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Douglas G. Baird

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Llewellyn's Heirs

*Douglas G. Baird**

Many of the ways in which we think about commercial law were foreign to lawyers trained a century ago. They grew up steeped in a world of Langdellian formalisms. A chattel mortgage, chattel trust, trust deed, and factor's lien were discrete elementary particles in the commercial law universe. Heavy reliance on concepts such as "consideration" or "title" were indispensable for any well-functioning commercial law. We can celebrate Llewellyn and his commercial code because he did so much to move us away from abstract formalisms towards the commercial world itself. But what mountains are left for us to climb? By Professor Rasmussen's account, very few. In his paper, Robert Rasmussen joins the ranks of commercial law's dreary post-lapsarians. We have learned the lessons of public choice theory and once learned they cannot be forgotten.¹ In this dark and fallen world, the uniform law process can be defended, if at all, only as the best among number of bad choices.

Professor Rasmussen ends with only a glimmer of hope. With respect to some articles of the Uniform Commercial Code, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") may be better than the alternatives. Consumer advocates and academics are likely to have a stronger voice in the uniform law process than in the state legislature. Moreover, the state legislature is not likely to function particularly well. In contrast to corporate law, there is no way to harness the forces of regulatory competition.

Jurisdictions cannot compete for commercial contracts in the same way they compete for corporate charters. Those involved in shaping uniform laws are less likely to bend to the political winds than Congress. After all, unlike elected members of Congress, those who drive the uniform law process are mere amateurs in the art of rent extraction.

In the abstract there is nothing wrong with Professor Rasmussen's call for assessing the work of NCCUSL by focusing on the art of what is possible, nor can one take issue with his qualified and begrudging support of the process. But Professor Rasmussen's account may slight what is possible in the uniform law process. Before we assess

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* Harry A. Bigelow Distinguished Service Professor of Law, University of Chicago Law School.

1. The cohort that focuses on the uniform law process as one in which the forces of public choice drive the process begins with Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).

the recent and, by Professor Rasmussen's account, unhappy experiences with statutory reform, it is worth reexamining where today's commercial scholars lie relative to Llewellyn. An interesting paradox is at work. Our own generation's giants in commercial law—scholars such as Lisa Bernstein, Robert Scott and Alan Schwartz—are at once Llewellyn's greatest critics and his true heirs. In finding fault with Llewellyn, they too often fail to understand that they stand on his shoulders. They are the ones in today's academy most concerned with how the law works in action.² By contrast, many involved in uniform law process, particularly those in the failed effort at a comprehensive revision of Article 2, have been too quick to assume that they are Llewellyn's heirs. They rely on primitive intuitions about what is "fair" in commercial law. They seem to think that casual empiricism, coupled with a high-minded cynicism about large firms and institutional lenders, tells them everything they need to know about commercial reality. Llewellyn, however, began by renouncing such smugness.

We should pay more attention to this great peculiarity of our own age, and we should begin assessing Llewellyn distinctive virtues. Understanding Llewellyn's virtues is no easy task. As Alan Schwartz has shown, Llewellyn lacked the tools in empirical methods and economic analysis that are second nature to us.³ Some of his specific ideas about commercial law were wrong. Moreover, Llewellyn himself did little to endear himself to modern readers. His off-putting prose style was a mannered mix of precious erudition and colloquialisms. It does not wear well. Equally important, his view of commercial life took shape in the first part of the last century. Robber barons and itinerant peddlers dotted the commercial landscape. Sinclair Lewis's *The Jungle*, an exposé of Chicago

2. Understanding the law in action is the essence of legal realism. See William L. Twining, *Karl Llewellyn and the Realist Movement* (1973). For Llewellyn's own account of legal realism, see Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931). By understanding the way in which merchants in particular industries interact, by exploring how market actors act in the face of imperfect information, and by examining closely the way legal rules change incentives, they (and many other fine scholars, including Professor Rasmussen himself) are set upon the same mission. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630 (1979); Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. Chi. L. Rev. 1155 (1990).

3. See Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *The Jurisprudential Foundations of Corporate and Commercial Law* (Jody S. Kraus & Steven D. Walt, eds. 2000).

meatpackers, had just appeared. Snake oil salesmen still provided doctors decent competition. The great con men were in their prime.⁴ As a result, from our vantage point, Llewellyn's account of the commercial world overemphasizes such primitive forms of mischief.⁵ We should not, however, let any of these flaws obscure Llewellyn's great strengths and his ability to harness them in the cause of law reform.

In the strategic battle to shape the law, Llewellyn took Sun Tzu to heart. He knew the terrain, he knew his enemies, and he knew himself.⁶ Over these dimensions, too many of those now engaged in law reform consistently fall short. In this paper, I review each in turn.

I. THE TERRAIN OF COMMERCIAL LAW

The common law was property-based. A reader of Blackstone will find little devoted to contracts and even less to commercial law. The problems the common law lawyer faced were in the first instance problems relating to property. Most of the problems were reduced to questions of the rights of a discrete individual against another. How does *A* convey Blackacre to *B*? Did *A* trespass upon *B*'s land? Ownership of personal property turned on whether an unbroken chain of voluntary transfers connects the current possessor with the original owner. The law of tort grew out of the writ of trespass. We ask whether *A* injured *B* or *B*'s property. The law of contract in turn grows out of tort. We understand commercial transactions by looking at *A*'s bargain with *B* against a background set of clearly defined property rights.

Among the many sins of Christopher Columbus Langdell was his failure to see that this conception of the law was much too narrow.⁷

When property rights are pre-ordained and everything else turns on the interactions of one individual with another, many important questions are never asked. As long as you assume that property rights

4. See W.T. Brannon, "Yellow Kid" Weil 293-94 (Ziff-Davis 1948); see David W. Maurer, *The Big Con: The Story of the Confidence Man and the Confidence Game* 274 (Bobbs-Merrill 1940).

5. Such an overemphasis creates a pitfall. A commercial law that begins with the assumption that in every trade one party is likely set upon cheating the other cannot serve its primary mission—promoting value-enhancing exchange between parties who act in good faith. Llewellyn, of course, did not make this mistake, but many modern academics that followed in his wake have. See Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con*, 98 Mich. L. Rev. 2716 (2000).

6. See Sun Tzu, *The Art of War*, chap. 10 (Samuel B. Griffith trans., Oxford Univ. Press 1963).

7. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 38-39 (1960) [hereinafter "Llewellyn, Common Law"].

have a predetermined shape, you never have to worry about how legal rules bring various institutions into existence. You can worry about a discrete marketplace transaction between *A* and *B* without ever asking about the legal rules that brought the market into being in the first place. Moreover, by focusing on a discrete transaction and the narrow legal rights associated with it, one never has to worry about the forces outside the law that also loom large in commercial transactions.

One of Llewellyn's great strengths lay in his understanding that commercial law must be shaped by the world in which it operates and the forces at work there.⁸ Llewellyn turned to the law merchant and focused on its rules, particularly those centered around norms that emerged in a well-functioning market.⁹ These norms imposed obligations that do not exist in the case of one-shot deals, but granted benefits as well. Llewellyn advanced an idea of good faith with a higher threshold than mere honesty in fact, but at the same time, he believed that those who met the heightened standard of good faith desired greater rights than a discrete rights-based approach would allow. To be sure, it is easy to find fault with Llewellyn's ideas about good faith. One can, for example, join Grant Gilmore and reject the idea that promoting the good faith purchaser in all his guises in fact promotes commerce.¹⁰ A balance always needs to be struck between the duties we impose on original owners and those that come later. How it should be struck is far from self-evident. Moreover, Llewellyn's conviction that protecting good faith purchasers promotes commerce in all contexts is at odds with his own belief that legal rules should be context dependent and reflect the sense of particular situations.

But in making these observations, we should not forget Llewellyn's starting place. Commercial law begins with the law merchant at the fair, not with William Blackstone, the horse trader.¹¹ Commercial law applies in the first instance to those who engage in value-maximizing exchanges that leave both parties better off. Markets do not come into being automatically. Markets themselves require regulation. The rule giving the buyer at a fair clean title notwithstanding a thief in the chain worked because the rule also

8. See Karl N. Llewellyn, *Across Sales on Horseback*, 52 Harv. L. Rev. 725, 740-42 (1939) [hereinafter "Llewellyn, *Across Sales*"]; Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 Harv. L. Rev. 873, 903-04 (1939).

9. See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan. L. Rev. 621, 624 (1975).

10. See Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code*, 15 Ga. L. Rev. 605 (1981).

11. For an account of the law merchant, see Harold J. Berman, *Law and Revolution* 333-56 (1983).

required that the goods be displayed. We may even understand some of the market offenses—such as the market crime of forestalling—as rules that ensured that goods were sold in the market at the optimal time. Without regulation, goods can be sold prematurely and to the wrong buyers. More generally, transactions in the marketplace work because there are legal mechanisms in place—from the piepowder courts to the sheriffs who ensured the king's peace—that facilitate voluntary exchange. The rules of the law merchant have to be seen against this background. Llewellyn understood well that commercial law rules themselves had to take these into account.

The implied warranty of merchantability itself emerges from the marketplace. It does not impose obligations beyond those that ordinarily emerge in the marketplace. Unless the buyer bargains for more, goods need only pass without objection in the trade. Good faith for merchants does not require that sellers to reveal their reservation price or divide the gains from trade evenly with their contracting opposites. They need only adhere to reasonable standards of fair dealing in the trade. Parties can allocate risk of loss among themselves by doing as little as putting an FOB term in their contract.

Article 2 was designed to work in a well-functioning market, a place where there are received understandings of fair dealing and ordinary course of business. The implied warranty of merchantability serves two functions. It makes it costly for sellers of shabby goods to enter the market in the first place, and it allocates responsibility among the reputable merchants who remain. The prototypical fact situation is the one we find in *Parkinson v. Lee*, a case between two traders in hops.¹² The buyer seeks to hold the seller responsible for hops that had been watered by the person from whom the seller had acquired them. The seller should bear the loss not because he behaved dishonestly, but because he was better positioned to prevent the harm and to pursue the wrongdoer.¹³

The implied warranty of title, like many of other provisions of Article 2, works in the same way. It protects buyers when their sellers, through no fault of their own, do not have good title to the goods that they are selling. It is not the law that we rely upon to punish thieves. Nor is it the law that we need to bring a cause of action against someone who sells us goods that he has stolen from someone else. Section 2-312, like the presentment and transfer warranties in Articles 3 and 4, is designed rather to pushing the responsibility for the wrong-doing up the chain so that it falls on the wrong-doer or the solvent party closest to him.

12. 2 East 314 (K.B. 1802).

13. See Karl N. Llewellyn, *Of Warranty of Quality, and Society*, 36 Colum. L. Rev. 699, 717 n.56. The case was, for this reason, wrongly decided.

Llewellyn's commercial law had modest ambitions. It sought to work within an existing landscape, rather than transform it (which it had no power to do) or pretend it did not exist. The problem is one of ensuring that commerce flourishes among honest merchants. The problems of fraud and corruption are best left to criminal sanctions and administrative regulation, and the challenge of ensuring that everyone receives a fair deal and pays a just price is one that we can realize only imperfectly. In law, as elsewhere, 95% is perfection.¹⁴

II. KNOW YOUR ENEMIES

The latest iteration of Article 9 makes it even easier for secured lenders to acquire a security interest in all of a business debtor's assets. But too many of the academic critiques of the new version rest with the observation that changes were the result of special interest lobbying on the part of secured lenders. In such a world, it is easy to wear the white hat—too easy. In the face of weak opposition, it is hard to test one's own position. Ironically, the original drafters of Article 9 had it easier. They wanted to broaden the scope of security interests in personal property. To do this, they could not avoid Louis Brandeis and *Benedict v. Ratner*.¹⁵ They were never presented with the trap that ensnared today's reformers, the trap of believing that those who disagree with them need not be taken seriously because they align themselves with Big Business and therefore must either be on the take or deluded.

Knowing and understanding the competing vision is central to understanding the law, and it is in this that today's reform-minded commercial law scholars have most conspicuously failed. They do not take the other side of the debate seriously. Too often, mere intuition substitutes for careful thought. For example, in the debate over reforming the rules governing offer and acceptance, Judge Easterbrook's opinions in *Pro-C, Inc. v. Zeidenberg*¹⁶ and *Hill v. Gateway2000, Inc.*¹⁷ were dismissed as "misinterpretations."¹⁸ Almost no effort was expended to understand the argument, its strengths and weaknesses, or the implications for law reform. One can disagree with the analysis in both opinions, but the idea that

14. Along with many others, *see, e.g.*, Richard A. Epstein, *Simple Rules for a Complex World* (1995), I owe this insight to my late colleague Walter Blum.

15. 268 U.S. 353 (1925). *See* Gilmore, *supra* note 10, at 620-29.

16. 86 F.3d 1447 (7th Cir. 1996).

17. 105 F.3d 1147 (7th Cir. 1997).

18. *See, e.g.*, Richard E. Speidel, *Revising U.C.C. Article 2: A View from the Trenches*, 52 *Hastings L.J.* 607, 616-17 (2001). This failing is hardly limited to those concerned with Article 2. Few of those who dismiss the Coase Theorem out of hand can even state it correctly.

reasoned opinions by this brilliant and eclectic judge can be ignored is just silly. In any battle, one cannot hope to succeed unless one takes one's enemies seriously. Llewellyn understood this principle too.

In putting forward his own vision of commercial law, Llewellyn's intellectual enemy was Joseph Story and, in particular, his opinion in *Swift v. Tysen*.¹⁹ As Llewellyn described it:

Story . . . chose to challenge New York, the proudly new commercial center, with a new Federal doctrine (and with that, certainly as of 1840, I have no personal quarrel). But Story chose also to rest his challenge on the quicksand of a "principle" at once horrendous as law, unnecessary to the case, and badly argued. That was bad judging. And it was lawyering so bad that a right lawyer would have mourned it through sleepless nights. It . . . laid no foundation, to produce persuasion and success in what had been an enlightened and statesmanlike ambition: to wit, to produce one dominant forum to unify the commercial doctrine of the growing, legally sprawling, Nation; to do a Marshall in commercial law.²⁰

We can revisit the facts of *Swift* briefly.²¹ Two swindlers induced George Tysen to sign a negotiable instrument as part of a fraudulent land deal. This instrument ended up in the hands of Swift. Swift, like Tysen, had been taken in by the same swindlers, but was not left high and dry. He had acquired Tysen's note from them in exchange canceling an antecedent debt just before they left for parts unknown. Hence, Swift imagined that he would ultimately be made whole. But, Tysen refused to honor the instrument when Swift presented it. He argued that Swift should enjoy against him only the rights that the swindlers had, and they had no rights against him at all. Swift argued that, as a good faith purchaser, he took the note free of Tysen's defense against the swindlers.

Swift v. Tysen began the Supreme Court's long and distinguished history as an expositor of commercial law. Llewellyn saw *Swift* as the leading alternative to his own vision of commercial law. The case is the paradigmatic commercial law dispute. Both litigants acted

19. 41 U.S. (16 Pet.) 1 (1842). Note: I have adopted the spelling that Tysen himself used and that Story used in his treatise on negotiable instruments. The reporter (Peters), however, used "Tyson" and this spelling is the one most commonly used.

20. See Llewellyn, *Common Law*, *supra* note 7, at 416.

21. The best account of the background to this case remains Tony Allan Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* 4-17 (1981).

throughout in good faith. The question turns on which should bear the loss for the harm caused by others. To answer this question, one has to identify the principles that make the most sense for the commercial world. Both Swift and Tysen were sophisticated commercial actors (a banker and a merchant respectively). Swift closer to the wrong-doers' final misdeeds and perhaps better positioned to have stopped them. But Justice Story thought the transaction needed to be placed in a larger context. People in business regularly took up negotiable instruments as security for antecedent debts. Inquiring into the actual facts and circumstances of how Swift and others took up an instrument was potentially costly. Story believed that as long as Swift was honest in fact, a court should go no further. This was an arena in which the virtues of a clear rule outweighed those of a case-by-case inquiry into particular transactions. A banker cannot stop and ask with respect to each negotiable instrument that passes his way whether he has to worry about defenses that those who have signed the instrument might have. Someone who puts his name on a negotiable instrument is bound to honor it when presented by a good faith purchaser. A legal principle that makes a holder's rights dependent on the facts and circumstances of each case, by its nature, impairs negotiability.

Llewellyn confronted Story directly. He rejected the idea that legal rules could be divorced from the context in which they operated. Indeed, a clear rule, "bereft of its reason, . . . [causes] complexity, uncertainty, injustice, and unnecessary litigation, across the country and across the years."²² The solution for Llewellyn was to insist that holders of negotiable instruments show that they acquired them in the ordinary course of their business. Judges, in his view, could extract legal principles from commercial practice. Limiting their discretion and forcing them to apply rules mechanically would not promote commerce.

Llewellyn's analysis was deep and thoughtful because he took Story seriously. By contrast, today's reformers often assume that the debate has no other side or that, to the extent one exists, it can be dismissed summarily or reduced to an abstract and indeterminate question of rules versus standards. Moreover, Llewellyn was able to carry his vision into the political arena and make compromises where necessary. He lost the battle to reverse Story in the realm of negotiable instruments.²³ With respect to its substantive holding,

22. See Llewellyn, *Common Law*, *supra* note 7, at 420-21.

23. See Llewellyn, *Common Law*, *supra* note 7, at 419-20 ("Indeed, my own effort, successful for a while, to reintroduce the 'current course' idea into the Uniform Commercial Code article on commercial paper stirred up a witch hunt almost like that of Brandeis against *Swift v. Tyson*.").

Swift v. Tysen remains good law.²⁴ An antecedent debt counts as value for purposes of qualifying as a bona fide purchaser, and there is no requirement that a bona fide purchaser acquire the instrument in the ordinary course of business. Llewellyn, however, persevered in Article 7. The “holder by due negotiation” cannot purchase a document of title by canceling an antecedent debt and must acquire the document in the ordinary course of business.²⁵ Llewellyn believed in the art of the possible.

It is worth noting that, notwithstanding Llewellyn’s antagonism towards Story, the vision each offered for commercial law bears one striking similarity. Story saw an opportunity to shape commercial law by promulgating general federal common law; Llewellyn by a uniform commercial code. In both cases, they created a gold standard. Even though states were not bound to follow the Supreme Court’s interpretations of the common law in their own commercial law controversies, they used these opinions as their benchmark nevertheless. Cases such as *International News Service v. Associated Press*²⁶ remain the source of common law wisdom even though the jurisdictional basis for the opinion has disappeared. By the same measure, Article 2 nominally applies only to the sale of goods, but its principles are the benchmark by which all of contract law has been shaped for the last forty years.

III. KNOW YOURSELF

Lord Mansfield earned his place in Llewellyn’s pantheon²⁷ because he possessed “situation sense.”²⁸ When Lord Mansfield asked whether a holder of a negotiable instrument should be immune from defenses that the issuer would otherwise have, Mansfield looked to whether the holder acquired it in ordinary course.²⁹ More generally, Mansfield refused to look at the law as a closed system. He brought in merchant jurors to advise him on the

24. See U.C.C. § 3-303(a)(3). There is, of course, a procedural issue in *Swift*, and with respect to it, the Supreme Court reversed itself in *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

25. See U.C.C. § 7-501(4).

26. 248 U.S. 215, 39 S.Ct. 68 (1918).

27. Llewellyn dedicated *The Common Law Tradition* to “the undying succession of the Great Commercial Law Judges whose work, across the centuries has given living body, toughness, and inspiration to the Grand Tradition of the Common Law.” See Llewellyn, *Common Law*, *supra* note 7, at v. Mansfield is the second link in this chain.

28. See Llewellyn, *Common Law*, *supra* note 7, at 420-21.

29. 1 Burr. 452 (K.B. 1758). Llewellyn, however, does fault Mansfield for not being as clear on this point as he might have been. See Llewellyn, *Common Law*, *supra* note 7, at 410-12.

law. He declared the law merchant part of the common law of England.

Llewellyn was drawn to the idea of the implied warranty of merchantability because of its long and distinguished pedigree in the law merchant. For centuries, one who made goods and sold them in the marketplace warranted that his goods passed without objection in the trade. Llewellyn expanded the scope of the implied warranty of merchantability. He extended it to all who dealt in goods of the kind, whether they made them or not. But Llewellyn embraced it in large measure because merchants themselves promulgated and supported the doctrine of merchantability. It is not the doctrine of the peddler or the horse trader, but they are not the major characters in the play.

The spirit that motivated Llewellyn was modesty about his own knowledge of commercial practice. As an academic, he did not know the kinds of warranties that best promoted commerce among experienced merchants. Far better than telling a manufacturer how to make his wares, we should merely tell him that he will be held to the standards of the trade. We find ourselves in a market for computers in which sellers compete with each other and offer us the same terms they offer to Fortune 500 companies. We should count our blessings to live in such a world. Sensible legal rules must take advantage of commercial norms that emerge in a competitive environment in which sophisticated parties are on both sides of the transaction. Rules that steer sellers towards offering goods with particular attributes or warranties tend to homogenize products and stifle innovation. Those in the academy cannot write a single warranty, suitable for all products, beyond such general requirements that the goods be consistent with the seller's representations, and in the absence of disclaimer, pass without objection in the trade. Law professors have no comparative advantage in setting terms of exchange.

IV. CONCLUSION

In assessing the uniform law process against its competitors, it is useful to remember Llewellyn's legacy. His virtues are, to some considerable extent, embodied in the uniform law process itself. NCCUSL has been successful in its chosen domain because it chooses its battlegrounds carefully, fights only the battles it can win, and pays close attention to the forces that have sway in the legislature, not only because they have power, but also because they have expertise.

In the legal academy, we all must pay attention to the craft of mastering doctrine and connecting it to practice with a healthy skepticism about how much of the law in action we in fact understand. This has long been a distinguished tradition in

commercial law, a tradition in which Llewellyn stands with Williston, Corbin, Hawkland and others. It is a tradition that we should both celebrate and take to heart.

