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# Bankruptcy Taxes and Other Filing Facts: A Commentary on Professor Bowers

Carl S. Bjerre\*

Advising law students on how to read cases, Karl Llewellyn admonished them, "*You will be impatient with the facts to the precise extent to which you need them.*"<sup>1</sup> This admonition remains well taken by those of us who, under the benign or malign influence of our law student experience, now like to spend our time sitting around thinking about revising or repealing commercial statutes.

Professor James W. Bowers's front-line proposal, to abolish the Article 9 filing system,<sup>2</sup> is naturally appealing to any practitioner who has toiled for long in the system's vineyards, but outright abolition would injure the same exploited filers in whose interest the proposal is made. For the filing system does benefit filers in addition to searchers and bureaucrats, and simply pruning back its overgrown vines would allow it to continue to benefit both filers and searchers, while striking a better balance between taxing the former and enriching the latter. To further this accommodationist goal, Part I of this Paper proposes adapting Professor Bowers's abolitionist stance to a sliding scale, so that only the most onerous portions of existing filing requirements would be abolished, while the others would remain in place. Part II of this Paper briefly considers some of the benefits of Professor Bowers's second choice, privatizing the filing system,<sup>3</sup> an idea

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1. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 56 (1960). The passage continues, in a characteristic vein:

If you do not need them, if you already have some knowledge of the background of the case, the facts will not be boring; they will interest you. If they pester and upset you, that is a sign that you know so little about what the case means in life that these facts need desperate study.

2. James W. Bowers, *Of Bureaucrats' Brothers-in-Law and Bankruptcy Taxes: Article 9 Filing Systems and the Market for Information*, 79 MINN. L. REV. 721, 722-23 (1995).

3. *Id.* at 742-43.

that turns out to be well suited to promoting Part I's accommodationism.

## I. PARTIAL ABOLITION

It is hard to disagree with Professor Bowers's central proposition that the Article 9 filing system, insofar as it requires filers to supply information for the benefit of later searchers, constitutes a tax. Apologists for this transfer of wealth may argue that nearly every filer acts also as a searcher (whether in the same or different transactions), so that the tax payments tend to flow back to their payors over time (much as the victim of a long-enough running Ponzi scheme may eventually recover her investment). But this argument is true, if at all, only because existing rules of law distort the marketplace by making available large amounts of information at bargain-basement rates. Only in such an environment is it rational for filers, before they file, to search for prior filings against their debtor even when other diligence devices would adequately address the filer's priority concerns.<sup>4</sup>

Because filers themselves also benefit by their filings, however, the tax metaphor doesn't do justice to its tenor. The imagery would usefully be enriched if we described the filing system not only as a tax, but also as an insurance policy.<sup>5</sup> The principal risk that filers seek insurance against is, as Professor

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4. Such an environment similarly makes it rational for the filer's law firm, as a risk-averse institution, to make a small search-fee disbursement on its client's behalf and to require the borrower's law firm to opine on the absence of conflicts with any prior filings.

A possible implication of Bowers with respect to such opinions should be negated. See Bowers, *supra* note 2, at 730-31. Security interest opinions in the filing context rarely require opining counsel to determine matters extrinsic to the filing. Rather, they assume away the question of whether the borrower has rights in the collateral, and express no opinion as to priority, except to note the presence or absence of prior conflicting filings. See *Special Report by the TriBar Opinion Committee: U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359, 380-83 (1993).

5. One hopes that the formal distinctions, at least, between a tax and an insurance policy will remain recognizable as the national health-care reform controversy continues.

A related metaphor for filing is that of staking a claim. Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53, 62-63 (1983) (citing ALAN SCHWARTZ & ROBERT E. SCOTT, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 594-97 (1982); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977)). This phrase highlights the exclusionary aspects of perfection, as the insurance metaphor fails to do, but the insurance metaphor highlights the contingent, second-best, loss-protective aspect of collateral, as the mining metaphor fails to do.

Bowers points out, the borrower's bankruptcy and the avoidance of unperfected security interests.<sup>6</sup> In a more common and, accordingly, less well-tailored metaphor, filing simply represents the price that lenders pay to beat the bankruptcy trustee.

Until UCC section 9-301(1)(b) is repealed<sup>7</sup> or secured transactions are abolished,<sup>8</sup> secured lenders will require access to some sort of bankruptcy insurance. This insurance must be implemented under the auspices of (although not necessarily implemented by<sup>9</sup>) the state, because it operates by curtailing the rights of strangers to the transaction, something that we generally don't permit private actors to do, no matter how efficient it

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6. See Bowers, *supra* note 2, at 732-33; 11 U.S.C. § 544(a) (Supp. V 1993). But the figure of speech that Professor Bowers uses in this context might usefully be enriched, too. The trustee may have the powers of Tinkerbell, but from a filer's point of view the trustee also has the motivations of Captain Hook.

Some insurable risks (one thinks of earthquakes or illnesses) are ineluctable, but the bankruptcy trustee's power to avoid unperfected security interests is not: a stroke of the right statutory pens could abolish it. Those who consider society's failure to do so unjustifiable (or even consider the bankruptcy regime as a whole bad or unworkable) might find the insurance metaphor for filing to be inapt, and I thank Professor Bowers for the observation that it is a euphemism for protection money.

7. See James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993) (proposing repeal of provision subordinating unperfected security interests to lien creditors).

8. This measure would be the logical consummation of an analysis that found security interests to be socially unjustifiable. See, e.g., Alan Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981). See also SCHWARTZ & SCOTT, *supra* note 5, at 558 ("Code drafters should consider selective prohibition rather than continued encouragement of secured transactions."). On the other hand, a number of commentators have advanced grounds on which security interests may indeed be socially justifiable. See, e.g., James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 57-68 (1991); see generally Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021 (1994) (advancing furtherance of debtors' freedom to alienate properly as ground for security interests); Paul M. Shupack, *Solving the Puzzle of Secured Transactions* 41 RUTGERS L. REV. 1067 (1989) (arguing that possible efficiency gains justify security interests).

With a relatively simple change in law, one could convert the puzzle of secured transactions from a social puzzle to a private-actor based puzzle. Specifically, one could make negative pledge covenants (i.e., promises not to grant security interests) enforceable against third parties by means of the Article 9 filing system, so that borrowers could credibly assure negative pledgees that no later-arising consensual claims would have superior property interests. Borrowers and their negative pledgees would thus be able to opt out of the regime that makes security interests possible, in effect abolishing secured transactions for themselves without the need for society to abolish them for everyone. I hope to explore this idea in a later paper.

9. See *infra* part II (advocating a private filing system).

would be. In other words, secured lenders need the state to assure them that their security interest will be perfected once they take some specified action.

Apart from concerns about ostensible ownership,<sup>10</sup> which do not trouble Professor Bowers,<sup>11</sup> there is no reason to require the specified action to involve the filing of a financing statement or other creation of a public record. One can envision a variety of cheap alternatives to filing that do not necessarily generate unacceptable fraud risks. Article 9 could provide for perfection to depend on the payment of a stamp tax, or on the state issuing of a certificate that is not a matter of public record,<sup>12</sup> or on no required action at all,<sup>13</sup> or on any number of more or less entertaining alternatives (including the affixing of a star to the belly<sup>14</sup> of a duly authorized officer of the lender).

On the other hand, there is no reason that the action required for perfection should purposefully avoid addressing concerns about ostensible ownership. There is nothing inherently evil in making information available to inquirers, and nothing inherently desirable in denying it to them; an injustice arises only if the system conscripts more information for the benefit of inquirers than filers can readily provide. If a lender can provide given information to the world easily and cheaply,<sup>15</sup> then a system that requires her to provide it imposes only a negligible tax

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10. See, e.g., Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983) (discussing the UCC's treatment of the "ostensible ownership" problem); Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683 (1988) (same).

11. See Bowers, *supra* note 2, at 734-36 (arguing that the market for information represents a workable solution because prospective secured lenders will bargain with debtors in any case).

12. Cf. Peter A. Alces, *Abolish the Article 9 Filing System*, 79 MINN. L. REV. 679, 708-13 (1995) (proposing a system of literal insurance, an interesting illumination of the insurance metaphor for the existing system).

13. See White, *supra* note 7, at 826.

14. See T.S. GEISEL (A/K/A DR. SEUSS), *THE SNEETCHES AND OTHER STORIES* (1961) (relating a fable about people's urge to claim superiority over others based on superficial differences from them).

The fable also teaches that if stars are too easily available, they tend to spread to too many bellies, thus diluting star-based superiority and prompting people to seize on other bases on which to claim superiority. *Id.* at 11-12, 15-22. This lesson should be borne cautiously in mind in connection with Professor White's proposal for automatic perfection. White, *supra* note 7, at 823-26.

15. Both of these adverbs imply the absence of lawyers. Both are also, however, less strong than "costlessly." See Bowers, *supra* note 2, at 727.

and is likely to confer a net social benefit.<sup>16</sup> Furthermore, filing itself<sup>17</sup> represents a means of providing information to the world that is far cheaper and easier than either the alternative considered by the original Reporters for Article 9<sup>18</sup> or any other true public-notice alternative that comes to mind.<sup>19</sup>

On the spectrum between retaining the status quo and abolishing the filing system altogether, there are numerous points at which the system could continue to address the ostensible ownership problem while subjecting filers to a greatly reduced tax burden. My own rough assessment of the optimal point on this spectrum calls for reshaping the filing requirements in three particular ways. First, collateral descriptions should be made optional. Second, filers should not be required to supply any debtor-related details other than its name and address. Finally, filers should perhaps be required to supply additional details concerning their own identity and contact information. These incremental, accommodationist proposals may lack the inherent panache of more sweeping approaches, but they derive a more

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16. This net benefit could even be production of a level of information disclosure that more closely approaches optimality than would the market for information alone. In the absence of disclosure requirements, information may tend to be underproduced, due to the combination of its costliness and its public goods quality (i.e., the difficulty of protecting it from exploitation by free riders). See, e.g., Jonathan R. Macey, *From Fairness to Contract: The New Direction of the Rules Against Insider Trading*, 13 HOFSTRA L. REV. 9, 32 (1984). By contrast, disclosure requirements may err in the opposite direction, mandating production of more information than a buyer would be willing to bargain for. By retaining a filing requirement but (as outlined below) keeping its contents minimal, one might strike a rough balance between the two risks.

17. In this context, filing refers to a mechanism considered separately from Article 9's current disclosure and place-of-filing requirements.

18. The key to [this] proposal was the imposition of a duty on a secured party to use due diligence to see that his debtor's financial statements made full disclosure of the security interest; creditors and purchasers misled by improper statements were to have a right of recovery, to the extent of loss caused by good faith reliance, not only against the issuer of the statement but against a secured party who had failed to perform his policing duty.

19. GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 15.1, at 464 (1965). Douglas Baird points out the cost that would have been imposed by after-the-fact inquiries about fulfillment of this monitoring duty, in addition to the cost of monitoring per se. See Baird, *supra* note 5, at 60.

19. The question of potential feasible alternatives to filing constitutes "the reef on which this ingenious and attractive argument [i.e., the one advanced in Professor Bowers's epigraph] usually founders." 1 GILMORE, *supra* note 18, at 464. Under the star-on-belly alternative referred to in the text, large numbers of middle-aged bank officers would wind up walking around partially unclothed—a severe negative externality.

humble appeal from close attention to the facts of the filing process—facts that may breed impatience.

#### A. COLLATERAL DESCRIPTIONS

Currently, financing statements must include "a statement indicating the types, or describing the items, of collateral"<sup>20</sup> but, consistent with Article 9's philosophy of notice filing,<sup>21</sup> the statement need not be specific enough to enable a searcher to determine whether particular property is encumbered.<sup>22</sup> The statute thus burdens filers with the cost (including the legal risks of error<sup>23</sup>) of drafting an adequate collateral description even though, in most cases other than single-asset filings or all-assets filings, the description will be of limited informational value to any future searcher.<sup>24</sup> Requiring collateral descriptions in many such

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20. U.C.C. § 9-402(1) (1990).

21. *Id.* § 9-402 cmt. 2.

22. *See id.* § 9-110.

23. At least one prominent law firm's routine procedure, to avert the possibility of error, involves filing the entirety of its security agreements as attachments to its financing statements. *Cf.* 2 THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 9-435 (1991) (characterizing the collateral description as "an all too fertile source of misery").

UCC § 9-110's reasonable identification standard imposes a risk similar in kind, though presumably not in degree, to the post hoc inquiries suggested by Baird, *supra* note 5, at 65-66, in the context of financial statement disclosure. A larger point is that filing, like other legal formalities, is intended to serve a "channelling" function, assuring private actors that their formally-expressed intentions will be respected by the courts. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941). The unpredictabilities of the "reasonable description" requirement deprive filing of some of these channelling benefits.

24. Any extrinsic reference, such as reference to provisions of a contract, limits a description's usefulness.

Descriptions of floating interests are also of limited use to searchers, yet substantial cost to filers. Consider a typical asset securitization transaction in which the collateral constitutes a specified, floating percentage of the debtor's accounts receivable meeting certain eligibility criteria. In the understandable neurosis that is brought on by the reasonable identification requirement, filers usually feel compelled to describe these accounts receivable by means of several pages' worth of mutually intertwined, verbally convoluted definitions, each of which may be subject to negotiations in the underlying documentation until the closing of the transaction. A bleary-eyed word-processor's inadvertent omission from the financing statement of a single phrase from one of those paragraphs could prove fatal to perfection. Moreover, adding insult to injury, all of the care, expense, and risk that a filer puts into a successful filing will be of little use to the later searcher who, due to the floating nature of the collateral, cannot learn from the filing whether a given account is encumbered.

At the other extreme, far less care need be lavished on a traditional single-asset filing. Yet the informational benefits to any later searcher from such a collateral description will concomitantly often be less, as well. Even without a

cases betrays a misplaced faith in a stable, communicative correspondence between words and things. For this reason, the requirement of a collateral description should be abolished.<sup>25</sup> The filing of a financing statement without a collateral description would represent a presumptive encumbrance of all of the debtor's assets, and searchers would have to determine through other means whether the actual security interest was, and would remain, satisfactorily narrower. This burden allocation would merely extend the diligence burden imposed on searchers today,<sup>26</sup> and would reallocate more justly the benefits and burdens of filing.

To abolish the requirement of collateral descriptions is not necessarily to abolish collateral descriptions. The filing system could, and should, continue to accommodate collateral descriptions offered by filers on a voluntary basis; these collateral descriptions, when provided, would act as limitations on the filer's security interest just as they do under current law.<sup>27</sup> A debtor contemplating it being sufficiently worthwhile to searchers, and by extension, to itself, for the description to appear of record could include this issue in the mix of issues over which it bar-

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collateral description, the searcher who came across a filing in favor of a post-age-meter vending company could be quite confident that that filer did not have a lien on, say, the accounts or general intangibles of the debtor.

25. A similar proposal is advanced as a natural extension of existing collateral description rules in Morris G. Shanker, *A Proposal for a Simplified All-Embracing Security Interest*, 14 UCC L.J. 23 (1981); see also Douglas G. Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2256 (1994) ("[I]t may not be cost effective to build a system that requires the financing statement to have any description of the collateral.").

An equally logical, but unjust, solution to the problem of filer effort without corresponding searcher benefit would be to increase the burden on the filer, requiring that collateral descriptions make clear precisely what property is encumbered. See Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, LAW & CONTEMP. PROBS., Summer 1992, at 5, 35-36 (pointing out that this would be an aid to speed and reliability).

26. "The notice required by a notice filing statute can never be more than a starting point for further investigations." 1 GILMORE, *supra* note 18, § 15.3, at 470; see also U.C.C. § 9-402 cmt. 2 (discussing notice filing).

Even under the current regime, searchers may be less interested in collateral descriptions than simply in the filer's identity; LEXIS and Westlaw offer on-line searches of, and presumably make a profit from, debtor and filer information without needing to include collateral descriptions on-line. It would be useful to know what proportion of on-line searchers, under what circumstances, proceed to procure hard copies of filings to check collateral descriptions.

27. Cf. Shanker, *supra* note 25, at 27 n.16 ("Perhaps an official form could be developed which indicated that all personal property was covered unless otherwise stated.").



gains with its filer, possibly compensating the filer for the trouble and the risk of the description being later held, or alleged to be, inadequate. Indeed, many debtors granting a security interest in only limited assets would have a strong incentive contractually to require the filer to disclose to inquirers the limited coverage of the security agreement. (Indeed, order to protect inquirers against the possibility of later a broadening the security agreement, such debtors would even have an incentive contractually to require the filer to execute subordination agreements in favor of the inquirers.) Depending on the expected frequency and attendant cost to the filer of accommodating inquirers under such contractual requirements, the filer could rationally choose to obviate the requirements by filing a collateral description instead.<sup>28</sup> As a result, collateral descriptions would appear only in those cases where interested parties considered them worthwhile, rather than appearing in all cases by statutory fiat.<sup>29</sup> Professor Bowers's market for information would thus operate, at least in part, within the structure of the filing system.

Searchers would, of course, prefer Article 9 at least to continue requiring filers to show of record the Code-defined types of collateral in which the filer claimed an interest (in order, for example, that prospective accounts receivable factors would not be put to the burden of inquiring about previous equipment-based lenders). Although it is difficult to argue in the abstract that imposing such a requirement presents too burdensome a tax,<sup>30</sup> we should not neglect the hidden costs involved in this apparently minor burden. It imposes a great penalty on the filer who unsuccessfully navigates her way through Article 9's increasingly complex scheme of classificational rubrics. Not everyone, and not every court, will classify a given item of collateral in the same way, and the classification exercise will grow even more chal-

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28. If the filer had initially filed without a collateral description, it could reverse that decision by amending the filing to include a collateral description. See also *infra* note 42 (discussing more speculative ways in which the system might elicit collateral descriptions or other optional filing information).

29. Cf. Bowers, *supra* note 2, at 727 ("[N]o one but the most optimistic fan of bureaucratic decision-making is apt to believe that the [current] system is likely either to collect or disseminate the optimal quantity and quality of information.").

30. See Shanker, *supra* note 25, at 25 (characterizing collateral classification as an "easy trick of the trade," though for the purpose of arguing that the unadvised should not be penalized for not knowing how to pull it off).

lenging as instruments, investment property, deposit accounts, and other types of collateral are folded into the filing system.<sup>31</sup>

## B. DEBTOR DETAILS VERSUS FILER DETAILS.

Some proposals for filing reform would, in the name of facilitating searches, require the filer to set forth the debtor's taxpayer identification number in addition to, or in lieu of, its name and address.<sup>32</sup> This number may be known to lenders that have investigated individual borrowers' credit records, but it bears no other relevance to most transactions that generate filings. Thus, the filer would have to obtain it for the sole purpose of the filing, and the costs of doing so (including, again, the legal costs of error<sup>33</sup>) would create a substantial systemic burden, increasing Professor Bowers's tax.

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31. In addition to new types of collateral becoming covered by filing, at least one type of collateral already covered by filing may be subdivided into two types. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9: REPORT 45 (1992) (addressing treatment of general intangibles constituting accounts receivable versus other general intangibles).

Filing's growing applicability increases the likelihood of filing being an appropriate perfection mechanism but also increases the likelihood for misidentifying a given item of filing collateral. Nor can the filer in doubt cannot simply check off the boxes for all reasonable possible classifications, without inviting debtor protests or, what amounts to the same thing, attorney wrangling.

32. See PETER A. ALCES & ROBERT M. LLOYD, REPORT OF THE UNIFORM COMMERCIAL CODE ARTICLE 9 FILING SYSTEM TASK FORCE TO THE PERMANENT EDITORIAL BOARD'S ARTICLE 9 STUDY COMMITTEE 24 (Working Doc. No. M4-26, May 1, 1991); Jan Whitehead Swift, *The UCC Filing System and the Need for Reform*, 26 UCC L.J. 283, 294 (1994). Some states have already adopted this requirement in non-uniform amendments. See BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 2.09[1][c] (1993).

Other proposals would require filers to include the debtor's gender and either individual birthdate or jurisdiction and form of organization. Similar arguments would apply to these requirements, with the possible exception of the debtor's jurisdiction of organization if this requirement were linked to a change in Article 9's place-of-filing rules. See *infra* note 44 (discussing altering place of filing rules).

33. Some indication of the size of problems courted by more extensive debtor-related filing requirements can be had by considering the filing problems related to debtors' trade names under current law. See ALCES & LLOYD, *supra* note 32, at 12-13; Juliana J. Zekan, *The Name Game - Playing to Win Under § 9-402 of the Uniform Commercial Code*, 19 HOFSTRA L. REV. 365 (1990). It is hard to be more sanguine about filers correctly determining their debtors' taxpayer identification numbers, jurisdiction, and form of organization than about filers correctly determining their debtors' names. Even without plumbing the depths of Murphian analysis, see Bowers, *supra* note 6, one can predict a certain number of financing statement misspecifications even of such a normally obvious datum as an individual debtor's gender.

Even if the filer otherwise knows the data, as it would debtor's jurisdiction and form of organization in a lawyered transaction, ensuring that it appears correctly on the filings, because administrative persons having little contact with the rest of the transaction usually prepare the filings, and as the number of data or the number of links in the transmission chain increase, so do the chances of fatal error and the costs of preventing it.<sup>34</sup> Proposals to rescue filers from errors in this information, for example by providing for such errors to be classified by fiat as "not seriously misleading,"<sup>35</sup> would reduce the legal costs of error, but would not reduce the administrative compliance costs to unadvised parties.

The filer can supply details about itself, by contrast, with less difficulty, and one could consider increasing a filer's obligation to do so, without being untrue to filer/searcher accommodationism. To the extent that collateral descriptions become less abundant or precise, the pressure on searchers to obtain information in the marketplace will tend to increase, and certain additional data concerning filers could help to hook up the information shoppers with the right sellers. For example, the telephone and fax numbers of an appropriate officer of the secured party would potentially be helpful to searchers and unburdensome to filers. A more interesting possibility would be to require disclosure of whether the secured party holds its security interest for itself or as agent for others.<sup>36</sup> Extensions of the same logic could even call for requiring secured parties to file amendments from time to time to keep the foregoing information current, or for revising the rule of section 9-302(2) to require that an assignee file a record of its assignment in order to remain perfected; however, the resulting benefit to searchers would surely

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34. These factors are particularly noteworthy in the case of taxpayer identification numbers. "Small typographical errors could easily go undetected with disastrous results. . . . To avoid the risk of losing perfection, secured creditors could be faced with the need to institute numerous costly cross-checks in order to assure accuracy." *ALCES & LLOYD, supra* note 32, at 24; *see also* LoPucki, *supra* note 25, at 20-22 (discussing other difficulties with, as well as benefits from, using taxpayer identification numbers).

35. U.C.C. § 9-402(8). *See also* Swift, *supra* note 32, at 294 (advancing this idea with respect to taxpayer identification numbers).

36. This raises issues related to "trafficking" in financing statements, including those litigated most notoriously in *In re E.A. Fretz Co.*, 565 F.2d 366 (5th Cir. 1978) (after debtor declares bankruptcy, unsecured creditors may not secure claims by assignment to senior lienor under "omnibus" financing statement). A secured party holding as representative is clearly better situated to engage in such practices, the merits of permitting which are beyond the scope of this Paper.

fail to justify the burden to filers imposed by either of these measures.

## II. PRIVATIZATION THE FILING SYSTEM

Filers' need for a state-blessed procedure, whatever its precise contours, through which to secure insurance against third-party claims does not imply any need for the state to actively participate in the procedure. The filing system may or may not constitute a natural monopoly,<sup>37</sup> but the only realistic way to gather the facts on that question is to enable competition to take place, letting entrepreneurs rush in and seeing if any of them prosper. The advent of computerization provides new grounds for hope that entrepreneurs will find sufficient profit opportunities in this area,<sup>38</sup> so that "organizational" and "technological matters may turn out to be closely linked."<sup>39</sup>

Article 9 could permit orderly relinquishment of the current monopoly by providing for the perfection upon filing either with the state, or with any private, licensed filing maintenance service. Such an enabling of private filing would be reminiscent of the "contracting out" used increasingly in other theretofore-governmental functions.<sup>40</sup> The main difference would consist of

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37. See Bowers, *supra* note 2, at 737.

38. See Ronald C.C. Cuming, *Computerization of Personal Property Security Registries: What the Canadian Experience Presages for the United States*, 23 UCC L.J. 331, 334 n.18 (1991) (arguing that computerization reduces cost and increases "revenues to the point that some systems produce significant income for provincial governments"). States might be loath to let these revenues be taken over by the private sector. See Paul M. Shupack, *On Boundaries and Definitions: A Commentary on Dean Baird*, 80 VA. L. REV. 2273, 2273 n.1 (1994). But this is no reason for revisionists not to fight the good fight.

39. But see Bowers, *supra* note 2, at 733 (drawing a distinction between the two).

40. It is also already under consideration for Article 9. See AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE REVISED ARTICLE 9 PARTS 4 & 5, FEB. 10, 1995 DRAFT 42 (1995).

Contracting out the filing-receiving function should be distinguished from the current, more limited practice of selling state-received filing information to private information resellers such as LEXIS or Westlaw.

Contracting out to a single party is less promising than contracting out to multiple, competing parties. If the government contracts out to only a single party, it must monitor that party to ensure adequate performance unless, in a potentially endless regression, the monitoring itself is contracted out. There is little reason to believe that the government can do better at the monitoring task than it can at the underlying, contracted-out task. "Sed quis custodiet ipsos custodes?" JUVENAL, SATIRES VI, ll. 347-48 in JUVENAL AND PERSIUS 110 (G.G. Ramsay ed. & trans. 1965) (1918).

holding the offer to contract open to any party meeting the licensing standards, rather than just to the bidder promising to charge the lowest prices.<sup>41</sup> These licensing standards could be limited simply to maintaining electronic access,<sup>42</sup> at some maximum fee, to filings received by the licensee and putting up a bond covering possible filer or searcher losses. Licensees or prospective licensees would have some incentive to lobby states to keep their respective licensing requirements uniform, or at least mutually consistent, and even to keep their filing requirements to the pared-back standard proposed in Part I.<sup>43</sup> Corporation law's so-called race for the bottom is another, less speculative possible mechanism for moderating licensing and filing requirements.<sup>44</sup>

Competing filing maintenance services would survive only by performing well, so that if the state's own services didn't measure up, then the state (as service provider, but not as licensor of

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41. Cf.; Baird, *supra* note 25, at 2254 (suggesting "entirely private" filing systems) Bowers, *supra* note 2, at 740-42 (considering the low-bidder option).

42. This access could probably take either of two forms. The licensee could electronically transmit, with a specified degree of promptness, copies of its newly received filings to one or more central public or private repositories, the records of which would be searchable by third parties. In the alternative, the licensee could maintain the sole record of the filings it received, but maintain electronic connection to a specified network in order to accommodate searches of its own records by remote parties. See Baird, *supra* note 25, at 2254 n.13 (suggesting computers linked with common protocols).

Filing data should be regularly accessible, but probably need not be constantly so. See Cuming, *supra* note 38, at 336 n.26 (noting that remote searches in British Columbia are permitted 12 hours a day, six days a week).

43. Dr. Seuss is characteristically insightful on the subject of entrepreneurial zeal:

"You want stars like a Star-Belly Sneetch. . . ?

My friends, you can have them for three dollars each!"

GEISEL, *supra* note 14, at 10.

"Belly stars are no longer in style," said McBean.

"What you need is a trip through my Star-Off Machine."

*Id.* at 17.

44. See Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577 (1995). This alteration of the place-of-filing rules would, of course, require filers to know their debtors' jurisdiction of incorporation, one of the data protested against in Part I. This requirement, however, would simultaneously eliminate the other often more difficult to determine, place-of-filing knowledge that UCC § 9-103 currently requires of filers.

Even if a net increase in filer burden resulted from such a change in the place-of-filing rules, it would be more acceptable than the burdens argued against in Part I, not only because of the benefits Professor LoPucki describes, but also because the purpose of this burden would not be to tax filers for the benefit of searchers. (In a sense, however, all place-of-filing rules aid searchers. A filing system that truly unaccommodating of searchers would include a choice-of-law rule permitting filers to file wherever permitted by any state.)

other service providers) would wither away. The quality of competing performances would be measured by how well they accommodated the preferences of the consumers of the service (rather than by any fixed "detailed description of the services that the winning bidder was obliged to provide"<sup>45</sup>). The free market's tendency to foster price and non-price competition is not a novel point, but it is one that bears stressing<sup>46</sup> as we attempt to reform the system, and the possibilities that beckon are exhilarating to speculate about, at least to us toilers in the vineyards. User-friendly technology.<sup>47</sup> Free Westlaw or LEXIS time for high-volume filers, or other lagniappes such as frequent flier miles. Credit arrangements.<sup>48</sup> Search fees that vary depending on how much detail the searcher requests beyond the secured party's name and contact information.<sup>49</sup> Pick-up service.<sup>50</sup> Immediate indexing of filings to permit immediate amendments or assignments. Free post-filing searches. Optimal levels of off-site data back-up. Ticklers concerning impending filing expirations. The possibilities are limited only by the competitors' impatience with the facts, i.e., with filers' and searchers' preferences.

These preferences are bound to be multifarious and even, as between different filers or searchers, mutually contradictory. They represent a set of facts that even the most patient draftsman would be unable to fix in statutory form with any useful degree of particularity. How fortunate, then, that in this instance the lesson derived from the facts is that we should keep our cotton-picking statutory hands to ourselves, drafting instead

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45. See Bowers, *supra* note 2, at 741.

46. Professor Bowers makes this point in his paper. *Id.* at 738 & n.45.

47. See Swift, *supra* note 32, at 287 (existing, markedly unfriendly technical requirements).

48. British Columbia offers debit arrangements. ALCES & LLOYD, *supra* note 32, at 21. But entrepreneurs would be more likely to offer the less conservative variation.

49. If higher search fees could be extracted from those wanting collateral descriptions (or, for that matter, taxpayer identification numbers of debtors), then the filing maintenance services could act as arbitrageurs in this information market, encouraging filers to provide the non-mandatory information by contracting to pass on to them a percentage of the higher search fees. Cf. LoPucki, *supra* note 25, at 33-34 (discussing marketplace possibly leading to optional filing of chain-of-title information).

50. Some Louisiana clerks apparently compete for filings by offering courier services to high-volume filers. See Bowers, *supra* note 2, at 738. In response to this evidence that even bureaucrats can, apparently, be taught to compete to some degree, a cynic might echo Samuel Johnson: "Sir, a woman's preaching is like a dog's walking on his hinder legs. It is not done well; but you are surprized to find it done at all." 1 JAMES BOSWELL, LIFE OF JOHNSON 463 (G.B. Hill & L.F. Powell eds., Oxford University Press 1934) (1791).

an enabling rule that lets those closest to the facts accommodate them as they see fit.