Anti-formalism and the structure of Anglo-American commercial law

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1. The world's developed economies have changed in the past two decades. Commercial exchange has changed. Electronic communication and computer technology has replaced documentary titles, invoices and paper-based records. This is particularly true in international transactions.[1] Over a longer period, the commercial value of *services* in mature economies has become progressively more significant than the value of *goods* produced. Throughout the twentieth century this development occurred.[2] The point of this paper is to describe how the commercial law in the United States, Britain and comparable countries has changed to reflect the new nature of production and commercial exchange.

2. A little more should be said about the scale of changes in commercial transactions. Consider electronic title. "Control" of electronic evidence of title has been chosen as the indicium of

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1 See D Murray, T Chorvat and C O'Connor 'Problems of proof in a paperless world: electronic information as evidence in commercial litigation' (2002) 35 *UCC Law Jo* 1; A Ballego 'Towards paperless international trade: EDI and EDIFACT' [1991] (4) *International Trade Forum* 10.

2 See R Shelp *Beyond Industrialisation: Ascendancy of the Global Services Economy* (Oxford, Pergamon Press, 1981).

ownership in the US *Uniform Commercial Code* ("the UCC"), to replace delivery of tangible documents.[3] Electronic "title", adopting the words the US *Uniform Electronic Transactions Act 1999*, equals the ability to *control* a "single authoritative copy of the [electronic] document which is unique, identifiable . . . [and] unalterable", and which is "communicated to and maintained by the person asserting control (or its designated custodian)".[4] The "control" connective is not further elaborated. On first observation, the "control" idea seems rather vague and indeterminate. Under the old law, "possession of documentary title" is susceptible to far more rigorous tests and calibration than "control" of electron sequences. For the steps in electronic transactions have few hallmarks. Electronic transactions may be replicated in ways that are difficult to detect. New room for fraud has been acknowledged.[5]

3. Nevertheless, the new UCC electronic title protocol will work and, in all likelihood, will work more effectively than the paper-based title which it replaces. It has to work. Players in the system need on-line title. The world has entered a digital age. *Praxis* is

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3 See National Conference of Commissioners on Uniform State Laws Discussion Paper: *Proposed Revisions to Uniform Commercial Code Article 7-Documents of Title* (Chicago, American Law Institute, 2003), 3-12, 75-120; and H Gabriel 'Revisions to Uniform Commercial Code Article 7: documents of title' (2003) 35 *Uniform Commercial Code Law Journal* 33, 35-6.

4 See s. 7-106 (b) (1) and (2).

5 See Discussion Paper: *Proposed Revisions*, n. 3, Sec 9-317 'Official comment' (120-1); also K Cronin and R Weikers *Data Security and Privacy Law: Combating Cyberthreats* (2002 looseleaf), §8.12-§8.16; P Grabosky, R Smith and G Dempsey *Electronic Theft: Unauthorised Acquisition in Cyberspace* (2001), 81-104; P Grabosky and R Smith *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities* (1998); D Denning *Information Warfare and Security* (1999), A Boss and J Winn 'The emerging law of economic commerce' (1997) 52 *Business Lawyer* 1469; A Brandt 'Embezzler's guide to the computer' (1975) 53 *Harv Bus Rev* 79.

another name for this intersection of technology and the world of concepts.[6]

4. A small alteration intended for the UCC's definition of "good faith" encapsulates the form of the new commercial law. "Honesty in fact *and the observance of reasonable commercial standards of fair dealing"* will shortly replace the words "honesty in fact in the conduct or transaction concerned".[7] Reasonableness and fair dealing are added to the equation. We will discuss the significance of this shortly.

5. The possibility of fraud in some systems of electronic title is limited by virtual walls and barriers. Some systems are "closed". Participating members sign master agreements providing for rights against the registry system and between members. Most electronic land title registration systems reduce the fraud risk in this way.[8] Electronic entries in "Torrens system" registers are officially certified and indemnities are provided to persons harmed in the certification process.

6. "Closed" system safeguards make the "open" system of electronic title proposed by the UCC all the more remarkable. Based only in control requirements, commercial property rights in electronic transactions are enforceable independently of

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6 Defined by W James 'Pragmatism' (1907) in *Pragmatism: A Contemporary Reader* R Goodman (ed) (1995), 53, 54.

7 See UCC (Proposed Rev) § 1-201(19) (Oct. 2000) (emphasis added), available at http://www.law.upen.edu/bll/ulc/ucc7 (accessed on 3 June 2003).

8 In several jurisdictions: see C Szypszak 'Public registries and private solutions: an evolving American real estate conveyancing regime' (2003) 24 *Whittier L Rev* 663, 672-5; L Chamberlain 'The Land Registration Act 2002: a "conveyancing revolution" Part 1' (2002) *NLJ* 1093; W Duncan and S Christensen 'Overcoming the problems of showing and making cybertitle' (1999) 8 *APLJ* 1; and S Yok 'Computerisation of titles under the modified Malaysian Torrens system' [1998] 3 *MLJA* 1.

underwriting contracts, official registers, government guarantees or other controls or forms of insurance. Title is made instrumental to a significant degree. The idea of title is equated with control of the electronic medium through which it is expressed.

7. Contrast the position with electronic money. 'DigiCash' (or "eCash") cannot be transferred interpersonally without intermediation of the money's issuer. No "open" system for digital money has yet emerged. Cryptographic technology has yet to produce fully negotiable electronic tokens like banknotes or coins. Transfers of electronic money are still treated as electronic payments made through bankers' electronic funds transfer mechanisms. These are variants of the familiar telegraphic instructions and nineteenth-century "wire transfers".[9]

8. For a long time, a significant credit risk for participating intermediaries in the commercial world was that paying bankers would become insolvent and fail to settle as required after value had been exchanged. Now this has largely been overcome.[10] However, the age of DigiCash has not arrived. The commodity is too fungible. A protocol or universal "set of rules" has not emerged from established practice or the community of users. Perhaps these are early days. Money fraudulently diverted within the system remains elusive. Legal doctrine has been allowed to stand in the way. Electronic money is treated comparably to other

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9 See B Geva *The Law of Electronic Funds Transfers* (2002 looseleaf), § 1.02(3).

10 See E Solomon *Virtual Money; Understanding the Power and Risks of Money's High-Speed Journey into Electronic Space* (1997) and G Weaver and C Craigie *The Law Relating to Banker and Customer in Australia* 2nd edn (1990 looseleaf), [3.360]-[3.370], referring to (Aust.) *Bank Interchange and Transfer System* ('BITS'), UK *Clearing House Automated Payments System* ('CHAPS') and *Society for Worldwide Interbank Financial Telecommunications SA* ('SWIFT').

property interests for the purposes of appropriations and mixtures.[11] "Who took the claimant's money?" and "Who owns the object with which the money was exchanged?" are questions which courts still pose in relation to electronic money. Conceptual questions exist. The answers are not obvious. It is almost impossible to apply nineteenth-century notions of property to streams of electrons passing instantaneously between computer terminals – which may be located, possibly, in different jurisdictions. The US idea that property equals "control" of a dealing may not seem quite so unsatisfactory.

9. Examples could be multiplied. Law, particularly the commercial law, has adjusted itself to change throughout the twentieth century. The *form* of the commercial law in common law countries has developed to reflect the new fluidity in exchange. Increased reciprocity and trust are present in the system. This is the essential point that I want to make in this paper. S*tandards and principles, in place of rules, are increasingly used to express commercial norms and regulation.*

10. Purposive reasoning in legal discourse is now dominant. Does the outcome facilitate or retard commerce? The familiar lawyer-like approach to problems of drawing factual analogies and

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11 On appropriations, see *R v Preddy* [1996] AC 815, interpreting the *Theft Act 1968* (UK), s-s 4(1) extended 'property' definition; S Bronitt and B McSherry *Principles of Criminal Law* (2001), 701-6; J Lipton 'Property offences into the 21st century' [1999] *JILT* http://www.law.warwick.ac.uk/jilt/99-1/lipton.html (accessed 18 June 2003) and D Fox 'Property rights and electronic funds transfers' (1996) *LMCLQ* 456, 457-9; on mixtures, see *Agip (Africa) Ltd v Jackson* [1990] Ch 265, Millett J, affd, but not on the medium of payment instruction, [1991] Ch 547 (CA), 565; D Kreltszheim "Identifying the proceeds of electronic money fraud' (1999) 7 *Information Management & Computer Security* 223; R Hooley 'Payment in a cashless society' in B Rider (ed) *The Realm of Company Law* (1988), 237 and text below at [7.16]-[7.17].

inferences from doctrine is in decline.[12] Judges in common law courts reason in an increasingly consequentialist way - whether legal reasoning is in form of the “top-down” or “bottom-up” variety.[13] Law is not now the independent discipline which it once was.

11. Commentators have observed that a moral reformation has accompanied changes in society and the commercial law.[14] Robust individualism is dying. Sharp distinction between one's own interest and that of others is no longer drawn. The capitalist “right to be selfish” no longer legitimates action in developed western economies. Instead, people are required, by law, to make sacrifices and to share. Ethical consideration of the “other” and a new altruism are becoming the private law’s dominant ideology.

12. Legal norms have taken a new, good-neighbourly aspect. A once widely-held belief in the neutrality of rule systems has been discredited. Justice is thought to inhere more in outcomes reached than in a principle for social action which the decision may imply. “Anti-formalism” is a term used to describe this new orientation.

13. Theoretical underpinnings of anti-formalism were expressed by the German political economist, Max Weber. Writing between

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12 See P Attiyah ‘From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 *Iowa LR* 1249, 1259-60.

13 See R Posner ‘Legal reasoning from the top down and from the bottom up: the question of unenumerated constitutional rights’ (1992) 59 *U Chicago L Rev* 433, 433-6; on result-oriented reasoning: see W James, n. 6, 65-6.

14 See, e.g., D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harv LR* 1685, 1713-7, 1776-7.

1910 and 1914, Weber described the emerging formal qualities of modern law. “The system of commodity exchange, in primitive as well as in technically differentiated patterns of trade,” Weber observed,[15]

> is possible only on the basis of far-reaching personal confidence and trust in the loyalty of others. Moreover, as commodity exchange increases in importance, the need in legal practice to guarantee or secure such trustworthy conduct becomes proportionally greater.

14. “Trusting” is one of the things that characterises modern modes of exchange. Commercial law, in Weber’s view, requires “ethical rationalisation” through “attitude-evaluation”. Categories which express *meanings* and *intention* must regulate the process. Relevant criteria cannot be reduced to a “mechanical jurisprudence” of rules.[16] The modern functioning of equity in common law systems captures this hermeneutic possibility - a fact which may have surprised Weber – given the “formalistic” qualities that he ascribed to the “Anglo-American common law”.

15. Anti-formalism has different vehicles in different countries. In Britain, Australia and, to a lesser degree, in Canada, case-law and equity are still the spearhead of the movement. In the United States, anti-formalism has been predominantly code-driven. The distinction between law and equity in America may still be enshrined in remedies textbooks, but, for most other

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15 In *Economy and Society*, G Roth and C Wittich (eds) (Berkeley, Univ of Calif Press, 1978), 884, 888-9.

16 See R Pound ‘Mechanical jurisprudence’ (1908) 8 *Columbia L Rev* 605.

purposes, it is said to be "long forgotten."[17] Aspects of the private law have been continuously restated under the auspices of the American Law Institute for the past ninety years. The *Uniform Commercial Code* became law in 51 jurisdictions between 1953 and 1966.[18]

16. Anti-formalistically, article 242 of the UCC states that any "unconscionable" contract or clause is unenforceable insofar as it produces an 'unconscionable result'.[19] This is a drastic invasion of freedom of contract. Overarching disallowance of contract terms on the grounds of "unconscionability" expresses the ideological shift which this paper has observed. Commercial law now curtails the pursuit of self-interest which was seen as a virtue in earlier times. For example, in 1898, Justice Wills was quoted with approval by the Britain's highest court when he said that:

> any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determined the enforcement of the right.[20]

This is the attitude of mind which has passed.

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17 See e.g., D Dobbs, *Law of Remedies: Damages-Equity-Restitution* 2nd edn (St Paul, Minn., West, 1993), 391-422 and T Thomas 'Justice Scalia reinvents restitution' (2003) 36 *Loy L A L Rev* 1063, 1065.

18 See W Twining *Karl Llewellyn and the Realist Movement* (London, Weidenfield and Nicolson, 1973), 270: "[B]y the end of 1969 only one American state, Louisiana, had held back."

19 US *Uniform Commercial Code*, § 2-302; see discussion in R Barnes 'Tracing commingled proceeds: the metamorphosis of equity principles into UCC doctrine' (1990) 51 *U Pitt L Rev* 281, 285-92.

20 *Allen v Flood* [1898] AC 1, at 46.

17. Commercial courts are now "chartered", as it were, to find and eradicate aspects of transactions which they find morally objectionable. This role has replaced traditional notions that "the law is right, that rules of law are to be obeyed because they are right, that men have duties to uphold the law."[21]

18. Australia and Canada remain more case-law oriented than the United States, where statute has been the pre-eminent vehicle for anti-formalism in the commercial law . Retreat from formal rules in Australia, Britain and Canada has proceeded, in part, through the development of equitable doctrines.[22] Partly, this is in codified form. Equity is prominent in Australia for an historical reason. Procedurally, equity and the common law remained separate in New South Wales until 1970. A lot of twentieth-century equity appeals from New South Wales were made to the Australian High Court. Other Australian jurisdictions were "fertilized" from the "top down" in this way.[23]

Conclusion

19. Commercial actors are increasingly obliged by anti-formalist laws to consider the interests of other commercial actors. Anglo-American commercial courts make "attitude evaluation" judgements about the legitimacy of commercial action

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21 Description of US commercial law reformer Karl Llewellyn in his 1929 lectures to students at the Columbia Law School, published as *The Bramble Bush* (1930), (1981) edn 15.

22 See D Klinck 'The unexamined "conscience" of contemporary Canadian equity' (2001) 46 *McGill L J* 571, 605-14; M Sneddon 'Unconscionability in Australian law: development and policy issues' (1992) 14 *Loy L A Int'l & Comp L J* 545, 562-3.

23 See R Meagher, J Heydon and M Leeming *Equity Doctrine and Remedies* 4th ed (2002), [1-50]-[1-55] and J Heydon 'The role of the equity bar in the Judicature era' in G Lindsay (ed) *No Mere Mouthpieces: Servants of All Yet of None* (2002), 71.

according to the dominant formulae in each jurisdiction. In the US, this is the *Codifications* and *Restatements of the Law.* In Britain and Australia, equitable doctrines occupy the same space, including such things as estoppel (requiring consistent action) and the fiduciary relationship (requiring that undertakings be honoured and transactional power not be misused). “Examination of the activities of fiduciaries”, in the words of Professor Ernest Weinrib, “involves . . . an inquiry into the propriety of profit-making”. Fiduciary litigation requires the courts to determine whether or not to “sanction or stigmatize a particular act performed by a businessman in a commercial context.”[24] Interpersonal “value” articulated by the commercial law may be inherent in the social order. This is the “moral terrain” of breach of faith, fairness and good faith, where actors are acknowledged to be unequal and people regularly pledge themselves to act and do business in the interests of others.[25] We may now be approaching the reclusive inner morality of capitalism.

24 E Weinrib “The fiduciary obligation” (1975) 25 *UTLJ* 1, 2; cf. J Brock “The propriety of profit-making¨fiduciary dutyand unjust enrichment” (2000) 58 *UT Fac LR* 185.

25 See P Finn “Unconscionable conduct” (1994) 8 *JCL* 37, 38.