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Mr. Levenberg's Criticism of the Final Report of the Article 9 Review Committee: A Reply

Homer Kripke*

Charles R. Levenberg, Esq., has written in the Minnesota Law Review a very critical article about the Final Report of the Review Committee for Article 9 of the Uniform Commercial Code. The article may have the effect of interposing an obstacle to adoption of the Committee's proposals by the states that have adopted the Code. The article is thus a very serious matter.

It would be natural for a reply to such an article to be written by the Reporter for the Committee, who was Professor Robert Braucher of the Harvard Law School. But now that Professor Braucher is Mr. Justice Braucher of the Supreme Judicial Court of Massachusetts, it would be unseemly for him to reply to the article with the sharpness that is appropriate under the circumstances. Therefore, the task falls on me as Associate Reporter for the Committee.

Mr. Levenberg's article is very little changed from the draft he sent to me in the spring of 1971. He had brought to the attention of the Reporters and Consultants to the Committee a criticism of our draft rule for determining the governing law as to perfection of security interests under Article 9 of the Code. We had been persuaded that his criticism was valid and we had made a corresponding change. I commended him then for his useful criticism, and I am now glad to commend him again pub-

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* Professor of Law, New York University.
1. Levenberg, Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code, 56 Minn. L. Rev. 117 (1971).
2. The Report is dated April 25, 1971 (hereinafter cited as the FINAL REPORT). It is described by Carl R. Funk, Esq., a member of the Committee and now Counsel to the Permanent Editorial Board for The Uniform Commercial Code, in 26 Bus. Law. 321 (1971).
3. The Permanent Editorial Board (PEB) appointed the Review Committee to consider Article 9 because of numerous nonuniform amendments to Article 9. REPORT No. 3 OF THE PEB (1967) at X.
4. A revision of the FINAL REPORT reflecting subsequent action of the sponsoring organizations, as described in the text at note 6 infra, is on the press as this is written. It will be the new Official Draft of Article 9 and is proposed to the states for adoption. It will be introduced in some state legislatures in their 1972 sessions.
licly. I then told him that I thought that the remainder of the points in his draft article were trivial, and I still think so. Since the tone of Mr. Levenberg's article offers the possibility that he could do great harm to an important legal enterprise by leaving the casual reader with the impression that there must be substance when there is so much vehemence, it is necessary to reply.

Of course, my strongly negative words will be justified only if I demonstrate that the article lacks substance. I propose to do this in Part II of the present article. But I must first in Part I explain why it is necessary to deal with the Levenberg criticisms.

I.

It is not that the product of the Review Committee is immune from criticism. On the contrary, the Final Report will doubtlessly be criticized by many on many points. An excellent example is the series of articles by Professor William D. Hawkland running in the Commercial Law Journal as this is written. Professor Hawkland is a recognized authority on commercial law and on Article 9 in particular. His comments and criticisms go beyond Mr. Levenberg's in substance and many of them offer food for serious thought. But the stance of the criticism is different. Professor Hawkland recognizes the enormous difficulties in achieving a uniform law that will satisfy everyone. He also recognizes that the Review Committee's work on the whole is an improvement and should be supported and is careful to couch his criticism in such form that he will not disrupt a useful program.

The achievement of progress in state law, where multi-state transactions are involved and uniformity is necessary, is an extremely difficult task. The National Conference of Commissioners on Uniform State Laws has not had uniform success in procuring the unanimous or substantial adoption of many of its uniform laws by the states. The Uniform Commercial Code

was one notable success of recent decades, having been rapidly adopted by all states but Louisiana, and also by the Virgin Islands and the District of Columbia. The National Conference has also had great difficulty in keeping laws uniform when they were improved by amendment, and the Code has already suffered an unhappy experience. Some comparatively minor amendments in 1962 were not adopted by all of the states which had adopted the basic Code, and this failure to act on the amendments detracted from uniformity. The present major revision of Article 9 also carries the risk that it will detract from, rather than add to, uniformity because if less than all of the states adopt it, we will have two versions of what is supposed to be a Uniform Commercial Code. Thus Mr. Levenberg's article contains the threat of causing great harm to a vital legal effort.

Efforts to improve and unify state law by statute seem to me to offer the most hopeful means for the future growth of the law in technical fields. It is no disparagement of the courts to say that the process of developing law in such fields by the case method is too slow. Despite the incredible feats of some of our great judges in keeping abreast of numerous technical fields, the courts as a whole have difficulty in understanding in sophisticated fashion the law of these fields. It is likewise no disparagement of legislatures to say that the law has become too technical for the ordinary legislator. Thus it rests on select committees of the National Conference, of the American Law Institute, and of the bar associations to draft such statutes.4

To overcome the inertia of the state legislatures and to modernize and amend a statute uniformly once adopted is an even greater task. To a large extent "lawyers' law" as distinguished from political matters will be acted on only if there is little or no opposition. The present effort to make a substantial change in Article 9 of the Uniform Commercial Code and to have it done so as to preserve rather than to destroy uniformity is a real test of the process—the first such attempt in recent decades. Any disagreement with the content of the proposed amendments necessarily causes some disruption of the effort—an unjustified disruption if the disagreement is not judicious in tone and well-considered.

The organizational task of extensively revising a successful

uniform law in a technical field like Secured Transactions is not a light burden. The American Law Institute selected two Reporters and a distinguished Review Committee of ten, including judges, professors and practicing lawyers. The Committee had as its Consultants the authors of the two leading treatises on Article 9. All members of the group gave unstintingly of their time over four years at many two and three-day meetings, besides almost continual correspondence and study of drafts. When the Committee finished its draft the work was reviewed in a two-day session by the Permanent Editorial Board for the Uniform Commercial Code and then in a two-day session by the Council of the American Law Institute. Thereafter the work was submitted on two different occasions to the full membership of the American Law Institute and then to the full membership of the National Conference of Commissioners on Uniform State Laws. None of these entities rubber-stamped the draft presented to it, and each made some changes. The draft was then approved by the House of Delegates of the American Bar Association.

To have this enterprise rendered unsuccessful because of an ill-considered attack would be a disaster to the law. Such a program of revision could not easily be mounted again. The American Law Institute endeavored to raise special funds for the expected budget of this enterprise. It succeeded only in part, and therefore the enterprise was a charge on the other funds and projects of the Institute.

Of course, if the result is indeed bad, then no matter how much effort and funds have been expended, the result ought not to become law, and a further effort will have to be made when and if the manpower and funds can again be assembled. If the result is good, this kind of attack is most unfortunate. The ultimate question is whether the attack is justified. To this question I now turn.

II.

Two general comments may be made concerning the Committee's work regarding Mr. Levenberg's criticisms.

5. Professor Grant Gilmore of the University of Chicago Law School and Peter F. Coogan, Esq., of the Massachusetts Bar, a frequent lecturer at the Harvard and Yale Law Schools. See G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (2 vol.; 1965); Coogan, Hogan & Vagts, Secured Transactions under the Uniform Commercial Code in 1 & 2 BENDER'S UNIFORM COMMERCIAL CODE SERVICE (1963).

6. See note 2 supra.
First, the Committee was not writing on a clean slate. Given the notable success of and basic satisfaction with Article 9 and its nearly unanimous adoption, the Committee was not free to start over from scratch. It could not change the fundamental organization and concepts of the Article with which the Bar is familiar, nor the appropriate procedures for day to day operations under the Article, nor the result in terms of successful perfection of security interests.

Second, the Committee was never dealing with a conflict of interests between a tortfeasor or a criminal and his victim, between the bad man and the good man. The problems of choice are always harder between two morally worthy men, each of whom has legitimate interests to protect. While the members of the sponsoring organizations sometimes are influenced by familiar local rules and sometimes by knowledge of one side of a problem on behalf of a client, they show remarkable willingness to transcend these considerations and adhere to the collective judgment of their Reporters and Advisers (in this case, the Committee and the Permanent Editorial Board). Mr. Levenberg, on the contrary, repeatedly sets up his individual judgments against the collective view with little more than mere assertion to support it.

References in the subheadings below are to the subdivisions of Mr. Levenberg's article.

II-A—Filing Procedures on Fixture Filings.

Mr. Levenberg argues that all fixture filings ought to be made at the Secretary of State's office in a state, to eliminate local filings. Certainly no lawyer with practical experience could expect the real estate Bar to accept a suggestion that every real property title search must be accompanied by a search in the state capitol for fixture filings.

In footnote 12 the author asserts that the draftsmen "have refused to provide a uniform definition of 'fixtures' . . . ." He also asserts that the draftsmen have created pitfalls by allowing the definition of fixtures to turn on state law. The fact is that since Mr. Coogan suggested7 and Professor Gilmore8 supported the idea of defining "fixture" and the present

writer questioned the feasibility of the idea,9 the question has been under almost continuous study by the Review Committee and its predecessors. The Committee did attempt a definition in its Preliminary Draft No. 1 of November 20, 1968.10 In Preliminary Draft No. 2 of February 1, 1970,11 the Committee explained that this draft had turned out to be entirely too complicated, largely because of the attempt to define “fixture”. Professor Braucher and I determined to jettison Preliminary Draft No. 1 when we found that committees from the section on Real Property of the American Bar Association and the American Land Title Association did not understand it, despite their assiduous study. It is not now relevant to explain why the attempt produced so much complication.12 Most writers would have accepted the Committee’s view that the effort to define “fixture” did not work.

II-B—Duration of Effectiveness of Financing Statements.

In a Committee statement it was explained that the five year duration of filing was intended to make the files self-clearing by permitting discard of those over five years old. Mr. Levenberg argues that this explanation loses its force when it is recognized that all financing statements are indexed alphabetically.13 I doubt that Mr. Levenberg can assert of his own knowledge that this form of indexing prevails in all 51 central filing jurisdictions and in the perhaps 1000 local filing jurisdictions. I know that he cannot assert that when the Code will be 15 or 20 years old in each state and the sheer bulk of the filings and indexes have become really burdensome, the states will not utilize the technique built into the statute of permitting the filings and the indexings to be arranged by year so that the older ones can be automatically discarded. Even if there were a single alphabetical index of financing statements, it would not be any great problem to go through the index cards once a year and discard those pages on which file numbers

12. See note 10 supra.
13. Levenberg, supra note 1, at 123.
showed that they were more than five years old. When the present Committee chose to retain this five year device, which is built into the original Code and which is presently law, the writer made contact with both the National Association of County Recorders and Clerks and also with the Secretaries of State Association and endeavored earnestly (but, I admit, without too much success) to get some feedback on this very point. There was no negative feedback either to the retention of the five year device as impractical or even to the new provision that an old financing statement kept alive by a continuation statement should be physically carried forward with the continuation statement to prevent destruction when the filings for the original year were discarded.\textsuperscript{14}

Here, as in so many places, Mr. Levenberg gives not the slightest weight to the opinion of 10 experienced lawyers who were members of the Committee and the specialists in the field who acted as Reporters for and Consultants to the Committee. The possibility that a differing consensus might be worthy of consideration against his single judgment does not seem to enter his calculations and certainly does not temper the vigor of his assertions.

\textit{II-C—Consequences of Lapsed Financing Statements.}

Here Mr. Levenberg disagrees with the Committee's decision that financing statements should not lapse during bankruptcy proceedings. He argues that this was unnecessary because it is an elementary rule of bankruptcy law that the filing of the petition operates as a freeze upon priorities as they exist on the date of filing. It may be a rule of bankruptcy law, but it is not that self-evident. On the very day that I read Mr. Levenberg's article I received a letter from an experienced lawyer who acts as a bankruptcy trustee saying that he had this question before him. He had seen the references to it in the Committee's discussion and requested help because he could not find any authority on the subject. I believe that Mr. Levenberg is correct in his general statement of the law which the Committee also so stated, but I do not believe that it is an elementary principle. I was persuaded to deal with the subject in the Committee's drafts because I found a Referee in Bankruptcy holding the contrary in a reported opinion.\textsuperscript{15}

\begin{footnotes}
\item[14] Final Report, supra note 2, at § 9-403(3).
\item[15] The law is collected in 4A W. Collier on Bankruptcy § 70.81
\end{footnotes}
Mr. Levenberg declares that it is “pure folly” for the Committee to provide that when a senior security interest lapses, junior interests rise to the top. This is, of course, a question on which opinions may differ. Professor Gilmore, one of the outstanding authorities in the field, differed with the Comments on this point in the existing Code\textsuperscript{16} and also differed with the Committee’s strengthening of that result in its redrafts. The subject was intensely debated within the Committee. There definitely are two sides to the question. The present issue, however, is whether the pure folly is in the difficult choice made by the Committee or in Mr. Levenberg’s use of the quoted phrase instead of letting his arguments stand on their merits.

II-D—Transfer of Collateral, Debtor’s Change of Name and Proper Name Under Which to File.

Another standard problem of choosing between competing interests is to decide whether a secured party is under a duty to refile when the debtor changes his name or the property is transferred to a new debtor with the result that a search against the present name of the person holding the property would not reveal a security interest. Problems of this sort obviously exist and have been debated for many years. The choice is one on which the Committee was at first divided. I prepared drafts reading the other way, which created new difficulties. I know practicing lawyers who would prefer to have seen the Committee make the other choice. The Committee reached its conclusion against requiring refileing in large part on the theory that some one about to make a new advance is alert to the particular situation and can investigate the history of the ownership of the property. In contrast, in today’s frequent extensions of credit, once the loan is made it is handled by clerks routinely without active participation of management personnel or meaningful contact with the debtor. The significance of any transfer or change of name is likely to be disregarded. Mr. Levenberg asserts the contrary but does not explain from what vantage point of experience he gets his information.

The Committee made an unclear situation certain by providing that filing in trade names of individuals is not effective

filing. It *authorized* extra filing in trade names where a creditor prefers to be cautious rather than get into litigation. The writer submits to the fair-minded reader whether there is justification for Mr. Levenberg's tone: "This hardly appears to solve the confusion caused by the use of trade names." 17


Mr. Levenberg questions whether a consumer debtor should be allowed to waive notice of a secured party's proposal to retain the collateral in lieu of the sale which might result in a deficiency. He seems to miss the point altogether. Obviously the consumer would automatically get notice of the intention when he signs the waiver. What he would be waiving is a waiting period and there hardly seems to be any policy issue on this point. Mr. Levenberg next objects because the Committee shrinks the class of persons entitled to receive notice of the secured party's proposal to retain the collateral in satisfaction of the debt in lieu of sale. The notice would hereafter be given only to junior interests (other than the debtor) who had informed the secured party in writing of their interest before the secured party gave his notice. Mr. Levenberg characterizes this time period, i.e., the period before the secured party gives his own notice so the latter does not have to keep on reopening his own notice, as an "irrational time limit" and the Committee's reduction of the class of persons entitled to notice as "devastating"; but he misunderstands the practical problem. A secured party creates a security interest and, of course, thereafter has no occasion to search the record for junior interests unless the statute requires him to do so on default. If there arises such a junior interest which has any serious hope of salvaging anything from the value of the property, the holder of the junior interest could, and normally would in prudent fashion, give notice to the senior secured party of his interest as soon as it arises. This would be sufficient to create for the secured party a duty of giving notice of intention to retain the property in satisfaction of the debt. Mr. Levenberg has dreamed up the improbable situation of a junior secured party who comes into the picture at the last possible minute after default and is forced to run a race to serve notice of his existence before the secured party gives notice of his intention to retain the collateral. There might be such a case, but it is very hard to visualize one

17. Levenberg, *supra* note 1, at 129.
where a legitimate secured party would come rushing in to
take a junior security interest when he had to race to give his
notice before the senior secured party (already in possession
of the collateral by assumption) acted to retain it in satisfaction of
an already defaulted debt.

Mr. Levenberg's lack of understanding of the problem makes
his strong phrases unjustifiable:

[I]t does not make sense to allow the senior easily to deprive
juniors of their right to object to the senior's retention of the
collateral. Juniors would be left to the mercy of the debtor to
protect them . . . .18 [A]dvances of credit under junior se-
curity interests will be too hazardous . . . .19 [T]he committee
has proposed notice procedures that permit seniors to seriously
harm juniors . . . .20

IV-A—Conflict of Laws—Freedom to Choose Applicable Laws.

Mr. Levenberg's lengthy discussion of freedom of the parties
to choose applicable law is of some interest and has some sup-
port in other writings. It is difficult to determine whether he
intends to criticize the Final Report in its handling of this topic,
although he seems to be saying that the Committee reached ac-
ceptable results without knowing what it was doing. The
Comment which he quotes makes clear that the Committee
was referring more issues to the general conflict of laws
 provision of Section 1-105 and fewer matters to what had been
the specific provisions of Sections 9-102 and 9-103 than does the
existing code. He might have given us credit for knowing that
Section 1-105 permits the parties to agree on governing law and
that the other sections cited do not mention the point. The topic
is an interesting illustration of the problems involved in partially
amending a uniform law.

The present general provisions have been severely criti-
cized,21 but also defended. The Committee first deleted the lan-
guage in Section 9-102 which said that the statements as to scope
of subject matter apply "so far as concerns any personal prop-
erty and fixtures within the jurisdiction of this state." Both
Professor Weintraub and Mr. Levenberg seem to agree that
this language was non-specific as to the time that the prop-

18. Id. at 133.
19. Id.
20. Id. at 134.
21. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS,
M. LEVENBERG'S CRITICISM

The Committee then made various clarifications of Section 9-103, but limited that section to questions of perfection, thus leaving all other questions, including validity and foreclosure questions, to the general conflicts rules of Section 1-105. Leaving validity to general rules was clearly justified because questions of validity include not only formalities, but also questions reflecting the fact that a secured transaction secures an obligation whose validity under rules relating to usury, infancy, etc., is not governed by Article 9.

The general conflict section, Section 1-105, has been the subject of a long debate and has recently again been criticized as “bad enough” for permitting the parties to choose the applicable law instead of being governed by the “center of gravity” test. But the Committee, as stated, was not writing on a clean slate: Section 1-105 presently is in the law, and portions of the Code not directly affecting Article 9 were not within the reference to the Review Committee on Article 9. The Committee was in active consultation as to these problems with Professor Willis L.M. Reese, who was then just completing his work on the Restatement Second of Conflict of Laws. He, in espousing the “center of gravity” test, had reached the conclusion that with the widespread adoption of the Code, “the reasonable relation” test in Section 1-105(1), which would permit the parties to agree on choice of law, and the “appropriate relation” test which applies in the absence of agreement would both be influenced by modern “center of gravity” theory. Thus, Section 1-105(1) seems to be becoming a restatement of the tendency of the law toward a “center of gravity” resolution of conflicts problems. The Committee's result was fully in accord with the modern trend.

22. "The general choice-of-law provision for Article 9, contained in section 9-102(1), should be repealed and not replaced." R. WEINTRAUB, supra note 21, at 373.
23. Id. at 353.
24. 2 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 243, Introduction to Chapter 9, Topic 3 (Movables) at 64-65 (1971).
25. Compare Gilmore, Legal Realism: Its Cause and Cure, 70 YALE L.J. 1037, 1044 (1961) on the extent to which earlier Uniform Acts were treated merely as restatement of the common law. In Kripke, The Principles Underlying the Drafting of the Uniform Commercial Code, 1962 ILL. L. FORUM 321, 331, the present writer said:
It is fair to say that the draftsmen of the Code had an anticodification or antistatute predilection. They did not want to codify the law, in the continental sense of codification. They wanted to correct some false starts, to point the law in the indicated
In so far as Professor Weintraub inveighs against the permission granted by Section 1-105 for the parties to choose the law instead of a "proper evaluation of relevant state policies," it should be noted that the problem for commercial parties is one thing and the problem for consumer questions is a different thing. The Committee was drafting in the expectation that this issue in the case of consumer matters would be taken out of the Uniform Commercial Code pursuant to the Notes to Sections 9-102 and 9-203 and would be covered by such statutes as Section 1-201 of the Uniform Consumer Credit Code or Section 1-201 of the National Consumer Act, both of which prescribe the governing law in a manner not subject to agreement (except on very limited conditions).

Thus, it is not true as Mr. Levenberg contends, that we did not know what we wrought, and my own view is that we wrought pretty well.

IV-B—Conflict of Laws—The Place of Filing and the Law Governing Validity.

This was the field in which the Committee accepted Mr. Levenberg's criticisms of its then existing draft; but he continues to criticize the Committee's solution. He does not seem to contend strongly that the Committee's test for what jurisdiction governs is wrong, but he objects because the applicable section fails to state that the filing required by that jurisdiction is within its own bounds. He worries about the task of the lay credit manager, not an attorney, who might not understand that if the governing jurisdiction does not tell him to file elsewhere, the filing which it requires is within its own state. This scarcely needs comment. Where else would a layman expect to file except in his own state, when he is told that his state law governs? At any rate, this is the plain meaning of the situation and is made clear by Section 9-401(4) of the Final Draft which Mr. Levenberg entirely overlooks. It reads: "The rules stated in
Section 9-103 determine whether filing is necessary in this state." This makes it perfectly clear that when Section 9-103 determines that jurisdiction is in this state and does not provide a special filing rule, Section 9-401 of this state specifies where to file in this state.

The Committee’s test of the jurisdiction governing perfection problems is the law of the state where the last act occurs, on which is based the assertion that the security interest is perfected or unperfected. Perhaps it is my fault that Mr. Levenberg, to criticize this, dreams up a case in which the collateral moves from state to state and the secured party seizes on a state with special non-uniform rules of priority and performs the last act of perfection in that state. While we were in discussion in the spring of 1971, I suggested a case of a race horse moving from track to track in different states while negotiations for a loan on the horse as security were under discussion. Perhaps this inspired his assumption that any secured party would resort to such Machiavellian tactics, especially since he recognizes that there are presently no special non-uniform priority rules to inspire departure from the usual principle that one perfects as soon as possible.

IV-C and IV-D.

These points are principally exposition. In so far as they are critical, much of the material is covered by the discussion of IV-A and B above. The Committee has been congratulated by many on its substantial clarification of Section 9-103. To date only Mr. Levenberg finds that it failed in that respect.

V—Questions of Scope.

Under the present Code, an assignment for security of an interest in a trust or estate appears to be an assignment of a general intangible requiring filing; but many persons would not realize that the assignment of these kinds of non-commercial collateral is subject to Article 9. There have been experiences of this kind.28 The Committee decided that filing should not be required. The Committee did not fail to realize that under this rule a second possible assignee would lose the benefit of having a place to search for notice of a first assignment. The ques-

tion is to choose between two legitimate interests and the de-

cision ought not to be said that the Committee\textsuperscript{29} "has cre-

ated an entrapment for bona fide purchasers." Assignments of

this kind of collateral for security, being non-commercial, are

rare enough. The number of cases of fraudulent double assign-

ments for security must be almost infinitesimal; surely the

Committee's decision to protect the first assignee from inadvert-

antly giving a windfall to a levying creditor or trustee in bank-

ruptcy is a correct judgment as against the theoretical fear of

harm to the rare second assignee.

There are other minor points which I have not dealt with.

It is not clear for instance, whether an assertion that "the Com-

mittee does not explain the purpose of the change from 'chief

place of business' to 'the jurisdiction in which the debtor is lo-

cated'"\textsuperscript{30} is intended as a criticism. I should have thought that

the purpose was obvious from the definition of location: the lo-

cation formula adopts chief place of business (now described as

"chief executive office") as the criterion where there is one,

but also provides an answer when the debtor is an individual

who has no place of business. There are other instances where

one cannot determine whether the provocative language is in-

tended as substantive criticism or is merely Mr. Levenberg's way

of writing and thinking. But I believe that the foregoing is suf-

ficient to point out that the article, if it is successful at all in

confusing the reader as to the merits of the Committee's Final

Report, has a done a great disservice to the law.

\textsuperscript{29} Levenberg, supra note 1, at 157.

\textsuperscript{30} Id. at 151.