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Commercial Calamities: An Introduction and Sermon

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Like most good ideas (and, gauging from reality TV, most bad ones), this symposium has its roots in someone else's innovation.[1] This knock-off was inspired by *Constitutional Stupidities, Constitutional Tragedies*, a collection of essays edited by Bill Eskridge and Sandy Levinson.[2] This collection comprises about forty essays from a galaxy of constitutional stars, each discussing pithily and wittily some constitutional provision or case that seems particularly silly, careless, or noxious. A fine idea, nicely executed, and well worth attention from the commercial lawyer in search of blended amusement and instruction. Indeed, the idea is so good that it seemed a pity to waste it on the constitutionalists, and the executive committee of the AALS Section on Commercial and Related Consumer Law agreed. Hence this symposium, in which a dozen and a half distinguished commercial law academics[3] go on the rampage, flailing away at approaches, doctrines, cases, or structures that they find irksome, perplexing, foolish, or just plain pig-ignorant. Most, to be sure, are too polite to uncase their bludgeons, variously preferring scalpels or feather pillows as their means of attack. Others show no restraint, perhaps to the relief of the reader eager to see Llewellyn's blood spattered on the pavement.[4]

Arranging these essays has been rather a challenge. With as varied a collection as this, the task is rather like choosing among a kaleidoscope's images—a slight twist, and we behold a new arrangement, as attractive as its

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[1] This is the spot for the obligatory Newton quote: "If I have seen further it is by standing on the shoulders of giants." For a combined *tour de force* and *jeu d'esprit* (thus exhausting my French vocabulary) devoted to this phrase, see—now!—ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965).

[2] CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

[3] And this author.

[4] A bit late for that, but never mind.

predecessor and, alas, as its imminent successor. We have taken modest refuge in the increasing irrelevance of arrangement; though we hope that copies of this issue will adorn the bookcases of commercial law mavens nationwide, in these days of downloading it seems more likely that readers will proceed *a la carte* rather than with our *prix fixe* meal. Still, there is something to be said for an attempt at narrative, even if ultimately factitious. The symposium is thus arranged more or less thematically in hopes that articles on common topics will illumine each other. We start with general discussions of the Uniform Commercial Code as something other than a great realist document (Professor Snyder)[5]—or, indeed, as something other than uniform, commercial, or a code (Professor Burnham)[6]. Then comes analysis of particular commercial excrescences, more or less in Code order. First in line is sales law, in which we include the general law of contract. So, then, we meet Professor Scott's demolition of *Hoffman v. Red Owl Stores*[7]—in particular, of how we use it in the academy, and how it warps our understanding of pre-contractual obligation. We find Professor Goldberg hacking away at the common understanding of another classic, *Wood v. Lucy, Lady Duff-Gordon*,[8] and the related treatment of output and requirements contracts in Article 2.[9] Professor Braucher takes on Amended Article 2's electronic commerce provisions, showing how they are at best unnecessary and at worst confusing and mischievous.[10] This portion of the symposium closes with Professor Cross's discussion of parol evidence in the CISG, and how the common understanding of the role of domestic law in this area is misguided.[11]

On to payments and then secured credit (including bankruptcy). The law of notes? A disaster, says Professor Cohen.[12] The law of NSF fees? A

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[5] Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007).

[6] Scott J. Burnham, *Is Article 2 Regulatory or Facilitatory? A Socratic Dialogue*, 68 OHIO ST. L.J. 57 (2007).

[7] 133 N.W.2d 267 (Wis. 1965); Robert E. Scott, Hoffman v. Red Owl Stores *and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007).

[8] 118 N.E. 214 (N.Y. 1917); Victor P. Goldberg, *Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-306 on Contract Interpretation*, 68 OHIO ST. L.J. 103 (2007).

[9] U.C.C. § 2-306 (2001).

[10] Jean Braucher, *Under the Surrounding Circumstances: Amended Article 2's Redundant (or Worse) Electronic Commerce Provisions*, 68 OHIO ST. L.J. 115 (2007).

[11] Karen Halverson Cross, *Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered*, 68 OHIO ST. L.J. 133 (2007).

[12] Neil B. Cohen, *The Calamitous Law of Notes*, 68 OHIO ST. L.J. 161 (2007).

disgrace, says Professor White.[13] And beyond these specific issues, Professor Maggs contends that payments law in the Code is chockablock with false promises and mistaken assumptions, containing many rules that bear no relation to the rules that actually govern payments transactions.[14] Secured credit fares no better. Professor Mooney attacks both the process that gave rise to the "consumer compromise" in Article 9 and its substance, including, as a little bonus, the text of an op-ed piece that he wrote in opposition—perforce anonymously, as he was co-reporter for the draft article.[15] Professors Plank and Schwarcz both address rights to payment in commercial law. Professor Plank takes a broad view, doubting the wisdom of placing the sale of receivables within Article 9 at all.[16] Professor Schwarcz looks particularly at a most controversial piece of litigation, *In re Commercial Money Center, Inc.*,[17] and the general topic of the automatic perfection of the sale of payment intangibles, finding both at best misguided and indeed commercially surprising and bizarre.[18] Another notorious case, *In re Spearing Tool & Mfg. Co.*,[19] incurs Professor LoPucki's wrath, as in his view it undermines the entire structure of the Article 9 filing system.[20] And Professor Rasmussen goes after the Supreme Court and its decision in *Till v. SCS Credit Corp.*,[21] in which the Court managed at once to avoid setting out a simple rule of decision and display a basic lack of commitment to the needs of commercial law.[22]

We close as we started, with some more general treatments of commercial law. Professor Hillman gives us a primer on creating commercial calamities, using Article 2's treatment of modifications as his

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[13] James J. White, *NSF Fees*, 68 OHIO ST. L.J. 185 (2007).

[14] Gregory E. Maggs, *A Complaint About Payment Law Under the U.C.C.: What You See Is Often Not What You Get*, 68 OHIO ST. L.J. 201 (2007).

[15] Charles W. Mooney, Jr., *The Consumer Compromise in Revised U.C.C. Article 9: The Shame of It All*, 68 OHIO ST. L.J. 215 (2007).

[16] Thomas E. Plank, *Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 OHIO ST. L.J. 231 (2007).

[17] Commercial Money Ctr., Inc. v. Netbank, FSB (*In re* Commercial Money Ctr., Inc.), 2005 WL 1365055 (Bankr. S.D. Cal. Jan. 27, 2005), *aff'd in part, rev'd in part*, 350 B.R. 465 (9th Cir. B.A.P. 2006).

[18] Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273 (2007).

[19] 412 F.3d 653 (6th Cir. 2005).

[20] Lynn M. LoPucki, *The* Spearing Tool *Filing System Disaster*, 68 OHIO ST. L.J. 281 (2007).

[21] 541 U.S. 465 (2004).

[22] Robert K. Rasmussen, *Creating a Calamity*, 68 OHIO ST. L.J. 319 (2007).

exemplar.[23] In contrast, Professor Boss looks to the internationalization of commercial law, which she finds potentially both a danger to domestic commercial lawmaking and a guide to its future invigoration.[24] Finally . . . well, more on the last essay later.

Now comes the hard part—to lay out the overarching themes of this *olla podrida*. The image of the kaleidoscope once again comes to mind. With so many authors writing from such different vantages, no one theme knits everything together. One can use several themes, but that achieves thematic completeness at the cost of thematic concision. Perhaps a different approach is in order. Alfred North Whitehead famously said that "all knowledge is a footnote to Plato."[25] We might adapt that slightly to our ends, saying that "all commercial law is a footnote to Llewellyn." With that in mind, I propose to take a few words of Llewellyn with which he summed up the Realist approach to law and show how these essays point to recent departures from Llewellyn's model. By doing so, perhaps we can look more broadly at how commercial calamities come into being and what we can do to avoid them, all in a manner consistent with the jural underpinnings of the Code.[26]

The text for this scholastic sermon is drawn from *The Common Law Tradition*, Llewellyn's magisterial study of appellate judging.[27] This characteristically ends with a series of untidy appendices, the second of which has the very Llewellynesque title, "Realism, the Genesis of This Book, the Treasure of the Law Reports for Behavioral Science, Things This Book Does Not Do and Some Points of Method." In this appendix Llewellyn lays out in four telegraphic phrases what he sees as the essence of Realist method: "see it fresh," "see it clean," "see it as it works," and "come back to make sure."[28] Let us consider these in sequence, relating each to the symposium contributions and drawing what lessons we may for the development of commercial law.

"*See it fresh.*" Here Llewellyn wanted us to look at legal problems as

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[23] Robert A. Hillman, *How To Create a Commercial Calamity*, 68 OHIO ST. L.J. 335 (2007).

[24] Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349 (2007).

[25] That is what Whitehead famously said. Unfortunately, it is not what he *actually* said. The quote is thus: "The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato." ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 63 (1929). Whitehead annoyingly sacrificed pith for accuracy. I prefer the bastardized version in the text, though, and there it rests.

[26] Though Professor Snyder would doubtless disagree.

[27] KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

[28] *Id.* at 510. Professor Snyder properly places three of these in the epigraph to his contribution, and a good thing, too. *See* Snyder, *supra* note 5, at 12.

though we had never seen them before. A fresh look might cause us to affirm the familiar, but it might also cause us to abandon it for a sounder, more functional approach. Llewellyn's crusade against the omnipresence of title in commercial law is a case in point.[29] Several of our calamities result from unwillingness to jettison archaic concepts or ways of thinking. Professor Cohen's attack on the law of notes, for example, rests greatly on the Code's curious continuation of commercial anachronisms in this important area. Professor Hillman's tongue-in-cheek guide on how to create a calamity uses the law of modifications as a text, in which the drafters of Article 2 sought at once to move forward and backward, with an ungainly split resulting. Professor Boss more politely shows that a fresh transnational law process has some dangers, but also some potential advantages, for American commercial law reformers.

Llewellyn's maxim remains vital, though in practice difficult to effect in commercial law. It is easier to think afresh in areas seldom relied upon, for there will be few settled expectations to upend. In commercial law any attempt at wholesale reform will likely be met with cries of "needless tinkering," to take one constant refrain from the Article 2 revision process. These cries could safely be ignored were they not sometimes merited. Statutory change can yield uncertainty, even if the change is in the end salutary, and uncertainty in turn yields cost to those who seek to plan. Moreover, even when this charge is unthinking or pretextual, it can be effective. Uniform state law is an oxymoron, and one that lends itself to manipulation by interest groups. By credibly threatening opposition and thus non-uniform enactment, an interest group can derail law reform or at least force accommodation.[30] This is particularly worrying for the U.C.C., the greatest success of the Uniform Law Commissioners and a model of uniform enactment.

On the other hand, incremental change, though easier, may give rise to ungainly and ultimately unworkable statutes. Indeed, by repairing one hole the statutory tinker may open another. The history of the "battle of the forms" provision in sales law, U.C.C. section 2-207, is an all too familiar illustration, with many hands trying to fix perceived problems and in the end

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[29] K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 165–91 (1938).

[30] A familiar point in the literature. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Christopher J.S. Termini, Note, *Return on Political Investment: The Puzzle of Ex Ante Investment in Articles 3 and 4 of the U.C.C*, 92 VA. L. REV. 1023, 1029–36 (2006).

creating a statutory disaster.[31] Even if the statute makes no mistakes, it can become unwieldy and unworkable save by the clerisy. One might point to the greatly increased length of Revised Article 9. Possibly the only way to "see it fresh" in commercial law is to harness an enlightened interest group, if such there be, in an attempt to do so.

"*See it clean.*" This maxim is related to the one above. If we are to "see it fresh" by looking at a problem without preconceptions, we are also to "see it clean" by brushing aside current legal impedimenta. Following current forms, even if they work in another context, may yield calamity. So, for example, Professor Braucher points out that bringing some, but not all, of the electronic commerce provisions from the Uniform Electronic Transactions Act into Article 2 is variously redundant and harmful, with the particular context making their adaptation at times positively mischievous. On a loftier plane, Professor Burnham shows how careless thinking about the U.C.C. can yield misconceptions, such as a hasty assumption that non-commercial transactions are outside its scope. Similarly, Professor Snyder attacks our common understanding that the Code is fundamentally a realist document, an understanding which encourages basic errors in Code analysis.

"*See it as it works.*" This may be the most important of Llewellyn's maxims when applied to the codification of commercial law. Certainly Llewellyn thought it vital that commercial law be drafted with commercial practice firmly in mind.[32] When practice departs from the statute, or when drafters ignore practice, opportunities for calamity burgeon. In this symposium, many essays turn precisely on a failure to "see it as it works." Professor Cross shows that we do not understand how parol evidence works in international transactions or across legal systems. Professor Goldberg criticizes our comprehension of how output and requirements contracts actually work. Professor Maggs points out the frequent unreality of payments law when set next to payments practice. Professor White shows how NSF charges bear no relation to the cost of collection, and how the law ignores this important imbalance. From differing perspectives, Professors Plank, Schwarcz, LoPucki, and Rasmussen shoot at the law of secured credit and bankruptcy, mainly by pointing out its ignorance of the systems undergirding the world of finance and the resulting disasters that arise when courts or lawmakers act or fail to act.

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[31] For one colorful account, see Letter from Grant Gilmore, Professor, Vermont Law School, to Robert S. Summers, Professor, Cornell University Law School (Sept. 10, 1980), *in* James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 723–25.

[32] Whether he managed this or not is another matter. For a balanced discussion of Llewellyn's aspirations and accomplishments in this vein, see WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 188–96, 313–21 (1973).

This should not be a problem with commercial law reform. One of the great virtues of the Uniform Law Commissioners is its variety. With a wide range of practitioners, judges, and academics from across the nation, it can bring many perspectives to bear on its products. For any potential problem, one would imagine that some commissioner will have pertinent experience to share with a drafting committee or the group as a whole, which ideally should cause rethinking and revision where a statute fails to take practice into account. Sometimes this does happen, even in this author's brief experience as a Commissioner. Not always, though; given the wide range of legal issues that may be implicated by a commercial statute, it is entirely possible that no Commissioner will have first-hand knowledge of how a problem works in practice. Of course, those in the affected fields have powerful incentives to bring their concerns to the drafting committees, but from the vantage of advocates, not disinterested seekers of truth.

One solution might be to give each drafting committee the resources to develop context on its own. When issues arise in committee meetings, often no one is certain what the state of the law is or whether a vivid scenario bears any relation to fact. The usual drafting committee venue—a hotel meeting room—does not lend itself to careful inquiry. The committee could ask the reporter to do research and return at the next meeting, but the reporter has a full plate merely with drafting. In any event, deferring decisions to the next meeting is a recipe for stasis. I have suggested elsewhere that greater use of electronic communication and funding for research would improve the quality of uniform laws.[33] This fits neatly within Llewellyn's preferred model, and should help make statutes more realistic (as well as more Realist).

Many of these problems are with courts, though, and there systemic solutions are harder to muster. Possibly continuing judicial education needs to take the concerns of commercial lawyers more into account, whether by introducing generalist judges to new transaction types or by bringing trends in commercial law more plainly to the attention of the bench. The specialized courts found in some jurisdictions might be another way to bring greater situation-sense, to use Llewellyn's phrase, to bear on sophisticated commercial problems.[34] (Our main specialized commercial courts, the bankruptcy courts, are, however, not immune from this sort of error, as Professor Schwarcz observes.)

"*Come back to make sure.*" This last comment is a little delphic. It may simply mean that the good Realist is careful, always checking his or her

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[33] Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 352–54 (1999).

[34] LLEWELLYN, *supra* note 27, at 60, 122, 127.

work as our grade-school teachers taught. More likely, though, it means that one cannot relax even after one has done one's work well; one must always come back to make sure that the job remains well done. Even the best laws need periodic review, lest the world pass them by at whatever cost for detours. Professor Mooney's comment fits better with the first reading; the ad hoc redrafting of Revised Article 9's consumer provisions lacked the levels of review that good uniform lawmaking would provide, and led, in Professor Mooney's view, to unfortunate results. Professor Scott's analysis of *Hoffman* and the treatment of pre-contractual obligation in Contracts courses illustrates the second point. Perhaps at one time *Hoffman* epitomized the common law's treatment of pre-contractual obligation. No longer, though. Even *Hoffman* has largely been limited to its facts in its own state, and, as Professor Scott has shown, it has proved unimportant elsewhere. Other bodies of law do give rise to pre-contractual liability, but draw far less attention in Contracts casebooks. This educational inertia—the failure to "come back to make sure" that this accurately reflects the legal world—disserves law students and thus the new generation of practitioners.

It is easy to say that those who make and study the law should constantly check themselves against both error and obsolescence. It is harder to make certain that we actually do this. Thanks to the UCC Reporting Service it is not difficult to keep abreast of the case law, and there is not so much scholarly literature that one is overwhelmed with the reading. Keeping up with changes in commerce is more of a challenge for those who do not represent those who make the changes. Possibly those of us in the academy should make more of an effort to read trade journals, legal and business alike, and attend bar conferences to keep current, just as practitioners might reasonably keep an eye on the scholarly literature. For law reform, one imagines that those affected by commercial law will let it be known if aging law stands in the way of modern practice. A more interesting, if probably undesirable, possibility is periodic review of statutes, whether by legislatures under sunset provisions or by courts, as proposed by Judge Calabresi and Senator Davies.[35] The need for stability in commercial law argues against sunset provisions, and the limited ability of courts to find facts freely argues against free revision. Periodic review by independent bodies, such as state law revision commissions or NCCUSL itself, might be salutary, and the Permanent Editorial Board for the UCC might reasonably be given the task of periodic, systematic review of the whole of commercial law.

One essay, alas, does not fit this tidy arrangement. The odd essay out—

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[35] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 204–05 (1979).

the destroyer of our classical symmetry—is, I abashedly admit, mine.[36] It is in the back so that it will mar the structure as little as possible. Perhaps fewer readers will get to it, which is probably to the good. But it does raise an issue that should worry us all, whether we are academics, judges, or practitioners: the decline of commercial law in the academy. In a way, this symposium would seem to prove the essay wrong; it fairly swarms with contributions from superb academic commercial lawyers. Nor should this be the last symposium of its kind. But the next to last? The third from last? Perhaps, for reasons best left to this symposium's ultimate crotchety effusion.

With that, we leave you to the symposium. We hope it provokes—well, some combination of laughter, annoyance, contemplation, and maybe even reform, both of commercial lawmaking and of the legal academy. Enjoy.

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[36] Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403 (2007).