering accounts and inventory, for example, may not similarly place secured creditors in a dominant position. Rather, the point is that because equipment acquisitions generally are more infrequent, sporadic, and fortuitous than accounts and inventory acquisitions, from a lender's perspective creditor reliance on the collateral value of such equipment is likely to be less pronounced. See Harris, A Reply to Theodore Eisenberg's Bankruptcy in Perspective, 30 UCLA L. Rev. 327, 338 n.66 (explaining that the two-point test of Bankruptcy Code § 547(c)(5) voidable preference exception properly applies only to accounts and receivables, not equipment):

[T]hose who take equipment as collateral typically expect the original collateral to remain in the debtor's possession so that he can use it to generate income that will enable him to repay the loan. Although they may easily take a security interest in after-acquired equipment, ordinarily these lenders do not expect to rely upon it and would be protected without it.

²⁹⁸ The NCF A proposal appears to limit the effect of a lessor's failure to file to circumstances more likely to involve reliance—i.e., the priority would work only in favor of secured parties and only to the extent of advances made after the lessee came into possession. See supra notes 86-88 and accompanying text. In the absence of evidence that secured financiers generally become aware that after-acquired equipment has been acquired by their debtors, however, the possibility remains that the reliance nexus is indirect and tenuous.

²⁹⁹ The reference to unsecured creditors is intended to include lien creditors because priority over an unperfected lessor under § 9-301(1)(b) would depend on achieving that status. The "windfall" refers to the senior claim to equipment that was not relied upon by an unsecured creditor at the time credit was extended. Obviously, there is some actual reliance
efits of filing information inure to unsecured creditors, he questions whether such benefits alone would justify the costs of the filing system. But, even if unsecured creditors typically do not conduct record searches they may receive relevant information on filings indirectly, such as through credit reporting services. Empirical data relating to the impact of filings on unsecured creditor behavior and credit decisions would be useful. However, Baird probably is correct that the benefits that unsecured creditors receive from information contained in Article 9 filings are even less significant, and less direct than those afforded secured creditors. And, to the extent that unsecured creditors do rely on filings, it may suggest that the identification of dominant relational secured creditors, rather than claims to discrete goods, is paramount.

3. Conclusions.—Filing under Article 9 provides various benefits, but the nature and magnitude of the benefits differ according to the context. It is difficult to identify and isolate any overriding theme or theoretical basis for Article 9’s filing rules that applies uniformly in all contexts. Although a filing requirement for leases would seem to provide fewer and smaller benefits than filing provides for many secured transactions under existing law, the disparity is the least when leases are compared with purchase money security interests held by sellers of goods. The question is on any property levied upon once a creditor goes to the time, trouble, and expense to levy execution. See Burns, supra note 26, at 459-61.

300. Baird, supra note 79, at 60-62; see also Burns, supra note 26, at 456-57.

301. For example, standard Business Information Reports issued by Dun & Bradstreet Inc. always include information on public filings, including Article 9 filings, against the debtor covered by the report. This information provides important signals to existing and prospective unsecured trade creditors and sometimes may affect the type of credit terms extended to the debtor or even may be the basis for denying credit extensions. Telephone interview with Delaine Donohue, Senior Vice-President, Dun & Bradstreet Information Resources (July 10, 1987).

302. Baird, supra note 79, at 60-62. To the extent that benefits of the filing system for unsecured creditors are questionable, what justification exists for the § 9-301(1)(b) rule that provides priority to lien creditors, irrespective of knowledge, over unperfected security interests? Concerns about ostensible ownership do not appear to offer an explanation; it is difficult to imagine that existing or potential unsecured creditors would investigate and rely on a debtor’s physical possession of assets, especially equipment, while failing to investigate and rely, directly or indirectly, on public records. Carlson has persuasively argued that the priority rule of § 9-301(1)(b) is not justifiable on efficiency grounds alone. See Carlson, supra note 235, at 218-23. The antifraud and anticollusion function of filing may offer justifications for the rule. See supra note 265, text accompanying notes 260-70. The rule also serves to provide a definite framework for the ordering of priorities. See supra note 263 and accompanying text.
where, short of a title registration system for all interests in personal property, the line ought to be drawn.

C. Code Treatment of Consignments and Sales of Accounts and Chattel Paper: Analogues, Exceptions, or Red Herrings?

Several commentators have relied on the Code’s treatment of consignments of goods and sales of certain receivables as support for their arguments that leases should be subjected to a filing requirement.\textsuperscript{303} In both consignments and sales of receivables, the Code places the burden of giving public notice on a “real” owner of personal property at the risk of subordinating the owner’s interest to creditors. Those who question the wisdom of adopting a filing requirement for leases ought to distinguish the treatment of consignments and sales of receivables from that which would apply to leases under a filing rule or, alternatively, explain why the treatment of consignments and sales of receivables is not appropriate. This Subpart addresses the Code’s treatment and concludes that the imposition of a filing requirement for leases might produce fewer net benefits and impose greater costs than result from the public notice requirements applicable to consignments and sales of certain receivables.

1. Consignments.—The Code perpetuated the pre-Code distinction between “true” consignments and consignments which are disguised secured transactions.\textsuperscript{304} True consignments are dealt with

\textsuperscript{303} See, e.g., Baird & Jackson, supra note 10, at 189 n.46; Coogan & Boss, supra note 53, § 4.3.04(4)[a], at 4.3-45 to -46; Hawkland, supra note 46, at 114; Leary, supra note 25, at 1088.

\textsuperscript{304} Section 1-201(37) provides, in pertinent part: “Unless a [lease or] consignment is intended as security, reservation of title thereunder is not a ‘security interest,’ but a consignment in any event is subject to the provisions on consignment sales (Section 2-326).” U.C.C. § 1-201(37) (1987) (emphasis added). The bracketed language in the quotation was deleted and the italicized language was added by the 1987 Official Text. The effect of these changes was to remove leases from the operation of the sentence and to change the sentence structure slightly. No substantive change affecting consignments was made or intended. Consignments had a checkered past under pre-Code law. The use of consignments was employed both as a device to enhance marketing (i.e., the consignee was not obligated to purchase the consigned goods, at least until they are sold to a third party) and as a price fixing scheme. The demise of the latter purpose was occasioned by developments in antitrust law. Judicial treatment, even when consignments were respected in theory, tended to be unfriendly based on ostensible ownership, as well as fraud, concerns spawned by the consignor’s “secret” interest. See generally 1 G. Gilmore, supra note 23, § 3.5, at 73-75; Dolan, supra note 16, at 22-24; Duesenberg, Consignment Distribution Under the Uniform
in section 2-326, which provides that when goods are delivered for "sale or return" (i.e., "primarily for resale"), they are "subject to . . . claims [of the buyer's creditors] while in the buyer's possession." But an exception to this rule is made when public notice of the consignor's interest is given. The public notice required normally is satisfied by the filing of a financing statement as if the transaction were subject to Article 9. Thus, the treatment of consignments under section 2-326 imposes a filing requirement on bailments of goods and the sanction for noncompliance is subordination to the bailee's creditors—essentially the same result urged by proponents of a filing requirement for leases, which are another form of bailment.

The Code's present treatment of consignments does not support an argument that a filing requirement should be imposed on leases as a logical extension based on similar policy concerns. If anything, the Code treatment suggests the opposite. Section 2-326(2) expressly provides that goods delivered for "sale on approval" (i.e., "when goods are delivered primarily for use") "are not subject to claims of the buyer's creditors until acceptance." On the merits, the existing provisions of section 2-326 dealing with "sale or return" and "sale on approval" do not tend to advance the argument either for or against a filing rule for leases.


As with leases for security, consignments for security create full-fledged security interests subject to the Article 9 rules, but true consignments are generally excluded from the scope of Article 9. U.C.C. §§ 1-201(37), 9-102(2) (1987). Although true consignments are not security interests, § 9-114 does deal with the priority between a true consignor and secured creditors of the consignee. See infra text accompanying notes 318-22.

305. U.C.C. § 2-326(1) & (2) (1987). When goods are delivered for sale to a dealer in such goods the delivery is "deemed to be on sale or return." Id. § 2-326(3) (first sentence).

306. Id. § 2-326(3) (third sentence).

307. See id. § 2-326(3)(c). The public notice requirement also may be satisfied if the consignor "complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign" or "establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others." Id. § 2-326(3)(a) & (b). The dearth of sign posting laws and the uncertainty inherent in the "generally known" standard make Article 9 filing the only practical alternative for the true consignor. See, e.g., J. White & R. Summers, Handbook on the Uniform Commercial Code 883-85 (2d ed. 1980); Hawkland, supra note 46, at 109.

308. U.C.C. § 2-326(2) (1987) (emphasis added). However, the rule in subsection (2) of § 2-326 is made subject to the provisions of subsection (3), with the result that even a consignment for use, pending acceptance, will be subject to the public notice requirements if the the consignee maintains a place of business and deals with goods of the same kind.
What policies are promoted and what benefits are provided by the public notice requirements of section 2-326? The Official Comment indicates that protection is afforded in circumstances where "creditors of the buyer may reasonably be deemed to have been misled by the secret reservation" of title by the consignor. The rationale of the Comment is the ostensible ownership concern created by the consignee’s possession of the goods. Dolan has questioned the assumption that creditors rely on the consignee’s possession and has argued persuasively that the current policy rationale of section 2-326 is the protection of creditors from fraudulent practices. Whatever label or rationale is asserted as the policy justification for the filing requirement resulting from section 2-326, there are fundamental differences between true consignments and leases. These differences relate to the nature and

309. *Id.* § 2-326 comment 2.
311. Dolan has stated:

The only advantage of the pro-creditor rule [of § 2-326(2) & (3)] today is its inhibition of fraudulent practices at little cost.

At one time creditors may have relied on their debtor's stock in trade, but modern commercial lenders, beginning with the advent of open-account selling and inventory financing, stopped extending credit based on a debtor's ostensible ownership of merchandise. Today creditors either investigate that appearance or do not rely on it at all.

Modern credit practices thus have outgrown the ostensible-ownership doctrine. Creditors actually do not rely on their debtors' ostensible ownership of inventory; instead they verify that ownership with more than filing searches, rely on other collateral, or depend on the general creditworthiness of the borrower or a guarantor. *Id.* at 29-30 (footnotes omitted). Interestingly, Dolan ultimately concludes that antifraud considerations alone do not justify denial of protection to the true consignor, such as by imposing a public notice requirement, but he justifies the public notice rules of § 2-326 on the grounds that "the cost of distinguishing" the true consignment from the security consignment "is great." *Id.* at 35. But see Coogan, *supra* note 24, at 958 n.126 ("The test as to whether a consignment is a true consignment or a disguised security agreement should provide no difficulty except in establishing the bargain of the parties."). Note also that the failure to file will subordinate the true consignor's interest to all creditors of the consignee while the security consignor would be subordinated only to such creditors who have become lien creditors. Compare U.C.C. § 2-326(2) (1987) with *id.* § 9-301(1)(b). See Hawkland, *supra* note 46, at 110. Yet, this difference is of little practical significance in most circumstances because the principal means for a creditor to acquire an interest in the goods is for such creditor to become a lien creditor. See U.C.C. § 9-301(3) (1987) (defining "lien creditor"). Moreover, the consignee's trustee in bankruptcy could avoid the unfiled true consignor's interest as well as the unfiled security consignor's interest. See Bankruptcy Code § 544(a) & (b).
extent of the benefits to be derived from and the costs imposed by a filing requirement.

The consignor desires and probably expects that the goods will be sold by the consignee to a third party buyer. If and when the goods are sold, the consignor expects to receive only a payment from the consignee equal to the purchase price of the goods. The consignor’s role is similar to that of a credit seller to the consignee; after a sale to a third party, the consignor is a creditor of the consignee with respect to payment of the price of the goods. 312 The effect of a consignor’s noncompliance with a filing requirement does not result in any increase in the amount of the consignor’s claim over the amount expected to be claimed upon the sale of the goods to a third party—the purchase price. In contrast, a lessor does not expect to have a claim against the lessee for the entire value of the leased goods except upon the occurrence of unanticipated events, such as destruction or loss of the goods. 313 The lessor expects to claim only the rentals and redelivery of the goods at the end of the lease term. 314 In the event of either nonfiling or a sale of the goods to a third party, the consignor expects to lose its rights in the goods. 315 Nonfiling by a lessor (assuming a filing rule were to apply), however, would have the effect of cutting off the lessor’s expected residual interest in the goods. 316 The risks and costs of noncompliance are greater for the lessor than for the consignor. 317

Other distinguishing contextual features arise from the nature of goods consigned for “sale or return” as “inventory.” 318 Section 9-114 provides a priority rule as between the interest of the true

312. See U.C.C. § 9-114 comment 1 (1987) (“It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of such sale.” (emphasis added)).

313. See supra note 131 and accompanying text.

314. See supra text accompanying notes 112-31.

315. The typical context of consignments suggests that most buyers would be “buyers in ordinary course of business” and would take free of the consignor’s interest under § 2-403(2), just as such buyers would take free of the security consignor’s security interest under § 9-307(1).

316. See supra text accompanying notes 112-31.


318. The characterization of the goods as inventory, as defined in § 9-109(4), would not be affected by the fact that the goods owned by the consignor are in the possession of the consignee.
consignor and secured creditors of the consignee. That rule is substantially the same as the inventory purchase money priority rule of section 9-312(3). Hawkland has explained the need for filing as well as notice to prior-filed creditors in the case of purchase money financing of inventory and consignments. Because inventory, by its nature, is expected to be sold and replaced continually, secured creditors rely substantially on after-acquired property clauses to assure them of a continuously prior perfected security interest in the shifting mass of inventory. Secured party reliance on after-acquired property clauses covering more stable goods, such as equipment, is less significant. Indeed, some inventory financing may represent an example of frequent, actual reliance by secured creditors on debtors’ possession of after-acquired property. Whether or not reliance typically is placed on possession, the point remains that inventory financers have high expectations that there will be no unknown interference with their claims to shifting masses of inventory.

Finally, the shifting nature of inventory makes it difficult for existing or potential secured creditors to rely on evidence of a debtor’s source of title to inventory. Continual shipments of consigned goods might create much greater impediments to discovery of conflicting claims than normally would be expected in the case of equipment covered by leases. For this reason the filing re-

319. If the consignor files a financing statement prior to the consignee’s receipt of possession of the goods and gives notification in writing to prior-filed secured parties claiming interests in that type of goods less than 5 years prior to the consignee’s receipt of possession, the consignor will obtain priority over such prior-filed secured creditors of the consignee and “identifiable cash proceeds” from the goods. U.C.C. § 9-114(1) (1987).

320. See Hawkland, supra note 46, at 111.

321. Id.

322. See supra notes 296-99 and accompanying text. Baird and Jackson, however, favor imposing on purchase money financers of equipment a § 9-312(3)-type obligation to notify prior-filed secured parties as a condition to purchase money priority. Baird & Jackson, supra note 10, at 194-96; see supra note 296.

323. See White, supra note 92, at 397 (quoted supra note 227). The statement in the text is supported by somewhat circular reasoning since existing law induces reliance by instructing secured parties that such reliance is appropriate for inventory until such time as a notification is received from a consignor or a purchase money inventory financer. See U.C.C. §§ 9-114(1), 9-312(3) (1987).

324. See supra text accompanying notes 253-59 (discussing the effect of filing on discovery of conflicting claims and lower costs of discovering leases than discovering secured transactions in the absence of a filing requirement).
requirement for consignments provides more benefits than such a requirement for leases would provide.

2. Sales of receivables.—The Code mandates filing for certain sales of accounts\(^{325}\) and chattel paper\(^{326}\) by using a technique different than that employed for encouraging public notice of consignments. Sales of accounts and chattel paper actually create security interests that are subject to Article 9.\(^{327}\) The principal effect of subjecting sales of such receivables to the Article 9 scheme is the impact of the Article 9 filing and priority rules.\(^{328}\) In several respects the Article 9 treatment of sales of accounts and chattel paper seems to be an apt analogue for adopting a filing requirement for leases. The buyer of accounts or chattel paper is the “real” owner, and the Article 9 default and remedies provisions are inappropriate, just as with leases. Nevertheless, such sales are subject to the Article 9 perfection and priority rules.

Including outright sales of accounts within the scope of Article 9 was not a new idea.\(^{329}\) However, the exclusion from the scope of Article 9 of the outright sales of certain receivables and other intangibles is enlightening as to the Article 9 drafters’ rationale for those that are included. Article 9 was intended to cover only sales

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325. “‘Account’ means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.” U.C.C. § 9-106 (1987).

326. “‘Chattel paper’ means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods . . . .” Id. § 9-105(1)(b).

327. Id. § 1-201(37) (“The term [security interest] also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9.”); see also id. § 9-201(1). Certain security interests in and sales of accounts and chattel paper, however, are excluded from the scope of Article 9. See id. § 9-104(f). Additionally, certain assignments of accounts are excluded from the Article 9 filing requirement. See id. § 9-302(1)(e).

328. Security interests in accounts may be perfected only by filing, but security interests in chattel paper may be perfected either by filing or possession. Id. §§ 9-302(1), 9-305. Sales of receivables are largely excepted from the impact of the Article 9 default and remedy provisions. Unlike security interests that secure an indebtedness, if accounts or chattel paper, which have been sold, are collected upon or disposed of after default, the secured party (i.e., buyer) is not entitled to a deficiency claim and the debtor (i.e., seller) is not entitled to any surplus, unless otherwise agreed. Id. §§ 9-502(2), 9-504(2).

329. The same approach was employed in the pre-Code accounts receivable statutes, which generally encompassed security assignments as well as factoring transactions involving nonrecourse purchases of accounts. See 1 G. Gilmore, supra note 23, § 8.7, at 275-76, § 10.5, at 308-09; see also supra note 196 and accompanying text. Gilmore explained that omitting such sales (i.e., factoring) transactions from the accounts receivable statutes would have exposed “non-notification” assignments to attack in bankruptcy under the rule of Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434 (1943). Chattel paper, per se, was not included within the scope of such statutes, however.
of intangibles within the context of typical business financing transactions; the sales of intangibles excluded from its scope were considered not to fit that mold.\textsuperscript{330}

The functions and benefits of a filing requirement for sales of receivables reveal a pattern which is similar to that considered for consignments and conventional secured transactions securing obligations. Sales of receivables subject to Article 9 are essentially financing transactions. Money passes from the buyer-secured party to the seller-debtor, and an interest in receivables of (presumably) equal value passes from the seller-debtor to the buyer-secured party. But, rather than relying on a contractual obligation of the seller-debtor to repay the funds advanced, the buyer-secured party's "way out" is the collection of the receivables from the account debtor obligors.\textsuperscript{331} Such transactions, indeed, are extensions of credit to the seller-debtor, but the buyer-secured party relies primarily on the creditworthiness of the account debtors rather than on that of the seller-debtor.\textsuperscript{332} Thus, loans secured by such receivables vary from sales of receivables in the degree of reliance on the debtor's creditworthiness.

\textsuperscript{330} See 1 G. Gilmore, supra note 23, § 10.5, at 309 ("Article [9] was meant to apply to sales of intangibles in institutionalized financing transactions (such as factoring); the three types of transfers which are specifically excluded [by § 9-104(f)] are merely examples of 'non-financing' sales.") Section 9-104(f) excludes from the scope of Article 9:
  a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness.

U.C.C. § 9-104(f) (1987). Gilmore does not otherwise dwell on the policy rationale for such exclusions except to note that "[o]ne defect of the accounts receivable statutes was that on a literal reading many transfers would be included (and thus subjected to filing requirements) which were not financing operations, which it made no sense to file, and which no one would ever think of filing." 1 G. Gilmore, supra note 23, § 10.5, at 309.

\textsuperscript{331} Such transactions may be denominated "sales," "assignments," or "nonrecourse" or "limited-recourse" loans which limit the source of repayment to the collateral. The economic effect is the same.

\textsuperscript{332} Receivables financings are found in all shades of gray in a spectrum between clearly recourse loans secured by receivables and clearly nonrecourse sales. Coogan argued that the exceedingly difficult task of distinguishing the receivable sale from the secured loan is even more difficult than the parallel distinction between leases and secured transactions. Coogan, supra note 24, at 957-58. He concluded that this difficulty was an important justification for subjecting receivables sales to the Article 9 filing regime since the filing rule would largely reduce the need to decide the issue at the outset of a transaction. Id. at 942-47, 957-58.
Sales of receivables are both similar and dissimilar to equipment leasing transactions in ways that influence an evaluation of relative benefits of a filing requirement. The nonrecourse feature of a receivables sale means that the buyer-secured party relies less on the debtor and more on the collateral (i.e., the account debtors' creditworthiness and any collateral for their obligations) than may occur with more conventional secured loans. As earlier discussed, equipment lessors similarly, and necessarily, rely more on the equipment involved than do lenders whose interests are secured by equipment. However, it would be a mistake to conclude that a receivables buyer-secured party does not rely substantially on the creditworthiness and integrity of the seller-debtor. Unlike the typical equipment leasing scenario, the seller-debtor in a receivables sale typically generates the property (i.e., receivables) which is the subject of the transaction. Consequently, the buyer-secured party must rely on the business practices and integrity of the seller-debtor as to the quality of the receivables (such as their validity and freedom from defenses of account debtors), the warranties of the seller-debtor with respect thereto, and the creditworthiness of the seller-debtor to back up such warranties.

Assuming those warranties are complied with, the receivables buyer-secured party relies on the property involved in order to recover its investment, as does an equipment lessor. Moreover, nonfiling jeopardizes that recovery, as would be the case for nonfiling if filing were to be required for leases, assuming Article 9 priority rules were applied. But the unperfected receivables buyer-secured party is left with an unsecured damage claim against the seller-debtor in an amount which is essentially equal (ignoring discount and profit factors) to the value given to the seller-debtor.

333. See supra text accompanying notes 111-31.
334. Although this feature serves to distinguish receivables sales from equipment leases, equipment lessors also may rely on the lessee for some analogous purposes such as the maintenance and repair of the equipment. When a small number of large receivables are involved, receivables financiers may seek verification from account debtors as to the existence of the receivables and the absence of claims and defenses. See U.C.C. § 9-318(1) (1987). Receivables financiers also may require waivers of such defenses from account debtors. See id. § 9-206(1).
335. The statement in the text assumes that the receivables sold are fully collectible or, at least, of the bargained-for value. Agreements for the sale of receivables invariably contain seller-debtor warranties of title and freedom from conflicting claims as well as warranties covering validity, enforceability, and the like. If an unperfected buyer-secured party is deprived of its interest in the receivables by a trustee in bankruptcy or a creditor of or
The equipment lessor's claim, however, might be substantially in excess of the value transferred to the lessee—the right to use the equipment during the lease term.\(^{336}\) Also, if the receivables sale transaction works out as expected, the receivables will be gone (i.e., collected) at the end of the day. The essence of leasing transactions, however, is the existence of the equipment's residual value for the lessor at the end of the term. Again, a lessor's investment in equipment may be subjected to a greater degree of risk, and cost, in the event of nonfiling or defective filing than presently exists for a receivables buyer-secured party.\(^ {337}\)

There are other differences between receivables sales and leases which bear on the relative costs and benefits of a filing rule. First, as with most secured transactions, a receivables transaction begins with property owned by the debtor and, indeed, normally generated, through sales or services or extensions of credit, by the debtor. An investigation by a prospective lender or purchaser as to conflicting claims to the receivables, such as accounting records, invoices, or the like, would not be likely to uncover the nonexistence of a prior transfer of the receivables by a less than honest debtor, especially if the account debtors had not been notified by a prior transferee.\(^ {338}\) The costs of discovery of competing claims, then, is greater for receivables than for equipment, in the absence of a filing rule.\(^ {339}\) Second, because assignments of receivables that are subject to the Article 9 filing rules take place exclusively in the financing credit context, the risk that such rules would affect nonprofessionals adversely may be slight when compared to such risks in the context of leases of equipment.\(^ {340}\) Third, receivables often

\(^{336}\). See supra note 131 and accompanying text.

\(^{337}\). See supra text accompanying notes 112-31.

\(^{338}\). See supra text accompanying notes 257-59. However, sometimes an assignee of receivables will mark the accounting records of the assignor so as to indicate the existence of the assignment.

\(^{339}\). See supra text accompanying notes 257-59. Filing also provides other, related benefits for receivables sales, such as priority ordering and discouragement of fraud and collusion, to a greater extent than would be the case if filing were required for leases. See supra text accompanying notes 260-79; see also Coogan, supra note 24, at 944 ("[T]he priority rules of article 9, including the first-to-file rule of § 9-312(5)(a), might work poorly if sales of accounts were outside the scope of the article.").

\(^{340}\). See supra text accompanying note 141. The statement in the text assumes that a filing rule would be applicable to some nonprofessional lessors.
represent a debtor's most liquid collateral and its principal means of financing its operations. The importance of receivables as a source of financing, and the consequent importance of satisfying lenders' and purchasers' priority concerns, may justify the expanded reach of the Article 9 filing rules for receivables.\footnote{341} Finally, the operation of the first-to-file rule, especially in the absence of influence from an overriding purchase money priority rule, when considered with the importance of receivables financing, suggests that receivables financings, including sales, frequently may involve dominant, exclusive, relational secured creditors. Notice of such relationships provided by a filing rule may provide more significant benefits than would result from a filing requirement for leases.\footnote{342}

A comparison of costs and benefits of filing for receivables sales and equipment leases is especially problematic. There are no smoking guns. The principal reason given by the drafters for subjecting receivables sales to Article 9 was the difficulty of distinguishing true sales from secured sales.\footnote{343} The similar difficulty inherent in the true lease-security interest distinction would seem to cut in favor of a filing requirement for leases.\footnote{344} But that argument is incomplete. The principal benefits of filing for receivables sales also result from the commercial importance of receivables financing, the need for information about conflicting claims and assurance of priority for lenders and buyers alike, and the difficulty of discovering such claims and verifying such priority in the absence of a filing requirement. In each case, filing for receivables sales provides more benefits than filing for leases.

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\footnote{341}{See Coogan, \textit{supra} note 24, at 944. The importance of accounts financing was recognized by the drafters of the 1972 amendments to Article 9, which amended § 9-312 so as to make it clear that the priority of a purchase money security interest in inventory extends only to cash proceeds and not to other proceeds such as accounts. \textit{See} U.C.C. § 9-312(3) & (6) (1987). "Accounts financing is more important in the economy than financing the kinds of inventory that produce accounts, and the desirable rule is one which makes accounts financing certain as to its legal position." \textit{Id.} § 9-312, Reasons for 1972 Change.}

\footnote{342}{See \textit{supra} text accompanying notes 282-88.}

\footnote{343}{See U.C.C. § 9-102 comment para. 1 (1987) ("[C]ertain sales of accounts and chattel paper are brought within this Article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended.".).}

\footnote{344}{Coogan, however, argued that the Article 9 approach to sales of receivables should not be applied to leases, in part because the distinction between a true sale of receivables and a loan secured by receivables is more difficult to make than the true lease-security interest distinction. Coogan, \textit{supra} note 24, at 957-58.}
3. Summary.—The foregoing discussion identified various characteristics of both consignments and sales of receivables that indicate greater benefits and fewer risks and costs may be achieved by the existing filing requirements for such transactions than would result from mandating filing for leases of equipment. Consignments and receivables sales, when viewed in the context in which they typically occur, demonstrate characteristics that support the wisdom of a filing requirement and that are not unlike those of more conventional secured transactions.

D. Sale-Leaseback Transactions

For a variety of reasons, an owner of equipment may desire to sell the equipment and lease it back, all the while maintaining possession and use. If the leaseback is a security lease, rather than a true lease, the transaction as a whole amounts to nothing more than a loan secured by a “chattel mortgage” security interest. A consummated sale-leaseback transaction is, with one principal exception, like any other equipment lease, and what already has been stated concerning the relative costs and benefits of a filing requirement remains applicable to the sale-leaseback. The exception is that prior to the sale-leaseback transaction, unlike most equipment leases, the lessee was the owner and in possession of the equipment. Two issues are raised by this circumstance.

First, as with most secured transactions, other than certain purchase money financings, an attempt to investigate the source of the seller-lessee’s title likely would fail to uncover the sale-leaseback if the seller-lessee were less than forthcoming. The seller-lessee might well retain evidence of its original acquisition of title. Thus, a stronger case is presented for a filing requirement for leases resulting from sale-leaseback transactions than for leases

345. Cf. In re Berez, 646 F.2d 420 (9th Cir. 1981). My experience and observations indicate that a very high percentage of such leasebacks are secured transactions. The buyer-lessees are, almost invariably, financial institutions that are less likely to rely substantially on the residual value of used equipment than the residual value of new equipment.

346. See supra text accompanying notes 257-59.

347. Investigation of accounting records might uncover the transaction, but such audits would be costly and unusual in credit transactions secured by equipment. Moreover, unless a transaction was material and sufficient time had passed for it to find its way into the seller-lessee’s financial statements, normal credit investigations often would not reveal that the transaction had occurred. See supra note 246.
generally. The antifraud and anticollusion functions of filing also might be more useful in the case of sale-leasebacks than for leases generally.348

The second issue is not directly related to the Article 9 filing requirements. The remnants of Twyne’s Case349 manifested in the “vendor in possession” doctrine continue to cast a shadow over the retention of possession by sellers in many jurisdictions.350 Although few states make such retention of possession a per se avoidable fraudulent conveyance, it does create a presumption, or at least evidence, of a fraudulent conveyance in most states.351 A few states have addressed the problem by allowing some form of public notice to provide a definitive cure.352

Hawkland has argued that eliminating the spectre of the vendor-in-possession doctrine and providing certainty for buyer-lessees in sale-leaseback transactions would be significant virtues of a filing requirement for leases.353 Hawkland’s argument misses the point. It is true that if the law were changed so that leases were subject to Article 9 perfection and priority rules and if the law also were changed so that an Article 9 filing would cure the vendor-in-possession fraud risk, then the vulnerability of the lessor in a sale-leaseback transaction would be reduced and some useful information might be provided to the marketplace. But the second change in the law does not follow from or depend upon the first. The California approach,354 which provides that public notice will cure the fraud risk in sale-leaseback transactions, exists in the absence of a general filing requirement for leases. Perhaps the law ought to be that a permissive filing for leases under section 9-408 would provide conclusive protection from the vendor-in-possession fraud

348. See supra text accompanying notes 260-74.
349. 3 Coke 80b, 76 Eng. Rep. 809 (Star Ch. 1601).
350. See generally supra text accompanying notes 162-74.
354. See supra note 352.
risk.\textsuperscript{355} But the wisdom of permitting a filing to cure the risk of fraudulent conveyance avoidance in a sale-leaseback transaction does not provide support for the wisdom of a filing requirement for leases generally in other contexts.

Such a means of curing the fraud risk might have other benefits as well. An opportunity to cure the fraud risk as well as the risk of a subsequent determination that a lease is one for security would provide an increased incentive for all lessors in sale-leaseback transactions to file, although most probably file anyway. Although more filing by lessors might occur (thus providing more beneficial information), it would not be accompanied by the problematic results of coercing filing by imposing the Article 9 priority rules on all leases.\textsuperscript{356}

VI. CONCLUSION: COSTS AND BENEFITS COMPARED

A. The Approach

Any attempt to identify and quantify costs and benefits to society that might flow from a change in the law is an enormously difficult task.\textsuperscript{357} Indeed, my principal criticism of much prior commentary is not directed so much toward the conclusions reached (i.e., that a filing requirement should be imposed), but toward the surprising ease with which those conclusions were reached. Proposals to expand the Article 9 filing scheme to cover leases have not adequately identified and explored, much less balanced, the various costs and benefits of such a change in the law. Previous commentary appears to have overstated the benefits and underestimated the costs of imposing such a filing requirement. Nevertheless, I reach no firm conclusions based on consistent theoretical and empirical grounds as to whether the law should impose a filing requirement for leases.

\textsuperscript{355} Such a rule, however, would be largely superfluous in a state which had enacted Article 2A. See U.C.C. § 2A-308(3) (1987); supra notes 172, 351.

\textsuperscript{356} See generally supra Part IV.

\textsuperscript{357} Apparently, it is difficult to explain or describe what happens under Article 9. See supra note 235. It is even more daunting to contemplate and explain what the effects would be if the filing requirements were expanded.
This article does not rely on a paradigmatic model or hypothesis designed to reveal the “correct” analysis or conclusion. Because too little information is available and too many questions remain to be asked and answered, any such model or hypothesis is likely to provide inconclusive results. An information base of a

358. Baird and Jackson have proposed a microeconomic pricing model, of sorts, on a very general level: Secured creditors charge lower interest rates because they rely on specific assets and, therefore, require reliable information about competing claims to the collateral. See Baird & Jackson, supra note 10, at 183-90. See generally supra text at notes 71-81. A filing requirement for leases would enhance the reliability of such information and thereby reduce costs for secured parties and, therefore, the price of secured credit. Id. The analysis in Baird and Jackson’s model suggests, therefore, that the widespread enactment of a filing requirement for leases would result in a measurable reduction in the average interest rate charged for secured credit. Has the impact of public notice requirements as a positive instrument of anti-inflationary monetary policy been overlooked? The costs of such a filing requirement which Baird and Jackson identify are limited to those involved with a lessor’s cost of filing and otherwise dealing with the filing process. See Baird & Jackson, supra note 10, at 185-86. They acknowledge that their argument depends on empirical assumptions. Id. at 183 (quoted supra note 79). Other commentary proposing a filing requirement was even less refined and also relied essentially on the untested assumption that leases create a problem of ostensible ownership.

359. For this reason, I have sought to walk a tightrope strung above the fray of legal analysis based on economic theory and empirically based analytical techniques developed by social scientists and historians, not to mention critical legal scholarship. Yet, these and other analytical tools may be useful to any effort to reach a thoughtful policy decision.

Some take the position that economic analysis of law based on an efficiency model is invariably destined to provide inconclusive results. In the end, we can only say what every law-and-economics article ends up saying: In a world with no transaction costs, no one gives a hoot what the law is. But in a world with transaction costs, who the hell knows what is going on!

Carlson, Is Fraudulent Conveyance Law Efficient?, 9 Cardozo L. Rev. 643, 682 (1987) (arguing that fraudulent conveyance law is not efficient, but is justifiable on ethical grounds). My point is more modest. The less that is known about behavior of the players, and the less deep the inquiries about differences between the existing operation of the Article 9 perfection and priority rules and the existing and potential results of leasing with and without a filing requirement, the more likely it is that any conclusions will be inconclusive or, perhaps, wrong. See Schwartz, Current Theories, supra note 235, at 37 (concluding that efficiency justifications for existing security law are “problematic” and that “current knowledge” is insufficient to establish a normative basis to change bankruptcy priorities and calling for further research); Scott, supra note 11, at 970 (explaining that the development of a “theoretical framework” to understand secured credit requires “accumulated evidence of the actual operation of credit markets”); see also Weinberg, supra note 206. Weinberg concludes that the “efficiency criterion has proved useful in explaining the pattern of protection for legally innocent purchasers of goods that exists under American law.” Id. at 592. However, he recognizes that other issues, such as “costs of a rule change” and “public and private costs of alternative regimes,” should be considered before a conclusion is reached as to the desirability of changing the rules. Id. Of course, the likelihood that an approach to a policy question will produce inconclusive results does not mean that the analysis will not surrender valuable insights or indicate areas which might warrant further investigation.
sufficient critical mass is necessary to devise an appropriate model or hypothesis to be tested. One goal of this article is to provide an agenda relating to existing filing requirements for secured transactions, as well as for leases and other bailments, which may facilitate more rigorous exploration than has been achieved to date.

My methodology, if it can be given that label, is to identify the various likely, or reasonably possible, costs and benefits of imposing a filing requirement on leases and to compare the costs and benefits of a filing requirement for leases with those presumed to flow from the existing Article 9 rules. “Costs” and “benefits”

360. Economic analysis of law or anything else relies on assumptions which often do not exactly or even roughly replicate the real world. But economists also relax their assumptions in various contexts in order to more closely reflect the real world. See generally M. POLINSKY, AN INTRODUCTION OF LAW AND ECONOMICS 2-4 (1983); R. POSNER, supra note 125, at 15-17. Even though the complexities of the world are such that the assumptions will never be accurate or complete, the creation of any economic model for the purpose of analysis of an existing or proposed legal rule, including the art of simplifying and relaxing assumptions, requires an understanding of its operation, the players which are likely to be affected by any change, and the nature of the effects. Similarly, social scientists who investigate empirical evidence in society must develop hypotheses to be tested based on perceptions, imperfect as they may be. See, e.g., Sullivan, Warren, & Westbrook, The Use of Empirical Data in Formulating Bankruptcy Policy, 50 LAW & CONTEMP. PROBS. 195, 200 (1987) (“It is not merely important that the researcher identify the normative and empirical issues clearly. It is necessary to identify the right questions—or at least the most useful ones—in advance, so that scarce resources will not be squandered.”). It is likely that neither the other commentators nor I have a sufficient grasp of the behavioral patterns or value judgments of the players who would be affected by a filing requirement. Anecdotal observations such as mine, while useful, do not provide a substitute for employing various, more rigorous analytical tools of scholarship. See Jackson & Schwartz, supra note 15, passim. But theoretical analysis in the absence of an adequate information base is equally problematic.

361. Douglas Baird has criticized this approach because it compares the likely effects of a filing requirement for leases with those of filing requirements for all secured transactions rather than only the closest analogue of a lease, a purchase money security interest held by a seller of equipment. Letter from Douglas Baird to Charles W. Mooney, Jr., supra note 126. Baird’s criticism is fair and astute and the comparison he favors must be made. See supra text accompanying notes 271-79. But the analysis also may benefit from an appreciation that filing under Article 9 serves a variety of purposes which vary in quality and quantity depending on the context. The lease-purchase money security interest comparison Baird proposes might indicate that such security interests should not be subjected to a filing requirement under Article 9. Indeed, it would be appropriate also to explore more generally the wisdom of the existing Article 9 filing rules. If the filing rules under Article 9 are not warranted, then the argument that they should be extended to leases would be crippled. This article does not undertake that task, except to the extent that it identifies the costs and benefits of the existing rules.
mean different things to different people. For present purposes the terms “costs” and “benefits” continue to be used in a broad sense. And the assumptions are maintained that the Article 9 perfection and priority rules are generally satisfactory and likely to remain in place and that the priority rules which would accompany a filing requirement for leases would be similar to the existing Article 9 rules.

B. The Benefits

What are the benefits which might be expected to flow from a filing requirement for leases?

(i) Information: Reduction of discovery costs.

A principal benefit would be the provision of information, as is contemplated by the Baird and Jackson model. The costs to interested persons of discovering, and risks of not discovering, leases might be reduced. Since leases are easier to discover than most secured transactions, a filing requirement for leases would provide fewer benefits than filing for secured transactions. And the proponents of a filing rule for leases have not demonstrated that the costs of existing law are sufficiently significant to warrant a change. For example, a very small percentage of reported decisions appears to involve reliance creditors or purchasers who have been misled. Even if filing were required, many reliance creditors and purchasing...
ers might continue to investigate the source of a lessee’s interest in any event. 366

(ii) Timing and veracity: Priority ordering and discouraging fraud and collusion.

Although a filing requirement for leases also might discourage fraud and collusion, such benefits probably would be smaller than those provided by filing for secured transactions. 367 Sale-leasebacks are an exception. 368 Moreover, it is doubtful that a filing rule would provide material benefits in connection with the evidentiary aspects of determining priorities. 369

(iii) Reduction of true lease-security interest controversy.

A filing requirement for leases might reduce true lease-security interest characterization disputes. 370 Uncertain and vague legal rules may impose costs by making the outcome of an existing or potential dispute more difficult to predict and by encouraging costly litigation. 371 But an argument that the law should eliminate the true lease-security interest distinction for purposes of priority in order to save costs, standing alone, is absurd. 372 The argument must be that if there is some other rational basis for imposing a filing requirement, such as providing useful information to the marketplace, or if there is no rational basis for the true lease-security interest distinction in this context, then a collateral benefit would be the reduction of costs associated with determining the issue. In any event, to the extent that lessors file voluntarily under section 9-408 and to the extent that the true lease-security interest

366. Interested persons might be no less inclined to pursue such investigation, even in the face of a filing search showing no leases, so as to uncover prior owners and to search for filings against such prior owners. In those circumstances, a filing requirement would provide little additional information, except when the prospective debtor or seller provided fraudulent documentation of its source of title.

367. See supra text accompanying notes 262-70.

368. See supra note 258; supra Part V.D.

369. See supra text accompanying notes 266-68.

370. See supra note 130.

371. See, e.g., R. Posner, supra note 125, at 512-14. On the other hand, it is the very vagueness of the frontier between true leases and secured transactions that appears to encourage precautionary filing by lessors.

372. The law also might be changed to abolish the crime of murder or even to create a comprehensive title registration system for all interests in personal property. Predictability would then be enhanced and costly litigation would be reduced.
determination would be necessary for other purposes, there would be little or no reduction in costs.\^373

### C. The Costs

It seems clear enough that some benefits would result from subjecting leases to a filing requirement, even though estimating the materiality of such benefits is problematic. But the various costs which might arise as a result of a filing requirement also must be considered.

**(i) Costs of compliance.**

The most obvious costs, and the principal costs addressed by prior commentators, are costs of compliance with a filing requirement.\^374 These costs include filing fees, search fees (depending on the applicable priority rule\^375) and, in particular, the cost of deal-

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373. The true lease-security interest determination would be necessary anyway in many situations where the nature of appropriate remedies and damages on default (most priority disputes occur in the context of a default) and bankruptcy issues are involved as well as in various other contexts. See supra text accompanying notes 32-36. Determination of the amount of a lessor’s claim, and consequently determination of the true lease-security interest issue, would be necessary in the case of avoidance or priority occasioned by a lessee’s failure to file. See supra text accompanying notes 128-29.

Kripke argues that the revised § 1-201(37) will result in more predictability and, consequently, fewer instances of voluntary filing by lessors. Kripke, supra note 5, at 798; see also Cuming, supra note 40, at 258. Although the new definition is an improvement, it probably is not that good. See supra note 24 and accompanying text. Additionally, aggregate costs associated with fewer voluntary filings would be offset, at least partially, by the more clear and predictable definition. It remains anyone’s guess as to the materiality of any cost savings based on reducing the circumstances where the true lease-security interest distinction need be made for perfection and priority purposes.

374. These costs sometimes have been addressed by arguing that, as among a lessor, a lessee, and third parties, the lessor can most cheaply bear the cost of solving problems (i.e., creating benefits) by filing. See, e.g., Baird & Jackson, supra note 10, at 188-89; see also R. Posner, supra note 125, § 3.10, at 71. If the filing related costs were the only costs involved, this argument would be more persuasive. But there are other costs to consider. Posner acknowledges that the “lower-cost avoider” should not always bear the risk. In discussing the thief rule, he states:

Although [the owner] could prevent the erroneous transfer to [the good faith purchaser] at lower cost than the [the good faith purchaser] by taking greater precautions against theft, allowing [the good faith purchaser] to obtain a good title would encourage theft. . . . We do not want an efficient market in stolen goods.

375. For example, Baird and Jackson would require a lessor to notify secured parties, who previously filed on equipment, in order to acquire the equivalent of a “purchase money priority.” Baird & Jackson, supra note 10, at 195-96; see U.C.C. § 9-312(3) (1987) (purchase money priority for inventory requires similar notification); supra notes 296-97.
ing with the detail and structure of a filing and priority scheme. The apparent frequency with which many professional lessors now make routine precautionary filings under section 9-408 indicates that at least for those lessors, these costs of compliance or attempted compliance may not be significant. Presumably, however, there are some nonprofessional lessors who do not file routinely. For these lessors the educational investment necessary to comply with a filing requirement, or even to know about it, and the risks of noncompliance, would be substantial. To the extent such non-professionals would be excluded from the filing requirements, the remaining lessors subject to the requirement might be those who generally now file anyway.

(ii) Costs of noncompliance.

To lessors: A filing requirement for leases would impose costs on lessors by increasing the risk of loss from noncompliance. Under existing law the lessor who fails to file or makes a defective filing runs the risk of subordination only if the lease is characterized as a secured transaction. If a filing rule incorporating the Article 9 priority rules were imposed, a lessor would be exposed to the risk of subordination whether or not the lease would be so recast. The lessor would be exposed not only to the extent of the value transferred to the lessee (i.e., the lessee's right to use the equipment during the lease term), but also to the extent of the lessor's residual interest. Because lessors normally rely more on the equipment than secured creditors, the effects of nonperfection by lessors would be more costly than those for secured creditors.

To lessees: The increased exposure of lessors to costs resulting from a filing rule also would impose costs on lessees. A lessor's unsecured damage claim arising from third party priority or avoidance of the lessor's property interest could exceed the value ultimately conferred on the lessee or its estate. Such a claim could force the lessee to assume an involuntary obligation for the entire value of the equipment. Unsophisticated lessees may not

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376. The lessor would be compelled to determine the proper place of filing, the formal requisites of the filing, and the like. See supra note 241.
377. See supra text accompanying notes 140-42.
378. See supra text accompanying notes 114-25.
379. Id.
380. See supra note 133 and accompanying text.
381. See supra note 131 and accompanying text.
be well positioned to deal with this risk by coping with Article 9-type rules.\textsuperscript{382} Also, increased risk to lessors might be passed on to the lessees, thereby increasing the cost of leasing.\textsuperscript{383}

(iii) Additional discovery costs.

Another group of costs would flow from the operation of priority rules similar to the Article 9 rules that would, it is assumed, accompany a filing requirement for leases. These costs would be imposed on third parties, as illustrated by Example B in Part IV.\textsuperscript{384} A filing requirement for leases would require a prospective creditor or purchaser to ascertain whether equipment had ever been subject to a lease in order to determine any potential claims of secured creditors of a previous lessee. An investigation of a debtor-transferor's source of title often would not reflect whether equipment previously had been leased. These costs would offset, to some extent, benefits that third parties would receive from such a filing rule.

(iv) Costs of exclusions.

Most commentators have recognized that such a requirement would not be appropriate for all leases. But exclusions also give rise to the costs of drawing lines, unpredictability, and litigation. It is impossible to address the significance of those costs without knowing exactly what lines would be drawn.\textsuperscript{385}

(v) Institutional costs.

Some costs of a filing requirement would be widely dispersed and may be characterized as institutional or systemic costs. First, it has been argued that imposing a filing requirement for leases would add additional burdens to an already burdened, and in some states broken, Article 9 filing system, thus making the existing Article 9 regime less efficient and more risky.\textsuperscript{386} Second, any change

\textsuperscript{382} These risks would be exacerbated in the case of an unsophisticated lessee from a nonprofessional lessor.

\textsuperscript{383} From the standpoint of an aggregate cost-benefit analysis, any decrease in the price of secured credit resulting from a lease filing rule would be offset to the extent that costs resulting from increased risks to lessors are passed on to lessees.

\textsuperscript{384} See supra text accompanying note 134.

\textsuperscript{385} The lines drawn for excluded transactions might or might not be more clear than the line between true leases and secured transactions. At least the latter dichotomy can be considered with the benefit of substantial precedent and the new § 1-201(37), which may lead to increased predictability.

\textsuperscript{386} See Huddleson, supra note 5, at 674. The argument is not persuasive. The burden caused by widespread voluntary filing by lessors probably has already taken its toll. The Article 9 filing systems are in need of direct therapy. The ABA UCC Committee is studying
in law which provides for a novel approach to important commercial transactions includes enormous costs associated with drafting, consensus building, enactment, education, and maintenance of uniformity. Although Article 2A is long and complex, its changes to existing law are generally modest. The imposition of a filing requirement, especially if accompanying priority rules necessitated changes to Article 9, could even jeopardize enactment. Finally, many other issues and problems in commercial law may be in more need of attention. Given the financial and human resources available to the uniform law process at any point in time, it is important to consider the foregone opportunity costs of pursuing one project to the exclusion of another.

(ui) Variance Costs.

Some of the costs of a filing requirement for leases could be reduced by varying priority rules from those which apply to secured transactions under Article 9. Such variations would result in additional differences in treatment between secured transactions and true leases. That would reduce the benefits of a filing requirement, particularly the possible reduction of true lease-security interest disputes.

D. The Balance

I am not prepared to quantify and balance the costs and benefits of subjecting leases to a filing regime such as that provided by Article 9. Nor has anyone else done so. Previous commentators have reached conclusions on both sides of the argument, but their approaches were not thorough enough. This discussion, like other commentaries, is full of explicit and implicit empirical assumptions and intuitions concerning the way things are. Most are untested and uncertain. I have adopted the modest approach of using a helpful heuristic. I have taken the existing Code rules dealing with security interests and consignments as a baseline and compared the performance of the filing and search systems in the various jurisdictions. See Mooney, *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 Bus. Law. 1343, 1352 (1986).

387. It also would have been quite anomalous if a filing requirement had been imposed for leases but not for certain other bailments that might be viewed as even more appropriate candidates for filing. See supra notes 17, 227 and accompanying text.

388. See supra text accompanying notes 154-57.

389. See supra text accompanying notes 370-73.
the application of those rules with the application of similar rules to leases. It is comforting that some legal scholars recently have suggested that a more modest approach sometimes may be more useful and enlightening.\textsuperscript{390}

A comprehensive analysis of the relative costs and benefits of either adopting a filing requirement for leases or of continuing the existing rule should take into account many variables. Several are mentioned elsewhere in this article and most are difficult or impossible to quantify. It would be necessary to assign probabilities to the occurrence of various costs and benefits in the process of quantification.

Consideration of a plausible, but oversimplified, paradigm may be illustrative. Assume the following: (i) there exists a filing requirement for leases that generally incorporates the Article 9 perfection and priority scheme; (ii) in the absence of that filing rule, costs would be imposed (i.e., under existing law, costs are imposed) upon third parties as a class as a result of the absence of readily available information about lessors' "secret" claims; (iii) the costs to lessors as a class of minimizing such third party costs, by filing, are less than the costs to third parties as a class of minimizing their own costs by investigation; and (iv) the costs to lessors as a class of complying with filing requirements are less than the costs imposed on lessors as a class resulting from noncompliance (failure to file or defective filing)—i.e., loss or reduction of lessors' interests in leased goods. Based on these assumptions one might conclude that lessors are the lower cost avoiders. Lessors would be

\textsuperscript{390}. If these arguments are correct, then the standards for judging academic work in economics and constitutional law should be reconsidered. Perhaps the current bias in favor of brilliant, "paradigm shifting" work should be abandoned. The more pedestrian "normal science," may be the worthier endeavor.

There is a tendency today for high flying theorists to scoff at those whose work stays closer to the ground. Icarus, too, was undoubtedly scornful of pedestrianism. Farber, \textit{The Case Against Brilliance}, 70 MINN. L. REV. 917, 929-30 (1986) (footnotes omitted).

If this hypothetical confessional instinct were translated into legal scholarship, almost all the theogonies deduced from contemplating the texts of cases and statutes would disappear, to be replaced by some exceedingly modest suggestions full of self-consciousness about the difficulties of cause and effect between law and society. Although less dazzling, such a literature would constitute an advance. The assertion that laws are dictated by some overriding normative principle is paralyzing. Carlson, \textit{supra} note 235, at 208.
encouraged to file in order to avoid greater costs of noncompliance (assumption (iv)). Their costs of compliance would be less than the third parties’ costs of investigation (assumption (iii)), and such investigation would be necessary in the absence of a filing rule. These assumptions alone, however, are not sufficient to determine whether leases should be subjected to a filing requirement (i.e., whether efficiency concerns dictate that lessors, through a filing requirement, should bear the costs of eliminating the third party costs). Another assumption is necessary. Assume, for example, that (v) the costs to lessors as a class of noncompliance with a filing rule would exceed both (a) the costs imposed on third parties as a class by the absence of a filing rule and (b) the costs to third parties as a class of curing or reducing their costs by investigation. If assumption (v) were true, then lessors as a class should not be required to incur costs under a filing rule which exceed the costs which would be imposed on third parties in the absence of a filing rule. As mentioned elsewhere, it is safe to assume that some portion of the lessors would fail to file or would make defective filings. The problem, then, is one of quantification.

There is some support for a conclusion as to the wisdom of a filing requirement for leases which has not been reached by any of the commentators: Perhaps it really does not matter what the rule is. For example, the costs to third parties inherent in a lessor’s

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391. *Cf.* Harris, *supra* note 124, at 211-21 (economic analysis of priorities as between unperfected secured party and bulk buyer who fails to comply with requirements of Article 6).

392. *Supra* note 124.

393. No such quantification is attempted here. One criticism of the example is that the same analysis could be applied to secured transactions for which filing is required under current law. However, as discussed elsewhere, the consequences of nonperfection appear to be more harsh for lessors than for secured creditors. See *supra* text accompanying notes 114-25. Assuming a lease filing requirement were applicable only to professional lessors, it is reasonable to expect that approximately the same percentage of defaults would occur, and approximately the same percentage of nonperfection would occur, in the cases of secured transactions and leases alike. If this were so, then the losses incurred by lessors as a class could be expected to exceed, after adjustment for transaction amounts and volume of transactions, the losses incurred by secured parties as a result of nonperfection.

394. Scholars generally take little satisfaction in belaboring insignificant points (more correctly, points that they recognize as insignificant) and expend much effort explaining (read defending) the importance of their agendas. Perhaps this conclusion fits Farber’s prototype of a “brilliant,” but almost invariably defective, theory. See Farber, *supra* note 390. Nevertheless, it is not always easy to explain that someone may be beating a dead horse. Arguments will always arise as to whether the conduct constitutes beating, whether the animal is a horse or something else and whether the animal, whatever it is, is dead.
“secret” interest may be so slight and attenuated that prospective creditors and purchasers simply do not take them into account.\textsuperscript{395} It is also possible, but unlikely, that the various costs to lessors arising from a filing requirement would be ignored. Or the issue may be very difficult and closely balanced—one upon which reasonable scholars and lawmakers might disagree and one for which it is, and will remain, impossible to ascertain the “best” solution.\textsuperscript{396}

There are four bits of “evidence” which tend to support (or, at least, are not inconsistent with) this “who cares?” hypothesis. First, secured credit and leasing have coexisted, indeed prospered, in spite of the persistence of existing law which generally requires no public notice for leases.\textsuperscript{397} Certainly the expansion of equipment leasing in recent years has not been the death knell of credit secured by equipment.\textsuperscript{398} Second, my observations of the process

\textsuperscript{395}. See Carlson, supra note 235, at 222-23 (arguing that slight increases in prospects of recovery may be so “infinitesimally tiny” that they are “too unimportant to command attention” of lenders in pricing credit).

\textsuperscript{396}. See Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. LEGAL STUD. 43, 45 (1987):

I argue that variety in the treatment of the good-faith purchaser of stolen property can be linked to . . . the difficulty of discerning the best solution to a hard question. Societies may share the goal of minimizing the costs associated with the theft of property but may disagree over the way to achieve this goal.

To be sure, the poor (or lucky) soul who would suffer (or benefit) in a given circumstance because of the existence of one rule or the other would not be so sanguine. But such examples will always flow from line drawing in any legal regime.

\textsuperscript{397}. That is not to say that this circumstance refutes the notion that one rule or the other may be more beneficial at the margin. Rather, the selection of either rule may not produce material differences in the aggregate costs and benefits.

\textsuperscript{398}. Jackson and Kronman have argued that the principal advantage of secured credit would be lost without a generally applicable first-in-time priority rule. Jackson & Kronman, supra note 235, at 1162-63. Baird and Jackson have argued that the existence of secured credit depends on a “level of assurance of repayment that surpasses that of the unsecured creditor” and further that this assurance is provided by the Article 9 first-in-time perfection and priority scheme that is effected, in part, by the public notice perfection requirements. Baird & Jackson, supra note 10, at 179; see also Baird, supra note 79, at 62. It is apparent that the “defect” in the level of assurance that results from the general absence of a lease filing requirement has not been sufficient to eliminate the existence of secured credit. Secured business credit and equipment leasing are both commonplace.

Perhaps the Article 9 public notice-related perfection and priority rules are not essential to the existence of secured credit after all. Yet, I doubt that this is the case; the role of filing under Article 9 is quite important. See generally supra Part V.B. Alternatively, it may be that the volume of leased equipment is not substantial enough to impose material risks on secured parties. I am also skeptical of this explanation, given the staggering volume of equipment leasing during recent years. See supra note 20. More plausibly, perhaps the incidence and risks of debtor misbehavior or errors resulting in false reliance by secured parties
resulting in promulgation of Article 2A suggest to me that neither professional secured lenders nor professional equipment lessors have convincingly argued that they cannot or could not live with one rule or the other. Although the NCFA urged a filing requirement, their proposal came somewhat late in the process.\(^\text{399}\) Perhaps they would not have proposed any change in law requiring filing for leases had not the Article 2A project already been commenced.\(^\text{400}\) The American Association of Equipment Lessors strongly opposed a filing requirement for leases,\(^\text{401}\) but the apparently routine practice of voluntary filing by professional lessors may belie, at least to some extent, the strength of the opposition.\(^\text{402}\) Third, no private mechanisms have developed which would

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\(^{399}\) See supra notes 86-88 and accompanying text. Also plausible is the explanation that one reason such risks are negligible is that lessors almost always file financing statements. See U.C.C. § 9-408 (1987); supra note 46. The risk that the lessee or a third party may assert that a lease is actually a secured transaction may be sufficient to encourage filing. On the other hand, secured creditors may be engaged in routine costly investigation of the source of title to collateral so as to verify that it is not leased, and, perhaps, such investigation would not be undertaken if the only risks were defects such as a thief in the chain of title. Finally, it is also possible that the peaceful coexistence of secured credit and equipment leasing belies the seriousness of the problem—secured creditors may be routinely subjected to material losses which could be greatly reduced by a filing requirement that would lower the cost of secured credit. But this possibility does not appear likely, assuming that the reported cases involving assertions that leases were actually secured transactions provide a reliable indication. See supra note 222. All of this conjecture is difficult to sustain without empirical evidence.

\(^{400}\) Cf. Phillips, supra note 16, at 46-47 n.182: Article 9 has never rested its basic test of inclusion and exclusion of transactions on the doctrine of ostensible ownership. Rather, the basic test is that of an intention by the parties to create a “security interest.” ... For example, Article 9 does not cover “true” leases even though the debtor possesses property upon which the debtor’s other creditors might rely ... Moreover, there has been little dissatisfaction with the intention test since the Code came into widespread use some 15 years ago. If, instead, creditors relied predominantly upon what they saw, we would have expected expressions of greater dissatisfaction on the ground that the debtor’s recordation habits would make little difference to observing third parties.

\(^{401}\) See Huddleston, supra note 5, at 674.

\(^{402}\) I do not intend to suggest that the leasing industry’s opposition to a filing requirement was not serious and strongly felt, but I suspect that the opposition was overstated. The leasing industry probably would have recognized the benefits of Article 2A even with a filing requirement and would have learned to live with it. To the extent that the costs to lessors would be increased by a filing requirement such costs would, presumably, be passed on to lessees. Thus, the result might have been that leasing would have lost some of its competitive advantages over conventional secured financing. That possible result also may explain in part the NCFA support for a filing requirement.
indicate a strong need by secured lenders for additional sources of information about lessor’s “secret” interests. Voluntary filing by lessors no doubt reflects the desire for protection in the event of recharacterization of leases as secured transactions, not the desire to provide information needed by third parties. Finally, notwithstanding the careful deliberations by members of the drafting committee for Article 2A, several of whom initially were disposed toward a filing requirement, the committee remained unconvinced that a filing requirement was necessary.403

None of this “evidence” is even remotely conclusive. But it does indicate that the issue may burn more brightly for legal scholars than it does for the players affected by the status quo or who would be affected by a change in law. Perhaps there are bigger fish to fry.

E. Denouement

*It seems so simple.* Most professional lessors appear to file precautionary financing statements for leases anyway. And filing is so cheap! Would not the imposition of an Article 9-type filing requirement for leases represent a natural, reasonable next step for these commercial transactions which have, in recent years, “come of age” as important “financing” devices? After all, a lessee’s possession of goods “looks just like” a debtor’s possession. But the problem is not susceptible to a simple solution grounded on simple theoretical and historical bases. Assuming that the Article 2A drafting committee considered some of the troublesome issues treated herein, it is difficult to fault the drafters for their failure to depart from longstanding, well-settled law.

It is distressing that we know so little about the “real world” functions, effects, and operations of the existing Article 9 filing requirements. It is especially troublesome, therefore, to embrace an expansion of those requirements to other transactions beyond traditional bounds. There exist fundamental unresolved issues concerning the operation of credit markets and the role of possession of goods and the behavioral relationships between the two. The existing informational base is too thin.

403. See supra notes 42-44 and accompanying text.
Further study of bailments, including leases, provides an exceptional opportunity for gaining greater understanding of the role of filing for secured transactions under Article 9. A bailment of goods and a security interest in goods each usually involves possession by a debtor or lessee. Existing law provides a laboratory for examination of both the impact of a filing requirement and the effects of an absence of a filing requirement. Absent an adequate information base, this article has considered areas of critical comparison (i.e., reliance or nonreliance on possession, information, ordering of priorities, veracity and timing, effects of nonfiling, etc.) while filling the gaps with assumptions based on personal experience and observations, views of other observers, case law, conjecture, and intuition. This approach is more a beginning than an end. Yet, earlier treatments grounded on unproven assumptions concerning ostensible ownership and historical homilies fare no better (no matter how often repeated and revived) and, moreover, are less complete.

The process resulting in Article 2A might have been seized upon as an opportunity to explore more intensely many of the matters considered here. One reason that the process did not foster such an exploration was the failure of those who questioned the wisdom of a filing requirement for leases to explain why such a requirement would not be appropriate. This article comes too late for Article 2A. At an earlier time it might have provoked deeper and broader expositions supporting the case for a filing rule. Or its deficiencies might have prompted others to sort out better the downside to a filing requirement. It is not too late, however, for continued efforts to understand the Article 9 perfection and priority rules and the wisdom of similar public notice requirements for nonlease bailments.

The issue is closer and more difficult to assess than the earlier commentators on either side have seen it to be. Perhaps it is inevitable that strong views are easiest to embrace when the underpinnings of a position are unknown or unprovable.