Santa Clara University School of Law

Santa Clara Law
Santa Clara Law Digital Commons

Faculty Publications | Faculty Scholarship

1-1-1992

"We Have Met the Enemy and He is Us"

Kerry L. Macintosh
Santa Clara University School of Law, kmacintosh@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
26 Loy. L. A. L. Rev. 673

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

"WE HAVE MET THE ENEMY AND HE IS US."[1]

Kerry L. Macintosh *

Is the Uniform Commercial Code dead, or alive and well?

My fellow Symposium participants have chosen to answer this question by commenting upon the future of the Uniform Commercial Code in light of recent developments in the commercial law field. Their essays and articles have analyzed the growing role of international law, federal law and consumer protection legislation, and have discussed the extent to which the Code has, or has not, been displaced.

My Essay takes an entirely different tack. Assuming the Code still serves a useful commercial purpose, we, as commercial law specialists, must do what we can to ensure its continued vitality and utility. Therefore, I have chosen to comment upon attitudes within the legal profession that, in my opinion, undermine the intellectual vigor and practical efficacy of the Code. Examining three major groups—law students, practitioners and academicians—my Essay identifies problems and recommends solutions.

I. LAW STUDENTS

"Abolish the UCC."[2]

My experience as a law professor has led me to believe that too many law students never take Uniform Commercial Code courses—or, at least, never take such courses seriously. Why?

The first explanation for this lack of enthusiasm is perhaps the most obvious. Having survived the grueling first year of law study, students in their second and third years are too often motivated by the desire to pack their schedules with courses that are relatively easy. If ease is the standard for course selection, then Code courses do not qualify. For one thing, a statute, rather than a compilation of cases, is necessarily the primary focus of study in a UCC course. Rather than being told a selection of interesting and amusing stories, students must get down to the difficult

1. WALT KELLY, THE BEST OF POGO 163 (Mrs. Walt Kelly & Bill Crouch, Jr. eds., 1982).

* Associate Professor of Law, Santa Clara University School of Law; B.A., 1978, Pomona College; J.D., 1982, Stanford University. I am indebted to Dean Gerald McLaughlin of Loyola Law School for his thoughtful critique and helpful suggestions.

2. Anonymous student evaluation.

HeinOnline -- 26 Loy. L. A. L. Rev. 673 1992-1993

business of parsing statutory language. For another thing, the Code is complex and packed with technical language. Even apparently simple words, such as "writing," have technical definitions.[3] While any person with patience and a firm grasp of grammar should be able to decipher the Code, some students who grew to maturity in the video age may lack these basic skills. Finally, students are more familiar with some law school topics than others, either due to personal experience or constant media discussion. The average law student arrives at law school with some knowledge of abortion, crime, divorce, environmental protection, free speech, race discrimination, sexual harassment, torts, and wills and trusts. By contrast, the student's understanding of commercial transactions may be extremely limited. This lack of background could make a course in payment systems or secured transactions seem intimidating, and therefore unappealing.

A second possible explanation for apathy towards the Code is that law students do not understand the importance of the Code to them as future practicing attorneys. Again, to some extent, this failure to recognize the Code's importance may be a natural result of the limited business backgrounds that many students bring with them to law school. For several years now, prospective law students have watched with avid interest while the mythical lawyers of McKenzie, Brackman[4] have litigated a variety of esoteric issues. But few prospective students have had the opportunity to chat with real lawyers who could have told them that sales of goods, negotiable instruments, letters of credit and secured transactions involving personal property more often form the bread and butter of their law practice. And these topics are governed by the Code.

Although this ignorance is understandable, law schools could help solve the problem by emphasizing the importance of the Code once students arrive. Unfortunately, just the opposite occurs. At many—and perhaps most—institutions, students are immediately plugged into a first-year curriculum that generally emphasizes cases at the expense of statutes. If taught at all, the Code receives brief treatment in the basic contracts course. Too often, students exit the first-year curriculum with two dangerous misperceptions: first, that the modern law of contracts is about cases, rather than statutes; and second, that the basic contracts

3. The Code defines "writing" to include "printing, typewriting or any other intentional reduction to tangible form." U.C.C. § 1-201(46) (1990). For other technical definitions of seemingly simple terms, see *id.* § 1-201.

4. The fictional law firm of McKenzie, Brackman, Chaney & Becker practices in the fantasy realm of "L.A. Law," the hit NBC television series.

HeinOnline -- 26 Loy. L. A. L. Rev. 674 1992-1993

course has given them all the training they need to practice commercial law.

In some jurisdictions, the structure of the bar examination further encourages students to overlook the importance of the Code. Second- and third-year students prefer courses that prepare them for the bar examination, sometimes to the exclusion of other courses that would have been of greater use to them in practice. To offer a case in point, my present institution offers only one section of payment systems, a bread-and-butter course covering the law of negotiable instruments. Enrollment in that course seldom exceeds thirty students. By contrast, my institution offers up to three sections of trusts and estates every year; my section alone regularly enrolls over 100 students. The reason for this imbalance is that trusts and estates is tested on the California Bar Examination, while payment systems is not.

A third possible reason for the unpopularity of Code courses is the relatively low position of such courses within the law school hierarchy. Typically, there are few Code courses in the law school catalog, and none are required. Moreover, some schools hire only one Code professor, or, worse yet, rely on poorly-paid adjunct professors to teach this complicated and important subject. Students are quick to respond to such evidence and sense that the Code occupies a subordinate position within the law school. Once inculcated through the school atmosphere, a negative attitude towards the Code is hard for even the most committed professor to combat.

What are the solutions to these problems? The first and simplest, which many of us already practice, is to put as much heart and soul into our teaching as possible. If students come into Code courses with a negative attitude, we can and should compensate with teaching that is innovative, enthusiastic and enjoyable. Anyone who doubts that study of the Code can be made entertaining should read the popular treatise authored by Professors James White and Robert Summers.[5]

A second and more fundamental solution is to emphasize the importance of the Code in law practice. Then, students who aspire to become successful practitioners (or merely employed) will realize that they must invest the time and energy required to master the Code.

One of the most effective ways to convey this message to students would be to build serious study of the Code into the first-year curriculum. There are two ways to accomplish this. First, an individual profes-

5. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (3d ed. 1988).

HeinOnline -- 26 Loy. L. A. L. Rev. 675 1992-1993

sor could set aside a substantial amount of time within the traditional contracts course to teach Article 2 of the Code, *as a Code*. Many, if not most, contracts casebooks are organized by topic, emphasizing common-law solutions to commercial problems, while treating Code solutions as afterthoughts. The problem with this structure is that the Code is never taught as a Code. Students have little or no opportunity to learn technical definitions, to see how Code provisions interrelate, or to develop a sense of the jurisprudence of Article 2. To break free of this traditional structure, the contracts professor could revamp the course so that study of common-law concepts is followed by study of Article 2 as an integrated whole. Of course, to provide a meaningful, integrated study, the professor would have to devote a *significant* amount of class time to Article 2, at the expense of common-law material. However, this apparent disadvantage would in fact be an advantage, because the resulting course structure would more accurately represent the relative importance of statutory and common law in modern commercial transactions.

Alternatively, in law schools where the faculty is supportive of curricular change, the first-year curriculum could be enriched by the addition of a statutory analysis course. Under this approach, the contracts course would continue to emphasize common-law solutions to commercial problems. By contrast, the statutory analysis course could provide students with a comprehensive look at Article 2—perhaps adding some ancillary study of federal or state consumer protection legislation. First-year students would come away from the course with statutory analysis skills and a better understanding of the mechanics and importance of the Code.

The upper-division curriculum should also reflect the importance of the Code by including a selection of courses broad and substantial enough to give students a solid understanding of the Code. For example, a six-unit, two-course package of payment systems and secured transactions offers broad coverage without overburdening students with too much Code in any one semester.[6] Of course, these courses must be offered frequently enough to give the students a reasonable opportunity to enroll. In addition, course catalogs should be revised to emphasize the importance of studying the Code—as well as other important business subjects, such as corporations and federal income taxation. We do our students a serious disservice when we fail to vigorously combat their nat-

6. I have had extensive experience teaching the entire Code as a four-unit, one-semester course. In my opinion, however, four units are not enough to do the Code justice; and, in my experience, students are quickly worn down by the sheer volume of difficult, complex material to be mastered in only one semester.

HeinOnline -- 26 Loy. L. A. L. Rev. 676 1992-1993

ural, but misguided, tendency to allow bar examination topics to determine course selection.

None of these structural changes are likely to occur, however, absent a fundamental change in attitude. For example, my advice to offer adequate upper-division courses cannot be followed unless a law school hires enough teachers with Code expertise to staff those courses. And, even if offerings are adequate, law students are not likely to flock to courses that are viewed by other professors as low status. *Thus, our primary concern as Code specialists should be improving institutional attitudes toward our own subject.* We must explain to professors and students alike that the Code has significant value for society, and therefore deserves to be treated with respect within the law school hierarchy.[7]

II. PRACTITIONERS

"My condolences."[8]

Students who never learn the importance of statutes in general, and the Code in particular, eventually become attorneys who do not understand the Code. Unfortunately, the consequences of such ignorance are much more serious, because real cases—and real clients—are now involved.

I will never forget a telephone call I received many years ago from a practicing lawyer who wanted to know whether certain reasoning from a case decided in the 1920s still applied. As it turned out, the reasoning had long since been rendered obsolete by the enactment of the Code. *This experienced lawyer had never bothered to check the Code, and was therefore completely unaware that there was a statute on point.* Ever since taking this phone call, I have shuddered to think how many other lawyers may be working on commercial cases in blissful ignorance of the Code.

This example is extreme; many, if not most, lawyers do know that the Code exists. However, some practitioners may not know how to work effectively with the Code. From the first year of law school, lawyers are trained to work with cases. When faced with an unfavorable holding, they respond by manipulating facts, reasoning and dicta to achieve their ends. Within the Code, there is less room to maneuver. Often, there are correct, and incorrect, ways to read its statutory lan-

7. For a more extended discussion of this point, see *infra* part III.

8. U.S. Supreme Court Justice, upon being introduced to the author as a teacher of the Uniform Commercial Code.

HeinOnline -- 26 Loy. L. A. L. Rev. 677 1992-1993

guage. Clients suffer when lawyers fail to recognize that the Code imposes a more rigorous and unforgiving framework for their arguments.

Moreover, lawyers who lack basic Code skills cannot adequately perform their essential role as officers of the court. Judges depend on counsel to cite and argue the law that governs cases before them. When counsel do not understand the Code, judges may reach incorrect decisions.

Commercial justice would more often be served if judges themselves had a better understanding of relevant Code provisions, and their underlying policy foundations. As commercial law specialists, we all have had the unhappy experience of reading decisions that ignore, or even reject, governing Code provisions and principles in favor of common-law principles. For example, under the common law of contracts, a contract party who has substantially performed his or her own contract duties is entitled to receive performance from the other party.[9] By contrast, most authorities agree that the beneficiary of a letter of credit is entitled to payment only when the beneficiary *strictly* complies with the letter of credit terms.[10] Important policy considerations support the strict compliance standard. By allowing issuers to decide quickly, cheaply and confidently which presentations must be honored, the standard encourages issuers to make letters of credit readily available at low cost, and assures beneficiaries of prompt, reliable payment.[11] However, some courts seem to have applied common-law principles to the letter of credit, holding that a beneficiary is entitled to payment as long as he or she *substantially* complies with credit terms.[12] Unfortunately, adoption of a substantial compliance standard undermines the commercial vitality of the letter of credit by impairing the speed and predictability of payment.[13] Better training in commercial law and the Code could help prevent decisions such as these.[14]

---

9. E. ALLAN FARNSWORTH, CONTRACTS § 8.12, at 616 (2d ed. 1990).

10. *See, e.g.*, Board of Trade v. Swiss Credit Bank, 728 F.2d 1241, 1243 (9th Cir. 1984); Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 608 F.2d 43, 47 (2d Cir. 1979); Chase Manhattan Bank v. Equibank, 550 F.2d 882, 885 (3d Cir. 1977); Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802, 805-06 (4th Cir. 1975); JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT ¶ 6.02, at 6-4 (2d ed. 1991); HENRY HARFIELD, LETTERS OF CREDIT 36-37 (ALI-ABA U.C.C. Practice Handbook Series No. 5, 1979).

11. *See* Kerry L. Macintosh, *Letters of Credit: Curbing Bad-Faith Dishonor*, 25 UCC L.J. 3, 7 (1992).

12. *See, e.g.*, Crocker Commercial Servs. v. Countryside Bank, 538 F. Supp. 1360, 1362 (N.D. Ill. 1981); First Arlington Nat'l Bank v. Stathis, 413 N.E.2d 1288, 1298-99 (Ill. App. Ct. 1980).

13. *See* Macintosh, *supra* note 11, at 28.

14. Of course, there may be times when the courts can and should supplement the Code with common-law principles. For example, even though the issuer of a letter of credit has no

HeinOnline -- 26 Loy. L. A. L. Rev. 678 1992-1993

How can we solve these problems? Fortunately, most practicing lawyers are highly motivated to provide the best possible service to their clients. Once alerted to the importance of the Code and other commercial statutes, many would be happy to participate in self-education. As commercial law specialists, we should enthusiastically support the efforts of our local, state and national bar associations to promote and provide continuing legal education. Whenever possible, we should share our own expertise by serving as speakers at everything from lunch-time brown-bag meetings to major conferences.

Furthermore, practitioners could provide better service if information about the Code were more readily available. Thus, we should encourage individual practitioners, law firms and, most importantly, law libraries to purchase treatises on the Code and other commercial law topics. Whenever law library holdings of Code and commercial books seem inadequate, we can assist our librarians by taking the time to suggest appropriate purchases.

Of course, many practitioners work so hard that they have little time or energy left for post-graduate study of the Code. Ultimately, therefore, the most effective solutions must be found within law school walls. As noted above, we should be doing more to ensure that students graduate with the knowledge and skill necessary to work with the Code.

III. ACADEMICIANS

"The Code is more than a machine manual or a firedrill regulation. It is too important to be left to commercial lawyers."[15]

Consider carefully the foregoing quotation, taken from an article published in the *Stanford Law Review*. In one breath, the author exhibits a condescending attitude toward the commercial world, while simultaneously urging the reader to take seriously the task of studying and writing about the Code.

However schizophrenic, this quotation offers a rare public acknowledgment of the status problems we, as commercial law scholars, too often face within the legal academy. Our scholarly focus, the Code, must en-

---

statutory obligation to make payment against noncomplying documents, it may have a common-law obligation to facilitate the beneficiary's cure of documentary defects in good faith. *See id.* at 31-34. My point is simply that a court should never apply common-law principles without first giving fair consideration to governing Code provisions and their underlying policy foundations.

15. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622 (1975).

HeinOnline -- 26 Loy. L. A. L. Rev. 679 1992-1993

dure comparisons with a machine manual or firedrill regulation. Our articles, sent to student-run law reviews, are regularly rejected in favor of criminal law or critical legal studies pieces. Our academic colleagues, who expect us to attend and understand their First Amendment colloquia, plead ignorance and refuse to attend our commercial law colloquia.

We can correct this situation by taking the lead in explaining what makes the Code—and Code scholarship—important. Many of the courses that are most fashionable in the legal academic world are public law courses: constitutional law, criminal law, environmental law and so on. One possible reason for this trend is the human tendency to view society from the perspective of one's own profession. For a lawyer, it is natural to suppose that the most fundamental element of society is law. Thus, in a country like the United States, where government is founded upon law, we lawyers tend to emphasize the importance of the public arena, where our own significance is greatest.

But government is not the only fundamental element of our society. As recent recessionary woes have made painfully clear, our society also depends on a robust, competitive, capitalist economy. Without commercial transactions, our civilization would be severely crippled; indeed, it probably could not survive, at least not in its present, sophisticated form. Although the role of law is less central in commerce than in government, the Code serves a vital function by helping to ensure that commercial transactions move forward efficiently, profitably and fairly. Thus, Code scholarship deals with one of the most fundamental questions of all: How can we maximize our societal wealth and prosperity?

As Code scholars, we can contribute to a healthy commerce in several ways. We can begin by writing articles that clearly explain Code doctrine. The complexity of modern commercial transactions has demanded correspondingly complicated laws. Unless businesspersons and their counsel have access to writings that explain governing doctrine, they will be hindered in structuring profitable commercial transactions. Moreover, unless we, as commercial law scholars, first understand *existing* doctrine, we cannot pursue our next, and most vital task: writing normative articles that discuss *which* doctrine would best facilitate a vigorous commerce.

As we pursue normative analysis, we have an unusual opportunity and challenge before us. As mentioned above, government is the primary focus of study for many lawyers—even some business lawyers. For example, securities regulation scholars must study the acts of the Securities and Exchange Commission, while tax scholars must take into account the views of the Internal Revenue Service. By contrast, there is no large

HeinOnline -- 26 Loy. L. A. L. Rev. 680 1992-1993

and powerful federal agency with the authority to manage the wide variety of commercial matters governed by the Code.[16] Rather, our proper focus is the colorful and rapidly evolving world of business practice and custom. To ensure that our recommendations are in step with commercial reality, we should devote more scholarship to empirical and theoretical studies of business practice and custom.

Of course, writing articles and books will do no good whatsoever unless our voices are heard. Accordingly, we must take care to explain the importance and value of Code scholarship to publishers and editors—especially editors of student-run law reviews. Today, student editors are faced with an ever-growing, and often overwhelming, number of submissions. Faced with the task of screening these submissions, student editors naturally tend to reject those articles that they do not understand, or do not feel competent to evaluate. To counteract this tendency, we should share our expertise, by offering to discuss the merits of Code articles with student editors. In addition, we can encourage student-run law reviews to publish commercial law symposia, such as this one.

What else can we do to improve the image of our field? We can encourage gifted students who are interested in an academic career to specialize in commercial law. For students, the advantage is clear: Because there are relatively few job applicants competing in the commercial law field, a student may have a better chance of obtaining a suitable position by specializing in commercial law. For established commercial law specialists, the rewards are no less tangible: As more young, talented law professors study and write about commercial law, more new ideas will be generated, and our field will become more exciting and challenging.

Naturally, we also must take advantage of the talented applicant pool that such efforts would generate. We must insist that faculties hire an adequate complement of commercial law professors, so that more students are enabled to take advanced Code courses, and more valuable Code scholarship can be produced.

IV. CONCLUSION

For the last several decades, the Uniform Commercial Code has enriched our society by facilitating valuable commercial transactions. As commercial law specialists, we can help to ensure that the Code continues to serve this vital function. We should encourage law students, prac-

16. Recently, the Federal Reserve Board has made inroads upon this bastion of (relatively) free enterprise. The check collection process, once governed by Article 4 of the Code, is now governed by Regulation CC, 12 C.F.R. pt. 229 (1992), issued pursuant to the Expedited Funds Availability Act, 12 U.S.C.A. §§ 4001-4010 (1990 & Supp. 1992).

HeinOnline -- 26 Loy. L. A. L. Rev. 681 1992-1993

titioners and academicians to read, understand, work with, discuss, write about and, perhaps most importantly, respect the Code.

HeinOnline -- 26 Loy. L. A. L. Rev. 682 1992-1993